

## CLIENT ADVISORY



## FTC and HHS Urge Industry Self-Regulation to Address Childhood Obesity

On May 2, 2006, the Federal Trade Commission and the Department of Health and Human Services released *Perspectives on Marketing, Self-Regulation and Childhood Obesity* ("Report").<sup>1</sup> The Report reflects a public FTC/HHS workshop held in July 2005, which provided an opportunity for industry, consumer, academic, and government representatives to evaluate the role of the private sector in reducing childhood obesity rates in the United States. The workshop reviewed current food marketing practices and examined how the food and media industries are developing and marketing healthier foods to children and using education campaigns to positively influence children's diets. Because of the practical difficulties in attempting to impose government restrictions on food marketing to children—and the difficulty in conforming any such restrictions with First Amendment constraints—the agencies stressed the need for industry self-regulation and for the industry to use its marketing expertise to fight childhood obesity by encouraging healthy food choices. The Report reflects this, noting that self-regulation can be particularly beneficial, because it has the ability to address marketing activities that agencies such as the FTC and FDA lack the authority to challenge. At the same time, the agencies were clear that self-regulation must be "carefully tailored" to the problem of childhood obesity so as not to raise antitrust concerns.

### INDUSTRY INITIATIVES

The Report first focuses on industry initiatives. It notes that the food industry spent an estimated \$10 to \$12 billion to reach children in 2002. Food companies market their products to children using not only television and print media, but also packaging, labeling, promotional efforts, product placement, branded "advergaming," licensing of children's characters, and other tie-ins to children's movies and television programs. At the workshop, food industry

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<sup>1</sup> Fed. Trade Comm'n & Dep't Health Human Serv., *Perspectives on Marketing, Self-regulation & Childhood Obesity: A Report on a Joint Workshop of the Federal Trade Commission & the Department Of Health And Human Services* (April 2006) [hereinafter "Report"], available at [www.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCa ndHHSReportOnJointWorkshop.pdf](http://www.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCa ndHHSReportOnJointWorkshop.pdf).

members presented examples of current initiatives to respond to increasing rates of childhood obesity: new marketing, product innovations, and changes in serving sizes and packaging. These initiatives include promoting healthier products with marketing campaigns focusing on nutrition and education, labeling healthier products with seals or icons, restricting the means of advertising to children, developing community outreach programs, and eliminating marketing and/or implementing nutritional standards for the sale of foods in schools. Critics expressed concern, however, regarding the “continuing imbalance” between the pervasive marketing and sale of foods of poor nutritional quality to children and the relatively more limited efforts to promote good health. Critics also questioned the efficacy of some of the industry initiatives, citing, among other concerns, the questionable nutritional value of some reformulated products and the subjective nutritional criteria used in “seal” programs. After considering all the information provided, the Report recommends that the food industry take the following actions:

**Products:** Increase efforts to create new products and reformulate existing products to make them lower in calories, more nutritious, more appealing to children, and more convenient to prepare and eat.

**Packaging:** Help consumers control portion sizes and calories through smaller portions, single-serving packages, and other packaging cues.

**Labeling:** Explore labeling initiatives, including seals, to identify lower calorie, nutritious foods clearly and in a manner that does not mislead consumers.

**Advertising/Marketing:** Review and revise marketing practices to improve the overall nutritional profile of foods marketed to children. For example, adopt minimum nutritional standards for foods marketed to children, or shift marketing emphasis to lower calorie, more nutritious products.

**Consumer Education:** Explore ways to improve efforts to educate consumers about nutrition and fitness with simple and effective messages.

**Marketing in Schools:** Review and revise policies to improve the overall nutritional profile of the products marketed and sold in schools.<sup>2</sup>

<sup>2</sup> On May 3, 2006, a day after the Report issued, the three largest soft drink manufacturers working in conjunction with the William J. Clinton Foundation and the American Heart Association announced that they each would stop selling high calorie sweetened drinks in school cafeterias and vending machines. *Marian Burros & Melanie Warner, Bottlers Agree to a School Ban on Sweet Drinks*, N.Y. TIMES, May 4, 2006, at A1, available at [www.nytimes.com/2006/05/04/health/04soda.html?ex=1146801600&en=1b0118707acb6dd8&ei=5087%0A](http://www.nytimes.com/2006/05/04/health/04soda.html?ex=1146801600&en=1b0118707acb6dd8&ei=5087%0A) (registration required).

Because television is the primary source of nutrition information for adults, as well as children, workshop participants also focused on the media and entertainment industries. Public service campaigns and the licensing of popular characters to promote nutritious food were cited as positive initiatives currently being pursued by the media. The Report recommends that media and entertainment companies take the following actions:

**Educational Messages:** Continue to develop and disseminate educational messages about nutrition and fitness that are simple, positive, and repeated consistently across various platforms, with broad participation from other stakeholders.

**Character Licensing:** Review and revise their licensing of children’s television and movie characters to foster promotion of more nutritious, lower calorie foods.

The Report finally noted that obesity rates are increasing more quickly in certain minority communities than in the general population. In focusing on racial and ethnic populations in which childhood obesity is more prevalent, the Report recommends both the food industry and the media tailor marketing and outreach efforts to reach minority communities.

## CHILDREN'S ADVERTISING REVIEW UNIT ("CARU")

After assessing the current state of the industry and suggesting industry-specific initiatives, the Report turned to the Children's Advertising Review Unit ("CARU") and its Self-Regulatory Guidelines for Children's Advertising ("CARU Guides"), a major focus of the workshop. CARU was created by the advertising industry in 1974 and serves as the principal self-regulatory group governing advertising directed at children. The National Advertising Review Council ("NARC"), which directs the policies of CARU, is composed of the Council of Better Business Bureaus, Inc. ("CBBB") and the three major advertising associations. CARU's mandate is to ensure that advertising targeted at children under twelve is "truthful and accurate" and takes into consideration young children's cognitive abilities.<sup>3</sup> The CARU Guides are similar to the self-regulatory principles applied by the Grocery Manufacturers of America ("GMA") and the International Chamber of Commerce and in television broadcast and cable network advertising clearance standards. The CARU Guides do not describe what foods can and cannot be marketed to children. Rather, the CARU Guides seek to deter advertising techniques that might exploit or confuse a child

regarding the benefits of a particular product and thus serve as more than a simple prohibition on deceptive or misleading advertising. Companies that violate the CARU Guides are identified in a press release, and violations that involve a false or deceptive advertisement may be referred to the FTC. CARU currently does not fine or otherwise penalize violators.

The workshop participants raised concerns that the CARU Guides do not reflect the current marketing environment given innovations in advertising such as in-school advertising, advergames, and peer-to-peer marketing. Participants also discussed whether the CARU Guides should include nutritional standards for foods marketed to children. GMA suggested a number of improvements, and, in response to those suggestions, NARC has set up an online consumer complaint form for CARU, expanded its voluntary pre-review system for children's advertisements, and agreed that it would add additional members to its advisory board who have expertise in children's health. NARC also committed to providing annual briefings to the FTC and HHS and instructed CARU to study ways to monitor advertising in electronic games, commissioned a report on interactive online games, formed a task force to examine product placement, and asked CARU to study the use of third-party licensing of

characters. NARC and CBBB also have formed a self-regulatory working group to assess the CARU Guides in light of the current environment. The working group will evaluate new forms of marketing, product placement, and the use of cartoon characters to market foods to children.

The agencies noted that the CARU Guides are a good foundation for industry self-regulation, but urged that the Guides be expanded and their enforcement enhanced. The agencies recommended that industry consider additional self-regulatory measures, including:

- how to modify the CARU Guides to address forms of marketing foods to children other than traditional advertising;
- whether it would be beneficial and practicable to modify the CARU Guides to include (or to develop a new set of guides that would identify) minimum nutritional standards for foods that are marketed to children, standards that shift marketing to children to focus on more nutritious, lower calorie foods, or other measures that would improve the overall nutritional profile of foods marketed to children;
- the feasibility of an independent nonprofit or public health organization developing a seal or logo program that identifies

<sup>3</sup> Children's Adver. Rev. Unit, Council Better Bus. Bureaus, Inc., *Self-regulatory Guidelines for Children's Advertising* 3 (2003) available at [www.caru.org/guidelines/index.asp](http://www.caru.org/guidelines/index.asp).

more nutritious, lower calorie foods;

- to what extent paid product placement of foods in contexts other than television programming (e.g., movies, video games, Web sites) is appropriate; and
- what additional sanctions or other measures should be incorporated into the CARU Guides to deter violations, especially repeated violations.<sup>4</sup>

The agencies concluded that the CARU working group should be given time to complete its review and implement changes to the CARU Guides before the agencies recommend other alternatives, particularly since there is broad industry support for the working group. The agencies noted, however, that they will evaluate closely the changes the NARC Board makes to the self-regulatory process to determine whether the changes address the recommendations for self-regulation advanced by the Report.

*We hope that you find this brief summary helpful. If you would like more information, please feel free to contact your Arnold & Porter attorney or:*

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<sup>4</sup> Fed. Trade Comm'n, *Marketing Violent Entertainment to Children: A Review of Self-regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, 2-3 (Sept. 2000), available at [www.ftc.gov/reports/violence/vioreport.pdf](http://www.ftc.gov/reports/violence/vioreport.pdf).