

# Food & Drug

## E-ALERT

August 1, 2008

### FTC Releases Report on Marketing Food to Children and Adolescents

On July 29, 2008, the Federal Trade Commission (FTC) released its Report entitled, "Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation."<sup>1</sup> The Report, requested by Congress, reflects the FTC's analysis of marketing data provided in response to compulsory process orders issued last summer to the 44 food and beverage producers, marketers, and quick-service restaurants (QSRs) that the FTC determined were the primary marketers to youth (ages 2-17). The Report is part of the FTC's continuing efforts to evaluate food and beverage marketing to children and adolescents, and FTC officials made clear upon its release that they intend to continue to monitor and report on such activities in the future. This memorandum briefly summarizes the Report and the FTC's major findings and recommendations of greatest interest to the food industry.

#### Key Themes in the Report

##### *The FTC Accepts Self-Regulation, For Now*

In reporting its findings, the FTC acknowledged that food marketers have made substantial strides in adjusting their advertising and marketing practices to encourage better nutrition and healthy lifestyles among youth. The FTC found room for continued improvement, however, and set forth a series of recommendations to guide future efforts. Significantly, in a press briefing regarding the release of the Report, FTC officials stated that the Commission currently does not intend to mandate changes in food marketing practices directed toward children and adolescents; rather, it will continue to monitor industry self-regulatory efforts. Similarly, while the Report recommends adherence to "meaningful nutrition-based standards" for marketing food to children and advises the use of improved and more consistent nutritional criteria for "better for you"-type products, the FTC provided no specific guidance as to what those standards should be. The Commission thereby showed considerable deference to food industry self-regulatory responsibility to establish and implement such standards.

Commissioner Jon Leibowitz, however, filed a concurring statement cautioning that "some companies still need to step up to the plate and others need to strengthen their voluntary measures, not only because it is in the public interest, but also because it is in their self-interest," because a failure of self-regulation may make the next Congress and next Presidential administration more inclined towards government regulation.<sup>2</sup>

<sup>1</sup> The Report and related information released by FTC can be found at <http://www.ftc.gov/opa/2008/07/foodmktng.shtm>.

<sup>2</sup> Concurring Statement of Commissioner Jon Leibowitz, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation* (July 29, 2008), available at <http://www.ftc.gov/speeches/leibowitz/080729foodmarketingtochildren.pdf>.

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### *The Report Did Not Link Food Marketing to Childhood Obesity*

While the FTC's activities in recent years to evaluate food marketing to youth have been largely driven by concerns about rising obesity rates,<sup>3</sup> the Report did not attempt to address whether there is a link between food marketing and childhood obesity. The Report also did not assess what proportion of foods and beverages marketed to youth are of poor nutritional value, or "junk food," although the FTC intends to examine this in the future. Instead, the Report acknowledged that childhood obesity is a complex problem with many contributing factors, and that all segments of society – parents, schools, government, health care professionals, food companies, and the media – are obliged to play a role in finding and implementing solutions.

### *The FTC Acknowledged the Potential for Positive Food Marketing to Children*

In the Report, the FTC recognized that marketing to youth is a major food industry activity, but did not object to the concept of promoting food to children, nor did it characterize any marketing practices as notably objectionable or manipulative. To the contrary, the Report acknowledged the potential public health benefits that could come from harnessing the power of advertising. Accordingly, many of the FTC's recommendations are for using the industry's marketing capabilities to help promote healthy dietary choices and lifestyles among children and adolescents.

## **Scope of the Report**

### *Industry Supplied the Data*

The Report is particularly significant because it reflects that, for the first time, the FTC gained access to data privately held by food marketers. Prior efforts to assess accurately the full scope and impact of food marketing to youth had been hampered by lack of access to such data. The FTC appears to have received universal industry cooperation in responding to the compulsory process orders, and commented in the Report that the "Commission believes the companies were thorough and conscientious in preparing their responses, and it appreciates that effort."<sup>4</sup>

### *A Broad Range of Marketers and Activities Were Assessed*

The Report reflects financial and marketing data from: beverage manufacturers and bottlers; producers of packaged snacks, baked goods, cereals, and prepared meals; makers of candy and chilled desserts; dairy marketers; fruit and vegetable growers; and QSRs. Information was provided regarding expenditures in 20 separate promotional activity categories, including: traditional "measured media" – television, radio, and print advertising; packaging and labeling; "new media" including the Internet, other digital media, word-of-mouth and "viral" marketing; and other activities such as event sponsorships, use of celebrity endorsers, product placements, and marketing in schools.

### *The Data Provide a Benchmark for Measuring Self-Regulatory Efforts*

Data were provided for the 2006 calendar year. That period was shortly before or at the early stages of significant industry self-regulatory activities aimed at reducing or changing the profile of food and beverage marketing to children – most notably, the Children's Food and Beverage Advertising Initiative established by the Council of Better Business Bureaus (CBBB). Under the CBBB Initiative, 14 of the largest food and beverage companies have pledged either not to advertise their food and beverage products to children or to advertise only "better-for-you" products in advertising primarily directed to children under 12.<sup>5</sup> On

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<sup>3</sup> The FTC and the U.S. Department of Health and Human Services held a workshop in July 2005 on Marketing, Self-Regulation, and Childhood Obesity, and released a report in April 2006 that contained a series of recommendations for food marketers, including suggestions for self-regulatory initiatives to address the ways in which food products are marketed to children.

<sup>4</sup> Report at 6.

<sup>5</sup> The current participants in the CBBB Initiative are Burger King Corp., Cadbury Adams, USA, LLC, Campbell Soup Company, The Coca-Cola Company, ConAgra Foods, Inc., General Mills, Inc., The Hershey Company, Kellogg Company, Kraft Foods Inc., Mars, Inc., McDonald's USA, Nestlé USA, PepsiCo, Inc., and Unilever United States.

the same day that the FTC released its Report, the CBBB released its first progress report on the Initiative, announcing that advertising by participating companies “has already undergone a substantial shift toward the promotion of better-for-you foods.”<sup>6</sup> The FTC observed that its Report, based upon 2006 data, may serve as a benchmark for measuring the future success of self-regulatory efforts to modify food advertising to youth.

## Key Findings

### *\$1.6 Billion Was Spent on Youth Marketing*

The FTC found that the 44 major food and beverage marketers spent \$1.6 billion in 2006 to promote their products to children and adolescents. This figure was substantially lower than anticipated, as previous reports had estimated such annual expenditures to be around \$10 billion.<sup>7</sup> Of the \$1.6 billion, approximately \$870 million was spent on marketing to children (defined for purposes of the Report as children under 12), just over \$1 billion was spent on marketing to adolescents (defined as youth ages 12 to 17), and \$300 million overlapped between the age groups.

### *Television Remains the Primary Medium, but Campaigns are Integrated*

More money was spent on television advertising than for any other promotional activity – \$745 million, or 46% of the total marketing dollars spent in 2006. Expenditures for all traditional measured media accounted for 53% of total youth marketing dollars. New media such as company websites, Internet and other digital advertising, and word-of-mouth and viral marketing accounted for only 5% of all reported youth-directed marketing, or \$77 million. The FTC commented, however, that a focus on expenditure data may underestimate the degree to which marketers used such media to reach children and adolescents, because Internet advertising and other new media activities are far less costly than promotion through channels such as television advertising.

Marketers employed a full range of promotional techniques and formats. The FTC particularly remarked upon the extensive use of integrated marketing campaigns that combine traditional media, such as television, with previously unmeasured forms of marketing such as packaging, in-store advertising, and digital media, with such campaigns often involving cross-promotion with a television program or new movie popular among youth.

### *The Majority of Expenditures Were for Carbonated Beverages, Restaurant Food, and Breakfast Cereals*

Carbonated beverages, restaurant food, and breakfast cereals accounted for 63% of the total spent on youth-directed marketing, or \$1.02 billion. Youth marketing expenditures by carbonated beverage companies were mostly directed to adolescents, while such expenditures by breakfast cereal companies were virtually all directed to children. Generally, the food categories that accounted for the largest youth-directed marketing were also responsible for the largest overall marketing for the reported brands in terms of dollars spent. Expenditures for youth marketing of carbonated beverages and restaurant foods constituted a relatively small percentage of the companies’ overall marketing budgets for their reported brands.

Commissioner Leibowitz, however, lamented that the expenditures for carbonated beverage marketing to adolescents was nearly \$20 per American teenager. He was also troubled by the dollars spent to promote QSRs to children. Leibowitz acknowledged the progress some QSRs have made to develop new, lower calorie menu items for children, but encouraged them to do more to promote healthy choices, particularly given that some

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<sup>6</sup> CBBB News Release, “Major U.S. Food and Beverage Companies Comply with Pledges on Kids’ Advertising,” July 29, 2008, available at <http://us.bbb.org/WWWRoot/SitePage.aspx?site=113&id=1869d6a9-82aa-49a1-8419-40a8251fa916&art=6213>.

<sup>7</sup> See, e.g., Institute of Medicine of the National Academies, *Food Marketing to Children and Youth: Threat or Opportunity?* (2006). The FTC explained that it excluded nonfood marketing and advertising it did not consider to be directed to children, including coupons.

children in inner-city low-income neighborhoods have greater access to QSRs than to grocery stores selling “nutritious foods.”

## Key Recommendations for the Food and Beverage Industry

The FTC included in the Report a series of recommendations for the food and beverage industry, for the CBBB, and for media and entertainment companies. The major recommendations for the food and beverage industry are summarized below:

- The FTC’s primary recommendation is that food and beverage companies should adopt and adhere to “meaningful nutrition-based standards” for marketing their products to children under 12. The FTC suggests that a useful first step would be to join the CBBB Initiative.
- Companies should broadly construe “marketing” to include all advertising and promotional techniques.
- Companies should continue and increase efforts to improve the nutritional profiles of their products through product innovation and reformulation, and should aim to find ways to lower sugar, fat, and sodium without sacrificing taste and appeal. Notably, the FTC cited some research finding that statements that suggest a product is healthy, nutritious, or healthier than other choices generally do not appeal to children or adolescents because those consumers are concerned that taste will be compromised.
- Companies should “improve upon the nutritional criteria adopted for ‘better for you’ products.” In some cases, companies should re-examine whether the fact that a product has “less” of, or is “reduced” in, calories or certain nutrients (*e.g.*, sodium, sugar, or fat) is, by itself, a sufficient basis for qualifying as a “better for you” product. Companies also should work toward consistency among the standards used to determine what constitutes a “better for you” product, such as through the development and use of third-party standards, icons, or other devices.
- Companies should continue and expand efforts to package “more nutritious products” in ways that are more appealing to children.
- Companies should continue efforts to use product packaging to help consumers control portion sizes and calories, by offering smaller portions and single-serving packages.
- Companies should expand public outreach efforts – through company-sponsored initiatives, third-party partnerships, and innovative and varied media techniques – to educate children and adolescents about the importance of healthy eating and exercise.
- Companies should continue researching the effectiveness of their campaigns to educate and motivate youth to engage in healthier lifestyles. Companies also should conduct research on the effectiveness of various labeling devices to determine how consumers interpret such labeling and to identify those devices most effective at conveying “meaningful, truthful information.”
- Companies should devote particular attention to outreach aimed at ethnic minority populations that are disproportionately affected by childhood overweight and obesity.
- Companies should continue efforts to improve the nutritional profile of foods and beverages sold in schools, and should cease all in-school promotion of products that do not meet “meaningful nutrition-based standards.”
- The CBBB and participating companies should enhance the CBBB Initiative in a number of ways, including through implementation of the FTC recommendations and by:

- Requiring that 100% of food advertising directed to children under 12 promotes healthy dietary choices.
- Requiring companies not to engage in, approve, or allow placement of their product in media directed to children under 12.

## Responses to the Report

The Report received immediate attention from key stakeholders including the food industry, consumer advocacy groups, and Congress. Industry generally appears to have welcomed the FTC's recognition of the efforts it has made in recent years to help promote nutritious food choices and a healthier lifestyle, while acknowledging that more can be done. The Center for Science in the Public Interest (CSPI) called for stronger industry standards, tightening of "loopholes" in the CBBB Initiative, and greater participation in that Initiative by other food companies and by media and entertainment companies. CSPI appeared to remain open to self-regulatory measures, if effective. Other groups, such as the Campaign for a Commercial-Free Childhood and Children Now, expressed the view that self-regulation is insufficient. And some groups, including the American Society for Nutrition, questioned the suitability of marketing any food to children.

Senator Tom Harkin, who commissioned the FTC Report, urged industry to implement the FTC's recommendations. He observed that, as food companies are investing \$1.6 billion in marketing toward children, it is important for them to be doing so responsibly. Cautioning that the government will have to act if self-regulatory efforts do not produce significant changes in the landscape of food advertising to children, Harkin urged industry to develop a "meaningful and uniform set of age-appropriate guidelines for marketing to kids."<sup>8</sup> Senator Sam Brownback also announced his support for the FTC's recommendations in the Report.

The FTC Report will surely continue to fuel attention to food marketing toward children and adolescents. Companies currently engaging in responsible marketing practices to this population should be encouraged in those efforts, and may wish to take steps to ensure that those efforts are recognized and understood by consumers, the broader public, and regulators. Companies whose youth marketing practices may need improvement should examine the Report and the FTC's recommendations closely. Covington & Burling LLP has extensive expertise regarding the FTC oversight of food and beverage marketing to youth, and our attorneys would be happy to respond to any inquiries about this matter.

If you have any questions concerning the material discussed in this client alert, please contact one of our food marketing experts:

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<sup>8</sup> See Press Release, "Harkin Unveils FTC Report Showing \$1.6 Billion Used to Market Food and Beverages to Children" (July 29, 2008), available at <http://www.harkin.senate.gov/pr/p.cfm?i=301494>.