

May 2, 2007

The FTC Renews Request for Comments and Proposes Compulsory Orders Targeting Food Marketing to Children and Adolescents

On April 18, 2007, the Federal Trade Commission (the FTC or the Commission) announced that it is providing a second opportunity for comments while seeking approval from the Office of Management and Budget (OMB) to issue compulsory process orders to food and beverage marketers, distributors, and manufacturers, and quick service restaurant companies, to obtain information about food marketing to children and adolescents.¹ Under the Paperwork Reduction Act (PRA), the FTC must request and consider public comments on its proposed action and then seek approval from OMB before issuing its orders.

The FTC's recent action is part of an ongoing federal effort to obtain data and information to evaluate and report on the food industry's marketing activities and expenditures directed at children and adolescents.² The information is necessary to assist the Commission in preparing a congressionally-mandated report on this subject.³ The FTC first requested comments and information for its report last March.⁴ In October 2006, to comply with PRA requirements, the FTC requested new comments concerning the proposed compulsory orders.⁵ In response to its second request, the FTC received 27 comments, including eight comments favoring the proposed orders and three comments suggesting ways to enhance the quality, utility and clarity of the information sought. Now, the FTC is providing a second opportunity to comment on the proposed compulsory process orders, while simultaneously requesting OMB approval for issuing the orders. The deadline to submit comments is May 18, 2007.

The Commission now proposes to send compulsory process orders to 44 companies whose subsidiaries market and sell the foods and beverages that appear to be the most frequently advertised to children and adolescents.⁶ The identified categories include breakfast cereals, snack foods, candy,

¹ See 72 Fed. Reg. 19505 (April 18, 2007), available at http://www.ftc.gov/os/2007/04/P064504Proposed_Information_Requestsfrn.pdf.

² For additional background information on this issue, please see Covington & Burling LLP's previous e-alerts by accessing these two links: "[The FTC Seeks New Public Comments on Food Marketing Targeting Children](#)," and "[FTC Requests Public Comment on Food Industry Marketing Practices to Children and Adolescents](#),"

³ See Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. 109-108, 119 Stat. 2290 (Nov. 22, 2005); see also S. Rep. No. 109-88, at 108 (2005) (incorporated by reference in a House of Representatives' report; see H.R. Rep. No. 109-272, at 202 (2005)).

⁴ See 71 Fed. Reg. 10535 (Mar. 1, 2006), available at <http://a257.gakamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/06-1931.pdf>.

⁵ See 71 Fed. Reg. 62109 (Oct. 23, 2006), available at <http://a257.gakamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/E6-17666.pdf>.

⁶ Although the FTC does not precisely define "children and adolescents," it appears that these groups roughly span two to 19 years of age. See A Report on a Joint Workshop of the FTC & the Department of Health & Human Services, at 1 (April 2006), available at <http://www.ftc.gov/opa/2006/05/childhoodobesity.htm>. See also Comm. on Food Marketing and the Diets of Children and Youth, Food and Nutrition Board, Institute of Medicine, Food Marketing to Children and Youth: Threat or Opportunity? at ES-6 (The Nat'l Academy Press 2005) (defining children as 2-11 years and adolescents or teens as 12-18 years).

milk, yogurt and other dairy products, baked goods, carbonated beverages, fruit juice and non-carbonated beverages, prepared foods and meals, frozen and chilled desserts, and quick service restaurant items. The FTC also plans to seek information from major marketers of fruits and vegetables, as well as information about whether any of the targeted companies offer foods identified as healthier or “better for you.” It is not clear whether the proposed orders will provide guidance about how to identify the kinds of advertising that are “targeted toward children and adolescents.”

Generally, the proposed orders will seek information regarding the following:

- Types of foods marketed to children and adolescents;
- Types of media techniques used to market foods to children and adolescents, including “measured” media (e.g., television, radio, print, Internet) and “unmeasured” media (e.g., in-store marketing, events, product promotions and placement);
- Amounts spent to market foods to children and adolescents, as well as total food marketing expenditures;
- Nature of marketing activities in unmeasured media used to market foods to children and adolescents; and
- Marketing policies, initiatives, or research related to food marketing to children and adolescents.

The Commission is authorized to compel such information from companies under section 6(b) of the FTC Act.⁷ This is a relatively rarely used provision permitting the FTC to issue general or special orders to require certain companies to file reports or provide written answers to questions to assist the Commission in obtaining necessary information about the business's conduct, practices, and management, among other things.

The FTC's process and procedures are unique and potentially expose a responding company to certain legal risks. Indeed, companies will face fundamental questions about whether and how to respond, and what accommodations or conditions may be allowed or imposed in negotiations with FTC staff. It is critical that a recipient of a compulsory process order carefully consider how to prepare for and respond to one of these orders. For example, companies should be aware that although trade secrets and confidential commercial or financial information are generally protected from public disclosure,⁸ they may be disclosed to Congress and appropriate federal or state law enforcement agencies.⁹ Future liability based upon information provided in response to one of the FTC's orders is a

⁷ 15 U.S.C. § 46(b).

⁸ See e.g., *id.* at §§ 46(f) and 57b-2(f)(1).

⁹ *Id.* at §§ 46(f), 57b-2(d)(1)(A) and (f)(1). See also 16 C.F.R. § 4.10(g) (stating that trade secrets and confidential commercial or financial information may be disclosed in court subject to a FTC or court protective or *in camera* orders). In addition, the FTC may also review information marked as a trade secret or confidential commercial or financial information to determine its status. If the Commission determines that information is not a trade secret or confidential commercial or financial information and seeks to publicly disclose it, the FTC must give at least 10 days written notice to the company that owns the information, during which time the company may file an action in an appropriate U.S. district court to enjoin the intended disclosure. 15 U.S.C. § 57b-2(c). See also 16 C.F.R. § 4.10(e).

potential risk. In addition, answers and information must be truthful, provided under oath and within a reasonable time period, as prescribed by the FTC.¹⁰ A nonresponsive or tardy company may be subjected to daily fines upon the FTC's issuance of a notice of default.¹¹ Finally, it is important to note that all companies must maintain records and other information in their possession or control that may be responsive to an impending compulsory process order. Any destruction, removal, mutilation, alteration, or falsification of such evidence may subject the company to criminal prosecution.¹²

Companies that are likely to receive one of the FTC's compulsory process orders will be those that market and sell the identified categories of foods or beverages to children and adolescents. These include manufacturers, marketers, distributors, and quick service food companies. The FTC intends to target the parents of these types of companies to ensure that all relevant data from affiliated or subsidiary companies are reported. This second opportunity to submit comments on the scope and substance of the proposed orders provides potential target companies a final opportunity before issuance to shape the orders and communicate concerns or objections about the burdens and risks of responding to the Commission's information requests.

For assistance in evaluating the implications of the FTC investigations with respect to your company, please contact one of the attorneys listed below.

¹⁰ 15 U.S.C. § 46(b).

¹¹ Fines of \$100 per day may begin to accrue 30 days after the FTC issues a notice of default for failure to file the requested answers and information. *Id.* at § 50.

¹² 72 Fed. Reg. at 19510 (*citing* 15 U.S.C. § 50 and 18 U.S.C. § 1505).

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our food & drug practice group:

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