

COMMENTS OF THE COMPETITIVE ENTERPRISE INSTITUTE REGARDING THE
INTERAGENCY WORKING GROUP ON FOOD MARKETING TO CHILDREN:
PROPOSED NUTRITION PRINCIPLES: FTC PROJECT No. P094513

July 5th, 2011
By Electronic Filing
Federal Trade Commission
Office of the Secretary
Room H-135 (Annex)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: The Interagency Working Group on Food Marketing to Children: Proposed Nutrition
Principles: FTC Project No. P094513

I. Introduction

The Competitive Enterprise Institute (CEI) is non-profit organization in Washington, D.C., with a longstanding interest in protecting and expanding consumer choice in the marketplace, and in opposing overregulation of commercial speech. While we recognize that obesity is a serious problem, particularly among the nations' youth and understand regulators' desire to address the issue, we oppose the current proposal due to its conflicts with the right of commercial free speech and the deleterious effects it would have on vibrancy and competition in the marketplace.

Even though the Proposed Nutrition Principles are presented as voluntary, non-binding guidance documents all too frequently become viewed by government and regulated industries alike as *de facto* standards. Therefore, it is reasonable to expect that these principles will come to be seen as voluntary in name only, and thus set commercial speech restrictions that would otherwise conflict with First Amendment principles. In addition, the proposal would impose a significant regulatory burden on companies, undermine existing, ongoing efforts by leading food producers to formulate and market healthier products, and inappropriately expand the proper role of government in a way that limits consumer choice.

II. First Amendment Conflict: Commercial Free Speech

Commercial entities, like individuals, have the right to free expression, and that freedom ought to extend to their ability to freely communicate their products to any potential consumer, so long as that communication is not fraudulent. While the current proposed guidelines are voluntary, the weight and authority of the agencies involved in the creation of such guidelines threatens to make industry-wide adoption a *de facto* mandate. Voluntary standards and non-binding guidance documents issued by government agencies are widely acknowledged to represent agencies' interpretations of their statutory legal authority. Regulated industries in turn feel compelled to tailor their behavior to comply with those guidelines in order to minimize their

exposure to legal sanctions, so voluntary principles quickly take on the nature of *de facto* standards.

The Interagency Working Group explicitly recognized that, “[T]he proposed principles would be voluntary, largely in recognition of the First Amendment’s restrictions on the government’s ability to limit commercial speech.” Indeed, if the Federal Trade Commission (FTC) were to mandate the proposed guidelines, or if Congress were to enact the guidelines into law, the rules would be an unquestionable violation of the First Amendment. Yet, by treating the Proposed Nutrition Principles as nominally voluntary, the FTC may implement *de facto* commercial speech restrictions that nevertheless conflict with First Amendment principles. Therefore, CEI opposes the FTC’s current proposed guidelines for marketing food products to children.

Since the 1980s, U.S. courts have evaluated the constitutionality of commercial speech regulation in accordance with the four-pronged analysis set forth in the U.S. Supreme Court case, *Central Hudson Gas and Electric Corp v. Public Service Commission of New York* 447 U.S. 557 (1980). The *Central Hudson* test places the burden on the government agency seeking to restrict commercial speech to “demonstrate that the harms it recites are real and that its restriction will alleviate them to a material degree.” (*Edenfield v. Fane*, 507 U.S. 761, at 771, 1993). The proof must constitute more than a mere assertion made by the agency. Restrictions that rest on “anecdotal evidence and educated guesses” do not satisfy this test. (*Coors Brewing Co.*, 514 U.S. at 490.)

To pass muster under the *Central Hudson* test, restrictions on commercial speech must serve a legitimate and narrowly defined state interest, determined under four criteria (“prongs”). The Proposed Nutrition Principles fails this test.

Prongs 1 and 2: “[T]he State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest.” (*Central Hudson*, 447 U.S. at 564). This applies especially when considering speech that is neither misleading nor unlawful. The interagency working group’s report asserts that the guidelines seek to address “the high rates of childhood obesity,” yet it provides no evidence that product marketing that appears to be aimed at children has contributed to the problem of child obesity. There is no evidence proffered to suggest, let alone prove, that increased rates of childhood obesity are in some way linked to marketing and advertising. Nor does the report demonstrate that the guidelines’ recommended restrictions on commercial speech would result in, or contribute to, a reduction in childhood obesity.

Prong 3: “[R]estrictions must directly advance the state interest involved.” (*Central Hudson*, 447 U.S. at 564.) Even if we assume for the sake of argument that combating childhood obesity is a legitimate state interest, the guidelines offer no reason to believe that they would advance that interest. They would therefore fail to meet the standard of the third prong of the *Central Hudson* test. Further, the Supreme Court has clearly held that a “regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.”

Prong 4: “[T]he regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.” (*Central Hudson*, 447 U.S. at 564.) Even if we assume for the sake of argument that increased rates of childhood obesity are somehow linked to marketing and advertising, the guidelines still fail to meet the standards of the *Central Hudson* test which requires that speech restrictions be no more than necessary to meet the state’s goal. Therefore, even if the restricting speech would address a legitimate state interest, the restriction must be narrowly tailored to directly serve that purpose. In the past the Supreme Court has struck down such proposed restriction on speech, advising that “alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal (see: 44 *Liquormart*, 517 U.S at 507; and also *Coors*, 514 U.S. at 490-91).

III. **Regulatory Burden and Impairment of Effective Competition**

In addition to the conflicts with free speech noted above, CEI is concerned with the regulatory burden the guidelines will place on businesses. Compulsory data collection and compliance will cost significant amounts of money and time and possibly derail individual companies’ current efforts to improve product quality and marketing standards. Those efforts in response to consumer demand for healthier options and better information, rather than a government mandate. Indeed, research conducted by the FTC itself indicates that food manufacturers, when permitted to discuss nutritional elements in their products, compete to produce and sell healthier foods. Market forces can achieve greater efficiencies, more choices for consumers, and lower prices, than can one-size-fits-all government guidelines.

Over the last three decades, health-conscious consumers have demanded increasingly higher quality and a greater variety of healthful food products. These market forces already have prompted food producers to offer healthier alternatives and creative responses to consumers’ desire for improved health. Companies have invested time and millions of dollars to promote healthy eating and fitness, as well as tailored their products and marketing to health-conscious consumers in order to compete for their business.

For example, as addressed in the Grocery Manufacturers Association (GMA) comments to the FTC on May 18, 2007 its member companies have taken numerous steps and instituted various programs to address the growing demand among its consumers for healthier options. Such efforts include removing trans fat from products, reducing calories, offering low sugar options, lowering cholesterol, adding whole grains, adding fiber and vitamins and offering smaller product package sizes.¹

Also in an effort to meet consumer demand for a healthy lifestyle many companies have instituted programs to promote habits that benefit health. Companies, in conjunction with

¹ Letter sent to the Federal Trade Commission Office of the Secretary, May 18, 2007 from William C. MacLeod, Partner at Kelley Drye Collier Shannon, Re: Federal Trade Commission Request for Information and Comment on Food Industry Marketing to Children Report: Paperwork Comment: FTC File No. PO64504

national health and fitness programs have voluntarily instituted programs to promote healthier lifestyles for their consumers beyond what they ate or purchased.

Together the companies have spent millions of dollars on programs and events. Examples include the following:

- The General Mills Foundation partnered with the American Dietetic Association Foundation to create the Champion Youth Nutrition Fitness Program.
- Coca-Cola and Kraft Foods have made a combined five-year, \$12-million commitment to the Boys & Girls Clubs of America in support of Triple Play, a national after-school program developed in collaboration with the U.S. Department of Health & Human Services.
- Gatorade, in partnership with the University of North Carolina at Chapel Hill, sponsors Get Kids in Action, a multiyear, multimillion dollar research, education, and outreach effort.
- The Kellogg Company promotes healthy lifestyles through its Zumbando con Kelloggs, a dance fitness and nutrition education program specifically designed for Latino families; Earn Your Stripes, a campaign featuring Tony the Tiger and sports stars like Mia Hamm, Kevin Garnett, and Tony Hawk; and Girls on the Run, an after-school program for girls ages 8-11 that focuses on running games and workouts, culminating in a 5-kilometer race.

This behavior comports with the findings of several studies conducted by the FTC itself. For example, in a comprehensive study of fat and cholesterol consumption in the United States, FTC economists Pauline Ippolito and Alan Mathios examined changes in food products and consumption patterns before and after policy changes in the mid-1980s made it easier for firms to discuss diet-disease relationships in food advertising and labeling.² As FTC and Food and Drug Administration policies became liberalized, food manufacturers “began to link food choices to disease explicitly, and health-related claims of all types became more frequent in advertising and labeling.” The competition that resulted in turn led manufacturers to begin producing foodstuffs with lower levels of fats, saturated fats, and cholesterol. It is apparent, then, that market mechanisms provide incentives for manufacturers to advertise the nutritional benefits of their products and to shift production toward the healthier products that consumers demand.

It is important to preserve the freedom to produce and advertise products designed to meet consumer needs. It would be unfortunate if the proposed advertising guidelines were to short-circuit the ongoing market processes that are already leading food manufacturers to improve the nutritional elements of the products consumers value. Companies would be forced to divert their efforts in order to comply with the proposed FTC guidelines, thus diminishing or derailing their myriad efforts already underway in favor of a one-size-fits-all approach.

² Pauline M. Ippolito and Alan D. Mathios, *Information and Advertising Policy: A Study of Fat and Cholesterol Consumption in the United States, 1977-1990*, Bureau of Economics Staff Report (Washington, D.C.: Federal Trade Commission, September 1996).

IV. The Proposed Guidelines Are Unsuitable for Achieving Reductions in Childhood Obesity

Childhood obesity is a serious issue, but as history has shown, social problems cannot be solved by restricting the lawful activity of commercial entities, especially when such attempts conflict with U.S. law.

This interagency attempt at restricting commercial speech is not the first time the FTC has attempted to solve a children's health issue by limiting commercial speech. In 1978 the FTC, in what became known as the "kidvid" case, in an attempt to combat tooth decay among the nation's youth, proposed rules that would ban advertising sugary foods to children under 12 years old. The proposal was wholeheartedly rejected by the scientific and legal communities, as well as by the public, which saw the proposal as a leap toward nanny statism. Congress, reacting to the backlash, allowed funding for the program to lapse.

Tooth decay rates have dramatically improved since the demise of the kidvid proposal. At the time of kidvid, only 26 percent of children between 6 and 17 years old had no cavities in their permanent teeth. Today, 55 percent of children in that age group have zero cavities in their permanent teeth—this despite the lack of a FTC ban on sugary food advertising. There are many reasons for the improvement in dental health among the nation's children, but clearly, government curbs on advertising of sugary foods is not a significant factor.

While it is appropriate for government to address advertising that is false, misleading, or prompts consumers to engage in behavior that is immediately threatening to their safety (such as prompting a child to cook unsupervised or use electrical equipment near a bathtub), it is not within the statutory authority of the FTC to limit commercial speech that is neither false nor immediately harmful to reasonable consumers. Moreover, a government agency must not be able to violate the rights of commercial entities in order influence consumer behavior.

In the past, the FTC rules protecting children against unfair or deceptive marketing have focused on behaviors which parents cannot prevent—such as using toys in a dangerous way or calling 900 numbers, which could cause parents immediate financial injury. Purchasing food items which a government agency considers unhealthy does not fall into the category of behavior that parents cannot control, nor does it represent an immediate threat to safety.

Moreover, the marketing guidelines will do nothing to stop childhood obesity because they do not address the root cause of the problem: lack of parental guidance regarding food choices. Advertising of junk food or sugary drinks is not the root cause of increasing obesity in the nation's youth. Today, parents have more control than ever over what marketing their children are exposed to inside the home, thanks to DVR recorders that allow commercial-skipping, web browsers that block certain websites, and other modern technologies. Parents must be responsible for the safety and well-being of their children by reasonably monitoring and guiding their behavior. It ought to be parents, not the government, setting guidelines.

As J. Howard Beales III, then-Director of the Bureau of Consumer Protection, said in a 2004 speech at George Mason University, "[B]ased on the history of FTC regulation of

children’s advertising, experience with the prior kidvid rulemaking, and the current state of the law with regard to commercial speech and the First Amendment, one can only conclude that restricting truthful advertising is not the way to address the health concerns regarding obesity.”³

According to the Commission, deception is found when there is “a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”⁴ As Beales notes, when the advertisement is targeted at a particular group, the FTC is to consider the perspective of an ordinary member of that group. In addition, the FTC may consider a practice unfair only if it causes “substantial injury to consumers which is not reasonably avoidable....and not outweighed by countervailing benefits to consumers or competition.”⁵

The proper role of government is to protect individuals from violations of their rights, force or fraud. That some consumers may overindulge in certain products does not constitute fraud. Efforts by government to curb such overindulging will cause substantial harm to competition and to companies’ ability to market their products to consumers. Government attempts to restrict commercial speech—whether through law or intimidation—for the purpose of altering consumer behavior is an inappropriate use of government power.

V. **Though Voluntary, the Guidelines are Informal Censorship**

While the proposed guidelines are voluntary, they constitute an act of informal censorship, which court precedent has held as a violation of constitutional First Amendment rights. For example, in *Bantam Books, Inc v. Sullivan* in 1963, the Rhode Island state legislature created a commission to examine materials it believed to be obscene and to “educate the public” on the threat such materials represented to children (*Bantam Books, Inc. v Sullivan*, 372 U.S. 58). While the commission had no regulatory authority to ban or prevent the sale of these materials, it still notified distributors that their materials had been examined and were declared “objectionable for sale, distribution or display to youths under 18,” and requested their “cooperation.” The court found that this system of informal censorship was a violation of constitutional rights, because the state had bypassed the normal “procedures that will ensure against the curtailment of constitutionally protected expression,” and its actions resulted in the suppression of sales of the

3 J. Howard Beales III, “Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present,” speech delivered before the George Mason Law Review 2004 Symposium on Antitrust and Consumer Protection. <http://www.ftc.gov/speeches/beales/040802adstokids.pdf>.

4 Deception Policy Statement, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 176 (1984).

5 FTC Act, 15 U.S.C. § 45(n). Section 5 § 45 prohibits “unfair or deceptive acts or practices.” Section 12 § 52, prohibits the dissemination of any false advertisement that is likely to induce the purchase of food, drugs, devices, services, or cosmetics.

targeted materials, subjecting them to “a system of prior administrative restraints” in violation of the publisher and distributor’s constitutional rights. (372 U.S. 59-72).

Other court decisions have also maintained that government agencies can act in such a way that, although they have not enacted specific and mandatory rules or regulations, their actions constitute a violation of free speech rights. For example, in *Rossignol V. Voorhaar*, the Fourth Circuit U.S. Court of Appeals ruled that the actions of off-duty Sheriff’s officers, which included going around the county on an election day and purchasing all copies of a publication that had reported unfavorably on their performance, constituted an act of censorship because their “official positions were an intimidating asset in the execution of their plan,” and therefore they had acted “with the color of law.” (*Rossignol v. Voorhaar* 316 F.3d 516, 4th Cir. 2003).

The First Amendment prohibits “any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights of citizens” (*Grosjean v. American Press Co.*, 297 U.S. 233, 249-50). With regards to speech, including marketing speech directed at the nation’s youth, we must take the utmost care to protect freedom of expression. As the court noted in the *Bantam Books* opinion, “It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments” (372 U.S. 59-72). The guidelines, though ostensibly voluntary, could nevertheless be considered a violation of free speech due to the weight and authority of the agencies from which they emanate. The power of the agencies could be seen to give the guidelines the “color of law” and result in the suppression of speech.

VI. Conclusion

Government agencies should not hamper the liberty of companies to market their products however and to whomever they choose—including children—so long as purchasing decisions are voluntary and the marketing is not fraudulent or misleading. As noted above, major industry players already have done much to self-regulate and improve their products’ healthfulness. Yet, there are those who assert that they are not solving the problem fast enough or that they have not gone far enough.

Restrictions on speech must be the very last alternative to addressing a state interest, and must only occur in the event that such speech is a violation of some other individual rights. Obesity is a problem, but as Americans we are in much greater danger from losing our rights to free speech than from the marketing of unhealthy food products.

Rather than ask companies to abide by one-size-fits-all guidelines, the agencies should examine ways in which they can reduce the current regulatory, marketing, and labeling burdens on food producers, so that they may expand their current efforts to meet consumer demand for healthier options.