

E-ALERT | Food & Drug

May 25, 2011

INTERAGENCY WORKING GROUP HOLDS PUBLIC FORUM ON FOOD MARKETED TO CHILDREN

The Interagency Working Group (IWG) on Food Marketed to Children¹ held a half-day public forum yesterday to solicit additional public comment on the proposed voluntary principles for food marketed to children that it released on April 28, 2011.² That proposal has been deeply concerning to the food industry, as it would mean that the vast majority of processed and restaurant foods could not be marketed to children. Further, in light of the broad proposed definitions of such “marketing,”³ the proposal could mean that some products might not be able to be marketed at all or that longstanding brand icons could no longer be used.

The IWG is soliciting written comments on the proposal and has extended the deadline to July 14, 2011. Yesterday’s public forum was an opportunity for the IWG to summarize its proposal and to hear oral comments from stakeholders. Below are several key issues raised during the forum.

- Several speakers emphasized that the proposed “voluntary” principles will be effectively mandatory as a practical matter. They expressed the view that the only options available under the proposed principles would be complete product reformulation or cessation of marketing. One speaker representing the Alliance for American Advertising reported that an FTC official had said that not following the principles could be considered a deceptive practice.
- Many speakers questioned why the proposed principles would implement a stricter standard than other federal programs. For example, many foods deemed appropriate for inclusion in the Women, Infants, and Children (WIC) Program and the National School Lunch Program could not be advertised. Speakers noted that it would not be possible to market most yogurt products or bottled water to children under the principles as proposed.
- Speakers also questioned why the proposed principles do not align with the 2010 Dietary Guidelines for Americans. For example, speakers stated that the sodium limitations in the proposed principles do not comport with the levels set forth in the Dietary Guidelines. Others noted that the proposed principles would not permit advertising of enriched bread, the consumption of which is encouraged by the Dietary Guidelines for the folic acid and other nutrients it provides. The FTC representative replied that it has been a challenge for the IWG to apply principles from the Dietary Guidelines on overall diet and nutrition to individual foods, and that the IWG would welcome comments in this area.

¹ The IWG, comprised of representatives from the Federal Trade Commission (FTC), Food and Drug Administration (FDA), Centers for Disease Control and Prevention (CDC), and U.S. Department of Agriculture (USDA), was established at the direction of Congress to develop recommendations for the nutritional quality of food marketed to children and adolescents, ages 2-17.

² INTERAGENCY WORKING GROUP ON FOOD MARKETED TO CHILDREN, PRELIMINARY PROPOSED NUTRITION PRINCIPLES TO GUIDE INDUSTRY SELF-REGULATORY EFFORTS, <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>. For additional information and analysis, see our previous client alert [here](#).

³ The proposed definitions are contained in Appendix B of FTC’s Report, Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation, A Report to Congress (Jul. 2008), available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreportappendices.pdf>.

- Many speakers stated that the proposed marketing definitions are too broad. A representative from the Grocery Manufacturers Association (GMA) said that the definitions encompass categories not traditionally considered marketing, such as packaging. He stated that this could force companies to remove their own characters from their packaging and could even dictate a change in the shape of foods, such as animal crackers. Others noted that the proposed definitions would require elimination of seasonal displays depicting Santa Claus, the Easter Bunny, or Valentine's Day hearts, and that the broad sponsorship definitions would prevent traditional interactions with local communities, such as through support of local athletic programs.
- A few speakers stated that the proposed restrictions on advertising to adolescents would not be feasible. The FTC representative stated that one of the key issues being considered by the IWG is whether the scope of marketing activities should be narrowed for teens, such as to include only in-school and social media advertising. She indicated that the IWG particularly welcomes comment on this issue.
- Several speakers expressed the view that the IWG is following a flawed process. They stated that the IWG had not followed its 2009 Congressional directive to conduct a study and issue proposed regulations. The FTC representative responded that the IWG had conducted a study through its research into other practices and possible approaches.
- Several speakers stated that the IWG is using voluntary principles as backdoor regulation to circumvent the protections of a proposed rule, such as conducting a thorough cost-benefit analysis and providing support that the proposed action would reduce child obesity.

In light of the anticipated sweeping impact of the IWG's proposal, members of the food industry may wish to submit written comments amplifying the issues raised above or addressing other issues of particular concern.⁴

If you have any questions concerning the material discussed in this client alert, please contact the attorneys listed below:

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⁴ Comments filed in electronic form should be submitted by using the following link: <https://ftcpublish.commentworks.com/ftc/foodmarketedtochildreniwg> and following the instructions on the web-based form.