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FTC RELEASES FOLLOW-UP REPORT ON MARKETING FOOD TO CHILDREN AND ADOLESCENTS

On December 21, 2012, the Federal Trade Commission (FTC) released its Report entitled, "A Review of Food Marketing to Children and Adolescents: A Follow-Up Report" ("the Report").[1] The Report is a follow-up to the FTC's 2008 report entitled, "Marketing Food to Children: A Review of Industry Expenditures, Activities, and Self-Regulation," prepared at the request of Congress.[2] The Report assesses industry progress in implementing initiatives to improve the nutritional profile of foods marketed to youth (ages 2-17). The FTC acknowledged modest improvement in the nutritional profile of foods marketed to youth with the advent of self-regulatory initiatives. The FTC also commended the efforts of industry self-regulatory initiatives. At the same time, the FTC suggested that greater participation in industry self-regulatory initiatives is desirable and that these initiatives should expand the scope of self-regulated marketing activity.

KEY FINDINGS

Total Spending on Food Marketing to Youth Declined

The FTC found that the 48 major food and beverage marketers spent $1.79 billion on youth marketing, a 19.5% drop in inflation-adjusted expenditures from the nearly $2.1 billion spent by reporting companies in 2006.[3] Moreover, the proportion of companies' marketing budgets that was devoted to youth decreased between 2006 and 2009 across all food categories. Of the $1.79 billion, approximately $1 billion was directed to children (ages 2-11), and approximately $1 billion was directed to teens (ages 12-17), with $263 billion in spending overlapping between the age groups. The FTC did not offer an explanation for the drop in marketing expenditures, however, and therefore, did not attribute the drop in marketing expenditures to the industry's self-regulatory efforts.

Although Television Remains the Primary Medium, Television Marketing Spending Dropped Significantly and New Media Spending Increased Dramatically

More money was spent on television advertising ($633 million) than any other promotional activity, with television accounting for 35% of total youth-directed marketing expenditures. Expenditures on all traditional media (television, radio, and print) totaled $695 million, a significant drop from the $848 million spent in 2006. New media, such as company websites, Internet, and other digital

[1] The Report and related information released by FTC can be found here.
[2] The 2008 report and related information released by FTC can be found here.
[3] As in the 2008 report, the Report relies on previously privately held data from food and beverage marketers. The FTC issued a Special Order to 48 food and beverage manufacturers, distributors, and marketers, seeking data regarding expenditures and activities directed to children and teens in 2009. The FTC also requested nutrition data for those food and beverage products for which there were marketing expenditures directed to youth in 2006 and 2009. The FTC believes that the companies that supplied the data were responsible for a substantial majority of the expenditures on food marketing to children and teens in 2009.

advertising, and word-of-mouth and viral marketing, accounted for 7% of all reported youth-directed marketing, or $122.5 million. This marked a 50% increase compared to 2006 data.

The FTC described internet promotional activities as an "anchor" for food marketing, noting that more than 90% of the reporting companies engaged in online marketing in 2009. "Advergames" promoting foods and beverages were a key focus of these online marketing efforts. These games often incorporated social networking.

Marketers continued to employ a full range of promotional techniques and formats. The FTC remarked that, as in 2006, nearly one-third of all youth-directed marketing involved cross-promotion expenditures. In 2009, the companies reported 120 cross-promotions (up from 80 in 2006), involving movies, television programs, cartoon characters, toys, websites, video games, and entertainment venues totaling $584 million (versus $666 million in 2006).

The FTC remarked that industry research confirmed marketing to children is effective in generating "pester power." One company's research indicated that food ads and packaging were a key factor in purchase of a product and that 75% of parents bought the product for the first time because of a child request.

As In the 2008 Report, the Majority of Expenditures were for Carbonated Beverages, Restaurant Food, and Breakfast Cereals

Carbonated beverages, restaurant food, and breakfast cereals accounted for 72% of the total spent on youth-directed marketing, or $1.29 billion, compared to 63%, or $1.02 billion, in 2006. Youth marketing expenditures promoting carbonated beverages were mostly directed at adolescents, while expenditures promoting restaurant food and breakfast cereal were directed to both children and adolescents. As in 2006, breakfast cereal had the highest proportion of youth-directed expenditures relative to total marketing expenditures (25.9%).

Small Nutritional Improvements in Food Marketed to Youth

The FTC conducted a nutritional analysis of foods marketed to youth to determine whether, and to what extent, the nutritional quality of foods marketed to youth has improved under the industry's self-regulatory initiatives. Overall, the FTC found "modest" improvements from 2006 to 2009 across all key nutrients for foods marketed to children and improvements in all but sodium and saturated fat content for foods marketed to teens.[4] The FTC noted that the nutritional improvements were due both to reformulation of many products, as well as to products being introduced or newly advertised to youth in 2009 in place of less nutritious products.

In terms of particular product categories, the FTC found small improvements in the nutritional profile of cereal marketed to children and teens from 2006 to 2009, with less sugar and slightly more whole grain. The FTC noted small but positive changes (slightly lower calories) in the nutritional profile of drinks marketed to youth. The FTC found no improvement in the nutritional profile of snacks marketed to youth. The FTC noted improvement in the nutritional profile of Quick Service Restaurant ("QSR") foods marketed to children, with fewer calories and less sodium, sugar, and saturated fat. Additionally, menu items specifically identified as "children's meals" were more nutritious than other meals marketed to children ages 2-11.

[4] The FTC's analysis of the products focused on key nutrients or food components to either limit (calories, sodium, sugar, saturated fat, or trans-fat) or increase (fiber, whole grains, calcium, Vitamin D, and potassium) for a healthy diet.

The FTC noted that the average nutritional profile of Children's Food and Beverage Advertising Initiative ("CFBAI")-member products improved from 2006 to 2009, with greater improvement in foods marketed on television as compared to foods marketed through packaging or in-store displays.[5] The FTC recommended that industry self-regulation continue its focus on improving the nutritional profile of food marketed to children.

THE FTC'S ASSESSMENT OF INDUSTRY PROGRESS

The FTC noted that the food and beverage industry, particularly those companies that participate in the CFBAI, the Alliance for a Healthier Generation[6], and other self-regulatory initiatives, has made measurable progress in implementing the recommendations set forth in the 2008 report. The FTC commended the reporting companies' continued efforts to improve the nutritional profile of the products marketed to youth, through both the reformulation of existing products and the development of new products. In a press briefing regarding the release of the Report, FTC Chairman Jon Leibowitz noted that "food companies are reformulating their products and marketing more nutritious foods to kids, especially among companies participating in industry self-regulatory efforts."

The FTC encouraged those major food and beverage companies, including some QSRs, candy companies, and baked goods companies who are not currently members, to join the CFBAI. Chairman Leibowitz's comments in the press briefing cautioned that "there is still room for improvement: We will look for continued progress by the food industry and greater participation by the entertainment industry."

The FTC praised the CFBAI and its members for expanding their definition of what constitutes marketing "directed to children" and commended the CFBAI for requiring participants to commit that 100% of their children-directed advertising be for healthier dietary choices or "better for you" products. The FTC also commended the CFBAI for expanding its core principles to include additional marketing techniques, like Advergames, though the Report noted that the CFBAI does not yet cover product packaging and in-store promotion.

The FTC described the strengthening and standardizing of the nutritional standards applied to children's food marketing as the most notable development since the 2008 report. The CFBAI released a new set of uniform nutrition criteria in July, 2011, to be implemented by all members by December 31, 2013. The FTC observed, however, that the CFBAI's criteria for "nutrition components to encourage" appear to be less challenging to achieve than the criteria for "nutrients to limit." The FTC remarked that in many food categories, CFBAI members currently meet the criteria for nutrition components to encourage.

The FTC reported little progress among media and entertainment companies toward limiting licensing of their characters to healthier foods and beverages marketed to children, as was recommended in the 2008 report. While the FTC commended those media and entertainment companies that have implemented their own initiatives to apply nutrition standards for cross-

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[5] The CFBAI is a voluntary self-regulation program initiated by many of the nation's largest food and beverage companies, and launched by the Council for Better Business Bureaus, designed to shift the mix of foods advertised to children under 12 to encourage healthier dietary choices. The current participants in the CFBAI are Burger King Corporation, Campbell Soup Company, The Dannon Company, General Mills Inc., Kellogg Company, Kraft Foods Global Inc. (now includes former participant Cadbury Adams, USA, LLC), McDonald's USA, LLC, Nestlé USA, PepsiCo, Inc., Unilever United States, ConAgra Foods, The Coca-Cola Company, The Hershey Company, Post Foods, LLC, Hillshire Brands, and Mars, Inc.

[6] The Alliance for a Healthier Generation is a nonprofit organization that works with the food and beverage industry, and other industries, to address childhood obesity.

promotions, it noted that some major media and entertainment companies do not apply any nutrition standards for character licensing and cross-promotions.

The FTC Report made clear that the food and beverage and media and entertainment industries should make further progress in using marketing to promote healthier food choices by young consumers. Companies currently engaging in responsible marketing practices directed at young consumers 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 closely. Covington & Burling LLP has extensive experience 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 the following members of our antitrust and consumer law group:

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