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AMERICAN BAR ASSOCIATION

July 14, 2011

VIA ONLINE SUBMISSION

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Comment on the Interagency Working Group on Food Marketed to Children's "Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts."

We are pleased to submit these comments on behalf of the Section of Antitrust Law of the American Bar Association (the "Section"). The Section highly values the important contribution of the Interagency Working Group (the "Working Group") and its *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts: Request for Comments* (the "Proposed Principles") to the dialogue of how to address the problem of childhood obesity while balancing consumer protection and competitive concerns. To assist in furthering that dialogue, these comments identify potential antitrust and consumer protection issues raised by the Proposed Principles. The views expressed in these comments have been approved by the Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

On March 11, 2009, Congress passed the Omnibus Appropriations Act of 2009 (the "Appropriations Act").¹ The explanatory statement that accompanied the Appropriations Act when introduced in the House of Representatives recommended that the FTC, FDA, CDC, and Secretary of Agriculture establish the Working Group to "conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children."² On April 28, 2011, the Working Group released its Proposed Principles for public comment.³

¹ Pub. L. No. 111-8 (Mar. 11, 2009), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ8/pdf/PLAW-111publ8.pdf>. Bill Summary and Status is available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01105:@@&R>.

² Explanatory Statement Submitted by Mr. Obey, Chairman of the House Committee on Appropriations, regarding H.R. 1105, Omnibus Appropriations Act, 2009, Congressional Record H1653, H2059 (Feb. 23, 2009), available at <http://www.gpo.gov/fdsys/pkg/CREC-2009-02-23/pdf/CREC-2009-02-23-pt1-PgH1653-6.pdf#page=1>. Such an explanatory statement carries the interpretative weight of a "joint explanatory statement of a committee of conference." Explanatory Statement at H1653. While the statement provides a reliable guide to Congress's intent when

The Proposed Principles recommend that members of the food industries use “voluntary self-regulatory efforts” to develop or reformulate “all food products within the categories most heavily marketed directly to children.”⁴ They would request that industry members refrain from marketing any food products to children that do not meet two requirements. Pursuant to “Principle A,” foods marketed to children should “provide a meaningful contribution to a healthful diet.”⁵ Pursuant to “Principle B,” foods marketed to children should “be formulated to minimize the content of nutrients that could have a negative impact on health or weight.”⁶ The Proposed Principles define the term “marketing to children” by referring to the definition of that term used within the Orders to File Special Reports sent by the FTC to industry members in conjunction with the FTC’s efforts to collect information for the preparation of its July 2008 report to Congress, *Marketing Food to Children and Adolescents*.⁷

I. Executive Summary

The Section greatly appreciates the work by the Working Group in formulating the Proposed Principles and the contribution that the Principles make to the dialogue of how to address the problem of childhood obesity while balancing consumer protection and competitive concerns. As explained in more detail below, the Section recommends that before promulgating the Proposed Principles in final form, even as a voluntary guide for industry self-regulatory efforts, the following be given greater consideration:

- By removing or drastically altering many products in the marketplace for which consumers have expressed strong demand, the Proposed Principles are inherently harmful to competition and to consumer welfare in the economic sense. Although combating the child obesity problem in the United States is a valid countervailing consideration, this consideration becomes weaker to the extent that the scope of the Proposed Principles sweeps in many products targeted predominantly at adults.

approving the Appropriations Act, it “do[es] not have the force of law.” Singer & Singer, *Statutes and Statutory Construction*, 48:8 (7th Ed. 2007).

³ <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>. The FTC released a separate statement concerning the Proposed Principles which is available at <http://www.ftc.gov/os/2011/04/110428foodmarketstmt.pdf>.

⁴ Proposed Principles at 14-15.

⁵ Proposed Principles at 15.

⁶ Proposed Principles at 16.

⁷ Available at <http://www.ftc.gov/opa/2008/07/foodmkting.shtm>.

- It may be impractical, if not impossible, for industry members to adhere to the Proposed Principles without a significant degree of antitrust risk.
- The Proposed Principles’ references to broad “categories” of food products that are heavily marketed to children and adolescents creates ambiguity as to the scope of food products to which the Proposed Principles would apply. The Working Group should clarify that it does not intend the Proposed Principles to apply to products within the ten categories discussed in the Proposed Principles to the extent that such products are not marketed directly to children or adolescents.
- The Working Group should examine whether its definition of “marketing and advertising to children and adolescents,” which was developed for a different, relatively informal purpose and has not been vetted to the extent suggested in the Proposed Principles, should be reexamined for appropriateness to this potentially important and influential initiative.

II. The Working Group’s Decision to Direct Its Proposed Principles to the Nature of the Products Marketed , Rather than to Marketing Practices, Has Important Competitive and Consumer Implications

At the outset, the Section notes a prominent feature of the Proposed Principles which has important implications for competition and consumers. Although the Proposed Principles begin by discussing the marketing of food to children⁸ and make reference to standards for advertising to children promulgated by various industry bodies,⁹ the Proposed Principles themselves explicitly have a different purpose and goal. Specifically, the Working Group has developed recommended “voluntary nutrition principles to guide industry self-regulatory experts to improve the nutritional profile of foods that are most heavily marketed to children.”¹⁰ Principles A and B, as set forth in detail on pages 8-16 of the Proposed Principles, contain no recommendations or prescriptions relating to the techniques of marketing foods to children or adolescents. Instead, they are entirely concerned with recommendations about changes in the formulation, ingredients, and nutritional profile of food products. The Working Group states that its primary purposes are to have industry “strive to

⁸ See Proposed Principles at 1 (“Marketing can be an effective tool to encourage children to make better food choices, and voluntary adoption by industry of strong, uniform nutrition and marketing principles, like those proposed here, will advance the goal of promoting children’s health.”).

⁹ See Proposed Principles at 4, citing Better Business Bureau’s Children’s Food and Beverage Advertising Initiative.

¹⁰ Proposed Principles at 2.

create foods” complying with the Principles and puts forth the goal that “all foods within the categories most heavily advertised or otherwise marketed directly to children and adolescents would meet the nutrition principles by the year 2016.”¹¹ The Working Group further adds that its purpose is to “guide the industry in determining which foods would be appropriate and desirable to market to children to encourage a healthful diet and which foods industry should voluntarily refrain from marketing to children.”¹² This is to be accomplished through “reformulation” of the foods, rather than through changes in marketing practices.¹³

The primary role of advertising and marketing practices in the Proposed Principles is to provide the basis for defining the “categories of foods that are most heavily marketed to children,” to which the Principles (i.e., the nutritional reformulation standards) are then applied. This is reflected in the statement in the Request for Comments that comments directed to the substantive Principles will be reviewed directly by the CDC, FDA, and USDA and not by the FTC, whereas comments on the definition of the categories of foods most heavily marketed to children will be reviewed primarily by the FTC. Accordingly, the Request for Comments asks that commenters prepare separate comments reflecting this division.¹⁴

It appears, though it is not entirely clear, that marketing practices may also enter the Proposed Principles as an alternative when “reformulation” of existing foods to conform to the nutritional standards set forth in the Principles may be impractical. To that end, the Working Group

seeks comment on viable alternatives to its proposed nutrition principles, especially alternatives that are drawn from federal nutrition policy and regulations, with focus on foods known to be heavily marketed to children. Thus, for example, the Working Group is open to considering alternatives drawn from federal food labeling regulations defining the nutrient content claim “healthy,” federal regulations establishing disclosure levels for certain nutrients in

¹¹ Proposed Principles at 3.

¹² Proposed Principles at 5.

¹³ *See id.*

¹⁴ *See* Proposed Principles at 1. For reasons discussed herein, the Section is of the view that the FTC should be involved in the development of the substantive Proposed Principles as well, fulfilling its role to safeguard the interests of competition and consumers. Accordingly, to the extent that these comments address both the substantive Principles and the definition of the food categories, they are submitted together.

connection with other nutrient content claims, or the disqualifying nutrient levels used for health claims.”¹⁵

It is not clear from this language whether the Working Group proposes that federal food labeling and disclosure regulations should be used as a basis for an alternative standard for *reformulating* products that may be impractical to reformulate according to Principles A and B as proposed, or whether the Working Group is open to labeling or disclosure as an *alternative* to the reformulation of products in accordance with Principles A and B under at least some circumstances. The Section recommends that the Working Group clarify the Proposed Principles in this regard.

This attenuated role of advertising and marketing techniques in the Proposed Principles defines limits on the scope of the Section’s comments. The expertise of the Section lies in antitrust and consumer protection law. The Section does not claim expertise in food and drug law or other areas within the exclusive ambit of the FDA, CDC, or USDA. Accordingly, the Section has no comment on the specific nutritional standards set forth in the Proposed Principles’ detailed descriptions of Principles A and B, nor on any of the legal or Constitutional issues that may be implicated by the Proposed Principles. The Section also has no comment on whether the focus of the Proposed Principles on the nutritional makeup or formulation of the products marketed, rather than on marketing practices, accurately reflects the purposes of Congress as quoted on page 2 of the Request for Comments. The Section agrees, however, in consideration of the history of the FTC’s regulatory efforts in the children’s marketing area,¹⁶ that it is advisable for the Working Group to avoid specifying advertising and marketing practices that are or are not appropriate for marketing food products to children and adolescents. The Section also acknowledges, as noted by Consumer Protection Bureau Director David Vladeck in a recent blog posting regarding the Principles, that voluntary guidelines such as the Principles are different from the Commission’s past regulatory efforts.¹⁷

III. Careful Consideration of the Competitive and Antitrust Implications of Implementing the Principles Would Be Beneficial

This part of the Section’s comments responds to the following question posed in the Request for Comments, as well as to the Principles more generally:

¹⁵ Proposed Principles at 6.

¹⁶ See generally J. Howard Beales, III, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection* available at <http://www.ftc.gov/speeches/beales/unfair0603.shtm>; J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 Geo. Mason L. Rev. 873 (2004); Remarks by J. Thomas Rosch, *Where Do we Go From Here? Some Thoughts on the Future of the Consumer Protection Mission* (Apr. 29, 2007).

¹⁷ See David Vladeck, *What’s On the Table*, (July 1, 2011), available at <http://business.ftc.gov/blog/2011/07/whats-table>.

(29) Are there antitrust implications to industry voluntary adherence to the proposed principles?¹⁸

The Antitrust Section believes that there could be antitrust implications to voluntary adherence to the Proposed Principles. The Working Group concedes that in order to fully comply with the Proposed Principles, industry members may need to reformulate existing products. Moreover, the Proposed Principles also contain an inherent implication that industry members may need to remove certain products altogether:

The Working Group recognizes that, if the proposed nutrition principles were fully implemented by industry as proposed, a large percentage of food products currently in the marketplace would not meet the principles. The Working Group also recognizes that, while it may be feasible to reformulate some food products to meet the proposed nutrition principles, in many cases reformulation would require substantial changes in the nutritional profile of the food, such as significant reductions in added sugars or sodium content. Making substantial changes to the formulation of a food product may present both technical difficulties and challenges in maintaining the palatability and consumer acceptance of the product.¹⁹

As discussed below, implementation of these Principles may expose industry members to at least some risk of antitrust exposure. As noted below, industry members must be prepared for potential antitrust challenges not only from federal enforcement agencies, but also from state attorneys general and private plaintiffs. The Working Group should take competitive issues into account in formulating the Proposed Principles and should consider whether and how industry members might implement the Proposed Principles in a way that is commercially realistic and carries the least possible competitive risk. The FTC, as the Working Group member most concerned with competition, is ideally positioned to supply this perspective. Accordingly, the Section recommends, contrary to the implication of the Proposed Principles, that the FTC be closely involved in the development and promulgation of the nutritional Principles in its role as the guardian of competition and consumer protection interests. In particular, the FTC should be consulted on the competitive implications and antitrust risk associated with industry members' adoption of the Proposed Principles, as well as any consumer protection implications that may flow from restrictions on advertising or marketing practices that may be adopted appurtenant to the nutritional Principles.

A. Possible Antitrust Implications: Unilateral Consideration and Adoption of the Principles

¹⁸ Proposed Principles at 24.

¹⁹ Id. at 5.

In assessing antitrust implications of the Proposed Principles, industry members and those who counsel them must consider the likely manner of implementation of the Proposed Principles in real-world circumstances. One possibility, and the one apparently assumed by the Working Group, is that individual industry members will unilaterally choose to adopt or reject the Proposed Principles. Although this is a possible scenario, it is not the only or necessarily the most likely one (*see infra* at I.B), and the Working Group should anticipate the possible competitive issues that may arise under other circumstances. For example, the Working Group recognizes that in some instances, and in order to conform with the Proposed Principles, industry members will not be able to reformulate existing products to comply with the Principles without “both technical difficulties and challenges in maintaining the palatability and consumer acceptance of the product.”²⁰ In practice, compliance with the Proposed Principles would thus be likely to result in the withdrawal of some, and possibly many, products from the market altogether. Removing products from the market could in turn limit consumer choice and reduce consumer welfare in the economic sense used in antitrust analysis. While the reduction of consumer choice alone is not conclusive evidence of anti-competitive behavior and may at times be perfectly legitimate, it arguably may still raise antitrust concerns in some instances, even when “unilaterally” but “uniformly” adopted by multiple competitors.²¹

In expressing this comment, the Section acknowledges that the economic sense of consumer welfare used in antitrust analysis is not the only type of consumer welfare with which the Working Group and Congress must be and are concerned. Obviously, the Working Group must seek to balance competitive concerns with other important interests such as the prevalence of obesity and general nutritional condition of American youth. The Section, however, whose expertise and advocacy role is confined to consumer welfare as it relates to antitrust law, urges that competitive and economic-welfare concerns be accorded a place in this balancing process.

²⁰ Id.

²¹ Areeda and Hovenkamp, *Antitrust Law*, Vol. VII (3d. ed. 2010) at ¶ 1010 (discussing vertical mergers: “[o]ne might doubt whether the elimination of variety alone should be regarded as “anticompetitive” absent any evidence of reduced market output or higher prices. On the one hand, consumers are entitled to the benefits of competitive markets, which may yield a wide variety of product differentiations. On the other hand, independent market factors such as scale economies often serve to limit product choice. At the least, proof of such strategies would require a showing that consumers preferred the variety sufficiently that when it was narrowed, market output declined as a result. If consumers are completely indifferent about whether the taxicab they hail is a Checker or a Ford, then reducing the choice has little competitive significance. However, if consumers greatly prefer cable systems with multiple news channels over cable systems having only one and the result is reduced consumption of cable television or of all news programming, then competition has been injured.”).

B. Possible Antitrust Implications: Parallel Consideration and Adoption of the Principles

In our view, many industry members are unlikely to unilaterally implement the Proposed Principles without giving serious consideration to whether their competitors will similarly follow. This is because of several commercial realities. First, competitive pressures tend to discourage unilateral adoption of policy-based initiatives absent an assurance that other competitors will do the same. Second, part of the value to an industry member in adopting the Proposed Principles, and a possible way to recover some of the competitive advantage lost by forgoing certain effective marketing practices, likely would be the goodwill gained by publicly announcing that the member is adopting and will follow the Proposed Principles. This may be interpreted, rightly or wrongly, by antitrust enforcers or plaintiffs as “signaling” competitors of an intent to forgo certain marketing practices and an invitation to others to do the same. Third, the Proposed Principles as written are intentionally general and may require, or at least encourage, industry collaboration in articulating their meaning with respect to a specific food product category or subcategory. The Working Group should consider the impact of these factors when evaluating the effect of the Proposed Principles.

In light of these general principles, consider the following hypothetical: Competitors A, B and C each manufacture a popular food product that is highly profitable but does not comply with the Principles. Competitor A has a strong interest in adhering to the Principles, but is unsure of whether its two main competitors are also considering such a change. In order to fully implement the Principles, Competitor A will need to either reformulate its product (making it more expensive to consumers) or remove it altogether. However, should Competitor A reformulate or discontinue its popular product, but Competitor B and C do not follow suit, its sales could drop dramatically as customers react to the change. Indeed, Competitors B and C could gain market share as Competitor A’s sales begin to drop. As a result, Competitor A decides that it will not move forward with adhering to the Principles absent competitive intelligence confirming that Competitors B and C are similarly planning to do the same. Several months later, Competitor A learns from several large customers that Competitor B and C are each planning to reformulate their respective products in order to comply with the Proposed Principles. This prompts Competitor A to continue with its initial plan and implement the Principles. Competitors A, B and C each reformulate their respective product within a short time. Because of the costs associated with reformulation, each competitor is forced to raise the price of its product. Such a situation could prompt litigation or enforcement action alleging a price-fixing conspiracy.

This hypothetical demonstrates the real possibility that an antitrust plaintiff or government entity could construe legitimate market activity by competitors as illegal

collusion in violation of § 1 of the Sherman Act.²² Several other hypothetical situations could similarly prompt either a government entity or creative antitrust plaintiff to argue that industry members had an opportunity to or did collude:

- (1) Industry members adopt and follow the Proposed Principles and make public announcements to this effect, or communicate their intention to adopt and follow the Proposed Principles to each other through trade associations or other industry communication channels.
- (2) An industry trade association publicly adopts the Principles and recommends or requires that members of the association follow them.²³
- (3) An industry trade association convenes a committee of its members to interpret the Proposed Principles and establish more specific guidelines for implementing the Principles. It then recommends or requires that members of the association follow the guidelines as a means of complying with the Principles.

Any of these arrangements potentially could be challenged by a federal government agency, a state attorney general or a private plaintiff or plaintiff class as an agreement in restraint of trade under Section 1 of the Sherman Act or various state antitrust laws. The Section takes no position on the likely outcome of such a challenge. With expert counseling and careful structuring of the relevant arrangements, it may be possible for industry members to minimize and manage the antitrust risk associated with adhering to the Proposed Principles, even if there are collaborative elements to their compliance. The Section does, however, encourage the Working Group to bear in mind that the probable circumstances of adoption of the Proposed Principles may create such antitrust risk.

²² § 1 prohibits any contract, combination, or conspiracy that unreasonably restrains trade. *See* 15 U.S.C. § 1.

²³ As an initial matter, it is important to note that if the Principles had been issued by a private industry trade association to its members, rather than by the Agency Working Group, the issuance of the Principles alone might well be enough to draw antitrust scrutiny. Indeed, the FTC itself has scrutinized such agreements. At any rate, it is possible that in merely adopting the Principles and issuing recommendations to its members, an industry trade association may face at least some risk of antitrust exposure depending on the circumstances. *See* ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed. 2007) at 35-36; *see also Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 at 1008 (3d Cir. 1994).

IV. Consumer Protection Implications of the Proposed Principles

A. The Working Group Should Clarify that the Proposed Principles Would Apply to Products Marketed to Children and Adolescents, Not to All Products Within Broad Categories

Some language in the Proposed Principles is ambiguous with respect to the scope of application of the nutritional standards that are put forward. Part III of the Proposed Principles contains a proposed definition of “marketing targeted to children and adolescents” for use in determining which food products are marketed to children and adolescents and are thus covered by the nutritional recommendations of the Principles. The Proposed Principles are not entirely clear, however, on exactly to what use the marketing definition is to be put with respect to determining the scope of application of the nutritional recommendations. In Part II.B of the Proposed Principles, the Working Group discusses the identification of food “categories” which, based on the FTC’s prior studies of the marketing of food to children, the Working Group has determined are the most heavily marketed to children. These categories are described in footnote 17 of the report, and consist of breakfast cereals, snack foods, candy, dairy products, baked goods, carbonated beverages, fruit juice and non-carbonated beverages, prepared foods and meals, frozen and chilled desserts, and restaurant foods, with certain exclusions.²⁴

The ten categories of foods described in footnote 17 are broad, and each contains a great diversity of food products targeted at widely varying consumer segments. Some food products within each category may be marketed primarily to children; others are marketed primarily or even exclusively to adults; and still others are marketed to families or to consumers of all ages. The Proposed Principles state as a goal that “all foods within the categories most heavily advertised or otherwise marketed directly to children and adolescents would meet the nutrition principles by the year 2016.”²⁵ If by “categories” in that sentence is meant the ten broad food categories described in footnote 17, then read literally, the sentence suggests that the Working Group intends that *all* breakfast cereals, *all* snack foods, *all* candy, *all* dairy products, and so forth would be expected to conform to nutritional Principles A and B, regardless of whether the individual product is marketed directly to children or adolescents. Such an interpretation would appear to be supported by language in the Congressional statement that “when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children.”²⁶ In the Section’s view, this could be an overbroad application of the Proposed Principles. An alternative phrasing, which appears to be narrower although

²⁴ Proposed Principles at 7 n.17.

²⁵ Proposed Principles at 3.

²⁶ Explanatory Statement, *supra* note 2, at 1.

somewhat ambiguous, used by the Working Group is, “The Working Group is therefore recommending that the food industry focus its efforts on ensuring that any advertising or marketing of food products within these ten categories meet the nutrition principles set out below.”²⁷ Under this formulation, it appears that only foods within the ten categories that are directly advertised and marketed directly to children and adolescents would have to meet the nutritional principles. The recent comments by Bureau Director Vladeck indicate that only products marketed directly to children are contemplated as falling within the Principles, and that companies would not be urged to comply with the Principles’ nutritional requirements as to any products that they elect not to market directly to children and adolescents.²⁸ This is a more targeted and appropriate definition of the scope of application of the Principles.

The purposes of the Proposed Principles may be ill-served, and an unnecessary burden imposed on industry members, by a potentially overbroad definition of the scope of the Principles that captures many products marketed principally to adults. To take examples from a few of the categories, the interest balancing test calculus is likely to differ when considering the limited impact on improving child nutrition that would be achieved by requiring a premium fruit juice targeted at health-conscious adults, a weight-control prepared meal aimed at adults participating in a national diet program, or a chain of steakhouse restaurants catering mainly to adult diners to adhere to the nutritional principles as weighed against the accompanying reduction in choices to adults and the burden to industry, compared with the application of the Principles to foods consumed by and marketed directly to children and adolescents. Many companies in the food industry that market numerous products within the ten identified categories do not advertise or market any of their products directly to children or adolescents, either by the definition of such marketing proposed in Part III of the Proposed Principles or by any other reasonable definition. Other food companies market some products within the ten categories to children or adolescents and other products predominantly or exclusively to adults.

Both competition and consumer protection concerns are implicated by potentially overbroad definition of the scope of the Proposed Principles. As noted above, a key feature of the Proposed Principles is that they set forth standards, not for marketing and advertising, but for the nutritional and ingredient makeup of food products themselves. As the Working Group concedes, in many cases the “reformulation” of products that would be necessary to comply with the nutritional

²⁷ Proposed Principles at 7.

²⁸ See David Vladeck, *What’s On the Table*, (July 1, 2011), available at <http://business.ftc.gov/blog/2011/07/whats-table>, at Myth #3 (“The proposal simply recommends that the products companies choose to market directly to kids — as opposed to the products marketed to their parents — meet the nutrition principles outlined in the report.”), Myth #5 (“It’s true we’re proposing companies not market candy directly to children. We also recognize and applaud companies like Mars, Hershey, and Cadbury Adams that already voluntarily have stopped advertising to kids. We’re not proposing that companies stop selling holiday and special occasion treats or stop marketing those treats to parents.”).

principles would drastically alter the nature of the food product and may not be possible at all. Thus, a foreseeable consequence of adherence to the Proposed Principles is the elimination of some products from the marketplace altogether. If food industry members were being asked to eliminate or, if possible, reformulate all products in a broad food category heavily advertised to children regardless of whether the specific product is marketed to or consumed mainly by children, the effect may be to eliminate from the marketplace many products mainly marketed to and consumed principally by adults. As noted above, such economic consumer welfare concerns are not necessarily paramount, but are appropriately balanced against other interests and concerns, such as the child nutrition issues that serve as the primary motivation for the Principles. From a consumer protection perspective, however, the case for such government intervention is weaker where the primary consumer audience is the adult population, because such intervention has relatively less impact on child nutrition and more impact on adult consumer choice.

The Working Group appears to be concerned that the scope of products covered by the Proposed Principles under its definition of the food categories most heavily marketed to children may be *underinclusive*, based on Question 5,²⁹ as well as being concerned that its definitions of food categories marketed to children may “result in limits on food marketing in media that is also reaching a substantial adult audience” and potentially be “*over-inclusive* so as to include marketing directed primarily to adults.”³⁰ The Section shares these concerns, especially that the categories defined in Proposed Principles footnote 17 will in many cases be overinclusive. Accordingly, the Section suggests that the Working Group may wish to reconsider its reliance on the broad categories identified by footnote 17, and consider recommending the application of the Principles on a product-by-product basis without reference to the broad food categories.

In sum, to the extent that the Working Group continues to refer to the food categories identified in footnote 17, the Section recommends that the Working Group clarify that food industry members may adhere to the Proposed Principles, as to products within the categories, *either* by formulating the products in accordance with nutritional Principles A and B *or* by not marketing the specific product directly to children or adolescents.

B. The Working Group Should Give Further Consideration to Its Definition of Marketing to Children and Adolescents

The FTC has conducted a number of recent studies on the marketing of food and beverages to children. On July 14, 2005, the Federal Trade Commission (“FTC”) and the Department of Health and Human Services (“HHS”) held a workshop to

²⁹ Proposed Principles at 20.

³⁰ Proposed Principles at 23-24, Questions 23, 25 (emphasis added).

discuss industry self-regulatory efforts to encourage responsible marketing of food and beverages to children.³¹

Later that year the Senate and House of Representatives requested, as part of their conference reports to the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, that the FTC conduct a report on “marketing activities and expenditures of the food industry targeted toward children and adolescents.”³² The FTC subsequently released two reports. First, on June 1, 2007, the staff of the FTC’s Bureau of Economics issued a report entitled “Children’s Exposure to TV Advertising in 1977 and 2004: Information for the Obesity Debate.”³³ Second, The Commission used its authority under section 6(b) of the FTC Act to obtain documents and information from 44 food and beverage manufacturers, distributors, and marketers. Based upon the information collected, the Commission issued a report to Congress titled “Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation” in July of 2008.³⁴

Part III of the Proposed Principles sets forth the definition of “marketing to children and adolescents” which is employed to determine which food products would be subject to nutritional Principles A and B. Summarized in tabular form, the definition is as follows:

³¹ See Joint Notice Announcing Public Workshop and Requesting Public Comment and Participation, announced May 11, 2006, available at <http://www.ftc.gov/os/2005/05/050511childobese.pdf>. The agencies subsequently issued a report summarizing the information discussed during the workshop. *Perspectives on Marketing, Self-Regulation & Childhood Obesity: A Report on a Joint Workshop of the Federal Trade Commission & the Department of Health & Human Services*, report released April 2006, available at <http://www.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCandHHSReportonJointWorkshop.pdf>.

³² Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-108 (Nov. 22, 2005), available at <http://www.gpo.gov/fdsys/pkg/PLAW-109publ108/pdf/PLAW-109publ108.pdf>. The House conference report was submitted on November 7, 2005. *Conference Report*, H. Rep. No. 109-272, available at <http://www.gpo.gov/fdsys/pkg/CRPT-109hrpt272/pdf/CRPT-109hrpt272.pdf>. Page 202 of the House Report incorporates by reference an earlier report drafted by the Senate and submitted on June 23, 2005. *Report from Committee on Appropriations*, S. Rep. No. 109-88, available at <http://www.gpo.gov/fdsys/pkg/CRPT-109srpt88/pdf/CRPT-109srpt88.pdf>.

³³ <http://www.ftc.gov/os/2007/06/cabecolor.pdf>.

³⁴ <http://www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf>

Media	Objective Measures	Subjective Measures (used when objective measures are not available)
Media capable of being measured (<i>e.g.</i> , television, radio, print, etc.)	<p>30% of the audience reached by the marketing is between the ages of 2 - 11 years, or</p> <p>20% of the audience reached by the marketing is between the ages of 12-17 years, or</p> <p>marketing plan indicates that promotions is directed to, or designed to appeal to, children.</p>	<ul style="list-style-type: none"> • Use of child- or teen-oriented animated or licensed characters, • Use of language to appeal particularly to children or teenagers, • Use of child or teen models, • Use of child- or teen-oriented themes, activities or incentives, • Use of active participation of children or teens in some aspect of promotion
Certain digital media capable of being measured (<i>e.g.</i> , Internet ads)	<p>20% of the audience reached by the marketing is between the ages of 2 – 17 years, or</p> <p>marketing plan indicates that promotions is directed to, or designed to appeal to, children.</p>	
Media not capable of being measured (<i>e.g.</i> , packaging, labeling, in-store promotions, etc.)	Marketing plan indicates that promotions is directed to, or designed to appeal to, children.	

According to the Working Group, the definition of “marketing to children” that is utilized within the Proposed Principles was taken from the “existing FTC template for defining marketing to children and adolescents.”³⁵ The term “FTC template” appears to refer to the definition of marketing to children that was contained within the Orders to File Special Report that were issued by the Commission to members of the food and beverage industry in 2007.³⁶ The Working Group states that the use of this definition within the Proposed Principles is appropriate as the definition has “already been vetted through public comment in connection with the 2006 FTC Study.”³⁷

The Section has two concerns regarding the use of this definition. First, the Working Group’s assumption that the definition of “marketing to children” that was used within the Orders to File Special Report has been vetted through notice and public comment may be overstated. Although the Commission sought public

³⁵ Proposed Principles, at 17.

³⁶ See Appendix B to Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities and Self-Regulation, at B-1 through B-39 available at <http://www.ftc.gov/os/2008/07/P064504foodmktingreportappendices.pdf>

³⁷ Proposed Principles, at 17.

comment prior to issuing its Orders to File Special Report, the requests for public comment that were filed by the Commission do not appear to have disclosed a definition of “marketing to children.”³⁸ As a result, it is unclear whether the proposed definitions have, in fact, been “vetted through public comment.”

Second, to the extent that public comments were received concerning how the term “marketing to children” should be defined for the purpose of issuing Orders to File Special Reports, such comments were provided in the context of evaluating whether the definition that would be useful in terms of *collecting information* from industry members. They were not provided in the context of evaluating whether the definition is appropriate in the context of principles for prospective food marketing. Given the sweeping changes in the formulation of foods marketed to children and adolescents that would result from adherence to the Proposed Principles, the Working Group’s definition of marketing to children and adolescents could have far-reaching consequences and warrants a level of critical examination that, to date, it does not appear to have received.

Third, the objective criteria included within the proposed definition of marketing may be more amenable to retroactive, as opposed to proactive, identification. Specifically, companies that received the Orders to File Special Report were asked to look at data from advertising campaigns that had been conducted in the prior year and to determine which campaigns in retrospect were targeted to children. The Proposed Principles, however, ask companies to prospectively refrain from marketing certain products to children. It is unclear whether companies will be able to use the objective measures prospectively.

Fourth, there may be insufficient data for individual products bearing on measurement-based elements of this definition for these parts of the definition to be useful in determining whether products are marketed predominantly to children on a product-by-product basis. In such cases, the definition may often default to whether the “marketing plan indicates that promotions is directed to, or designed to appeal to, children” which, although characterized as an objective indicator in the FTC’s definition, is actually somewhat subjective, or to the other subjective measures incorporated in the definition. This lack of a quantitative basis to identify a product as being marketed to children or adolescents is likely to lead to variability from company to company in interpreting the scope of the Proposed Principles. As long as the Principles remain a guide to voluntary self-regulation by industry members, this

³⁸ As part of the OMB approval process for the 2006 and 2009 food marketing studies, the Commission published notices in the Federal Register concerning its intention to issue orders to file special report, under Section 6(b) of the FTC Act. *See* 71 Fed. Reg. 62109 (Oct. 23, 2006), 72 Fed. Reg. 19505 (Apr. 18, 2007); 74 Fed. Reg. 48072 (Sept. 21, 2009). While the notices included definitions of the terms “measured media” and “unmeasured media” they did not include the objective criteria that the Commission intended to use to identify “marketing to children.” Indeed the notices include only a conclusory statement that “the criteria for determining whether particular marketing activities and expenditures must be included” has been “carefully defined.” 72 Fed. Reg. 19510.

may not be a serious issue. However, the Working Group has framed at least one of its questions, on another topic, in terms of “if Congress were to enact [the Proposed Principles] into law.”³⁹ Under those circumstances, difficulty in applying the definition consistently could lead to problems for enforcement of the Proposed Principles.

Fifth, because of the risks noted above that the products subject to the Proposed Principles may be overinclusive with respect to encompassing many products consumed largely by adults, the Working Group may wish to consider a definition that takes into account the marketing expenditures directed at adults as well as that marketing expenditures directed at children and adolescents. In determining whether a particular product is “marketed directly to children and adolescents,” it may be more informative to know not just whether *any* of the marketing for that product is directed to media that meet the definition’s criteria, but *how much* of the marketing expenditure for that product is so directed, relative to the total marketing spend. Even if the proportion of the marketing spend *not* directed at a child or adolescent audience is not taken into account in determining whether a product is deemed to be marketed to children or adolescents, this information would be useful in gauging how overinclusive the definition used in the Proposed Principles is in practice.

Finally, to the extent that the Working Group determines that the appropriate definition of marketing targeted to children includes advertisements whose child audience is double the proportion of that age group in the U.S. population, the Section encourages the Working Group to adopt a definition of marketing to children that is flexible enough to account for future changes in demographics.

V. Conclusion

The Section agrees that obesity and related nutritional issues are a major social problem affecting America’s youth, and commends the efforts of the Interagency Working Group to address this problem. Inevitably, any such effort will have to negotiate tensions between various competing interests, including the benefit to society of a vibrant competitive economy and the value to consumers – both adults and younger consumers – of being able to make informed choices from among truthfully advertised products. To help reconcile these interests, the Section recommends that the Working Group consider the potential competitive implications of the Proposed Principles and consider how to minimize the Principles’ impairment of consumer choice to the extent consistent with the desired impact on child and adolescent health and nutrition, as well as other important goals and interests that motivate the Proposed Principles. To the extent that such impairment is inevitable, the Proposed Principles should be focused on the problem they are meant to address by being confined to products marketed predominantly to children and adolescents.

³⁹ Proposed Principles at 24, Question 30.

The Section also suggests that the Working Group consider whether the definition of marketing to children and adolescents that it has tentatively adopted is well enough vetted, sufficiently precise, and sufficiently capable of reliable, prospective application to guide industry in applying the Proposed Principles.

If you have any questions regarding these comments, please do not hesitate to contact me.

Sincerely,

Allan Van Fleet
Chair, Section of Antitrust Law