

**Before the
FEDERAL TRADE COMMISSION
and the
DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Washington, D.C.

**COMMENTS
of the
ASSOCIATION OF NATIONAL ADVERTISERS, INC.**

Food Marketing to Kids Workshop – Comments, Project No. P034519

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The Association of National Advertisers (ANA) appreciates the opportunity to submit these comments to the Federal Trade Commission (FTC) and the Department of Health and Human Services (HHS) on the important issues of “Marketing, Self-Regulation and Childhood Obesity.”

ANA is the advertising industry’s premier trade association dedicated exclusively to marketing and brand building. We represent more than 350 companies with over 8,000 brands that collectively spend more than \$100 billion annually in marketing communications and advertising. Our members market products and services to both consumers and businesses. Many of America’s largest food and beverage companies and restaurants are members of ANA.

We commend the FTC and HHS for focusing attention on the serious public health issue of childhood obesity. The U.S. Surgeon General’s groundbreaking report on obesity in 2001 contained a broad range of specific recommendations on how to address this serious health challenge in a balanced, comprehensive way. See *The Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity* at www.surgeongeneral.gov/topics/obesity/.

It’s important to note that the report contained no recommendations for restrictions on food marketing. As the Surgeon General concluded: “There is no simple or quick answer to this multifaceted challenge.” The report called on companies, individuals, families, schools, governments, and the media to work together to build solutions that will bring better health to everyone in this country.

The advertising community has accepted the Surgeon General’s challenge. We recognize that childhood obesity is a serious national problem. The available evidence strongly suggests that advertising is not a major contributor to childhood obesity. However, the advertising community already is playing an active role to be an important part of the solution.

Numerous companies have responded in the marketplace to concerns about obesity by developing menu alternatives, serving size changes and product reformulations. Thousands of new food and beverage products have been introduced in recent years to respond to consumer demand for “healthier” options. Quick service restaurants, for example, are now among the largest sellers of low calorie salads, yogurt and fruit. These new menu options and new lower calorie, lower fat food products can only be successful if companies have the ability to communicate with consumers through advertising. In this way, advertising can help educate consumers about health issues and play a positive role in addressing this problem.

The advertising community also is responding to the obesity challenge through the efforts of The Ad Council and our self-regulatory system, the Children’s Advertising Review Unit (CARU). We believe that CARU is an active, effective cop on the beat to protect the interests of children in the marketplace. We look forward to the public workshop on

July 14-15 as an opportunity to discuss CARU and other self-regulatory activities and how to enhance those efforts.

Childhood obesity is a complex problem that cannot be solved by simplistic proposals. Bans or restrictions on food marketing are unlikely to be effective in combating obesity. A number of other nations have instituted these types of restrictions without success. Efforts to restrict food marketing are a “feel good” approach that simply shifts focus away from real solutions. We commend the FTC for recognizing the significant First Amendment implications of such a censorship approach.

The advertising community stands ready to work with the government, parents and the health community to find additional specific steps that will directly address the problem of childhood obesity.

The Advertising Community is Committed to Addressing this Problem

ANA was one of the key organizers of The Advertising Council in 1942. The Ad Council provides over a billion dollars worth of public service ads over a wide range of public issues every year. Their numerous ad campaigns can be found at www.adcouncil.org.

Last year, The Ad Council, in partnership with HHS, launched a comprehensive public service campaign to inspire Americans to change their lives through healthier eating and increased physical activity. Since its launch, the “Small Steps” campaign has received extraordinary support from both the media and the public. The media already has donated more than \$72 million in advertising time and space for these messages during the first seven months of the campaign. The campaign’s website, www.smallstep.gov, receives an average of 80,000 hits each month. The campaign includes African-American and Hispanic targeted efforts. These efforts are further enhanced by cooperation with the Sesame Street Workshop to develop effective child-centered messages.

The Ad Council, in partnership with HHS, will be launching a new national PSA campaign this August to address childhood obesity. Targeted to youth ages 6-9, the multi-media campaign (TV, radio, Internet) will encourage children to adopt healthier nutrition and physical activity habits.

These are just two examples of partnerships between the advertising community and various government agencies to address the obesity problem. We will continue to encourage all of our members and business partners to support the efforts of The Ad Council through significant donated media and creative resources.

Food Companies are Responding in the Marketplace

At the same time, a large number of food and beverage companies and restaurants have responded in the marketplace to the growing societal concerns about obesity. Consumers are looking for ways to incorporate variety, balance and moderation into their diets and these companies are responding to their customers. Companies are reformulating products to be lower in cholesterol, fat and calories. Diet beverages often are leaders in their category. Even the candy aisle in the supermarket contains sugar-free or lower calorie options. Many restaurants are providing new salad and other lower calorie offerings in all of their stores. Hundreds of new products are being introduced each year in response to consumer demand. In fact, in the highly competitive food, beverage and restaurant industries, the advertising for many companies now prominently features the health or nutritional benefits of their products.

The FTC's Bureau of Economics found a perfect example of the way advertising can improve public health in their staff report on the link between fiber in cereals and the risk of cancer. According to the 1989 report, during the late 1970's and early 1980's "growing evidence [demonstrated] the link between reduced cancer rates and high fiber diets ... [but] there was no shift toward high fiber diets. However, as soon as producer advertising began in late 1984 there was a significant increase in market-share-weighted fiber content of cereals." See Pauline Ippolito & Alan Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market*, FTC Bureau of Economics Staff Report, at p. xi (1989). Thus, it was not until advertising practices had changed, due to consumer demand, that consumers began to incorporate more fiber into their diets. In a similar way, advertising can play a very positive role in educating consumers and directly addressing the obesity challenge.

Many companies also have launched individual efforts to promote better diets and more physical activity. One food manufacturer, for example, has awarded \$700,000 in grants to community YMCA's, hospitals for children, and 4-H programs to sponsor healthy lifestyle programs. Another is offering fifty \$10,000 grants a year to help communities sponsor programs to promote balanced diets and physically active lifestyles. Yet another company is providing pedometers in schools to encourage kids to walk more.

These types of partnerships with local governments, schools and non-profits, which continue to grow and develop, are critical to addressing the childhood obesity problem. Industry is eager to partner with governments to enhance nutrition education and physical activity.

Everyone can agree that one of the major factors contributing to increased childhood obesity is that our society has become dramatically more sedentary. A study by researchers at the University of North Carolina, for example, estimated that the decline in physical activity in the U.S. was a steep 13% between 1980 and the year 2000. Only one state -- Illinois -- still requires physical education in the schools and modern land use planning discourages physical activity in the neighborhoods where many Americans live. Partnerships encouraging more physical activity are another example of how food and

beverage marketers and restaurants are working proactively to be part of the solution to the obesity challenge.

The Advertising Industry's Self-Regulatory System Protects Children

The advertising community has an important proactive responsibility to help assure that advertising is truthful and nondeceptive. Special additional consideration and protection is given to the needs of children in the marketplace. In the mid-1970's, ANA and other industry groups developed the National Advertising Review Council (NARC). The NARC sets the policies for the National Advertising Division/National Advertising Review Board self-regulatory system, housed within the Council of Better Business Bureaus. This program allows for quick action on any national ad that is claimed to be false or deceptive. Several former Chairmen of the FTC have described the NARC system as an outstanding model of effective industry self-regulation.

Realizing that children are not miniature adults, the NARC, NAD/NARB program has been supplemented by the Children's Advertising Review Unit (CARU), an organization focused on the special needs of young people. Marketers realize that material that might be truthful and nondeceptive for adults might still mislead young people. CARU has devised a detailed code to assure that children are not taken advantage of in the advertising marketplace. The code is available at www.caru.org/guidelines.

The CARU Guidelines go beyond the issues of truthfulness and accuracy to focus on the uniquely impressionable and vulnerable child audience. In so doing, those guidelines go beyond what could be imposed by the government within the constraints of the First Amendment. CARU carries out its own monitoring and receives complaints from regulators, consumer advocates, Attorneys General, competitors and the public at large. The record of industry's compliance with CARU's guidelines demonstrates an extremely high level of effectiveness. CARU has brought formal cases or informal inquiries on a wide number of food advertising campaigns directed at children.

Our self-regulatory system continues to be an active cop on the beat, working to see that food marketing aimed at children is appropriate. Last year, NARC published a 92-page White Paper providing a historical overview of the efforts of CARU and the NAD to regulate food marketing. That paper is available online at www.narcpartners.org/narcwhitepaper.aspx CARU has brought several other food advertising cases since the publication of the white paper.

It's important to emphasize CARU's mandate and role in the marketplace. CARU was created to ensure that advertising directed to children is truthful, accurate and appropriate for its intended audience. It is not CARU's responsibility to decide which foods are "healthy" or to tell parents or children which products they should buy. In a free market economy, we believe those decisions are best left to consumers and parents.

While CARU is the most visible form of industry self-regulation, it is not the only one. Many major food and beverage marketers have specific policies on media placement and marketing techniques that these companies feel are appropriate for discussing their products with children. In addition, major broadcast and cable television networks have specific standards and guidelines for the placement of children's marketing. These self-regulatory practices come into play long before a commercial ever hits the television screen. So there are several layers of industry self-regulation that all work to see that marketing messages to children are appropriate and sensitive to their unique status.

Children Are Also Protected by Government Regulation of Marketing Practices

The self-regulatory efforts of CARU are buttressed by the broad authority of the FTC to stop any false, deceptive or unfair acts or practices in the marketplace. If a marketer refuses to comply with a CARU recommendation for changing an ad, CARU may refer the case to the FTC for enforcement action. Several cases referred to the FTC by CARU have resulted in consent agreements imposing substantial fines on marketers.

Children are also protected by federal legislation and rules by the Federal Communications Commission (FCC) that impose time limits on the amount of commercials that air during children's programming. The FCC's rules limit the amount of commercial matter to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. Also, the FCC rules require bumpers between programs and commercials and prohibit host selling, to ensure a clear separation between programming and advertising. These restrictions apply to both broadcast and cable programs that are originally produced and aired primarily for an audience of children 12 years old and younger.

We Reject the "Good Food/Bad Food" Argument

Much of the criticism of food advertising to children rests on a fundamentally flawed premise that demonizes certain food products. For example, the Center for Science in the Public Interest (CSPI) argues that food marketing is unfair because it encourages children to "pester" their parents to buy specific products; that parents cannot compete with advertising and that the need for parents to say "no" can strain the parent-child relationship. CSPI called for HHS to rate foods as either "good" or "bad" and to only allow "good" foods to be advertised to children.

CSPI also has proposed a set of food marketing guidelines that would restrict the marketing of food products to children unless the products met specific nutritional thresholds, as defined by CSPI. Those guidelines would apply to all those 18 years old or younger. Such an unprecedented approach treats all children under age 18 as incapable of making intelligent choices in the marketplace and ignores the role of parents. When CSPI and other groups call for broad censorship of food advertising, they are asking, in effect, for the government to step in to protect parents from their own children. We reject this type of governmental paternalism.

Also, Senator Edward Kennedy (D-MA) recently introduced legislation (S.799) that would require the Institute of Medicine and numerous federal agencies to develop national guidelines that: “(I) reduce the exposure of children and youth to advertising and marketing of foods of poor or minimal nutritional value and practices that promote sedentary behavior; and (II) increase the number of media messages that promote physical activity and sound nutrition.” Under that legislation, the FTC would have authority to enforce the guidelines and to impose fines on advertisers, networks or media groups that did not comply with the guidelines. This proposal appears to ignore or seriously undervalue the important and forceful efforts of CARU.

In addition, we reject the good food/bad food argument. There is nothing inherently unhealthy about foods from quick service restaurants, or cereals, or soft drinks, or candy or the myriad of other food choices, so long as those products are consumed in moderation as part of a well-balanced diet. The majority of food experts agree that the best solution to the obesity problem is to promote healthy, well-balanced diets, rather than attempting to demonize certain food products. There is clearly a need for more nutrition education in the schools and throughout society.

The government plays a vital role in protecting the safety of our nation’s food supply. However, we do not believe that it should be the responsibility of the government to define “good foods” or “bad foods” and impose marketing restrictions. As discussed below, any effort by the government to impose marketing restrictions and fines for noncompliance with mandated “guidelines” would raise serious First Amendment concerns.

Nor are parents incapable of making these choices for their children. Parents have more information today about food products than they have ever had, due to the Internet, the requirements of the Nutrition Labeling and Education Act (NLEA), the revised food pyramid and marketing efforts of food, beverage and restaurant companies.

We also believe it is critical to emphasize the importance of personal and parental responsibility when looking at the problem of childhood obesity. Adults make the vast majority of food purchases. While some parents provide money to children under eight, those parents are either supervising their children’s purchases or are willing to allow their children to make their own purchasing decisions. Therefore, to suggest that parents who fully understand the role of advertising do not have control of this process is totally misleading. Parents need to be parents and the government cannot replace their responsibility by restricting food marketing.

Food Advertising Has Not Significantly Contributed to Increased Childhood Obesity

Many critics of food marketing allege that children are “bombarded” by an ever-increasing number of food commercials leading to increased obesity rates.

Unfortunately, some of the reports of these critics have been based on assumptions and assertions, rather than scientific data and analysis. In fact, we do not believe that children's exposure to food advertising has significantly increased over the last decade. Nor do we believe that their exposure to food advertising has significantly contributed to childhood obesity.

The Kaiser Family Foundation, for example, released a major report last year, "The Role of Media in Childhood Obesity." The report found that studies were all over the map on the relationship between the amount of time children spend watching TV and obesity; some studies found a direct relationship and others did not. The report states, in part, "Pediatricians, child development experts, and media researchers have theorized that media may contribute to childhood obesity in one or more...ways" (emphasis added).

One thing was clear: there was no consensus that TV viewing caused obesity. Here are the words of the Kaiser report: "Exactly how media may contribute to child obesity has not been conclusively documented."

However, in the very same sentence, the Kaiser report then makes the huge leap to assert that "it appears likely that the main mechanism by which media use contributes to childhood obesity may well be through children's exposure" to food advertising. Terms such as "appears likely" or "may well be" are very far from being precise or conclusive. While the Kaiser report did not make any specific policy recommendations, the report has nevertheless been cited by Senator Tom Harkin (D-IA) and other policymakers as justification for broad restrictions on food marketing.

The Kaiser report also mentioned cross-promotions with popular TV and movie characters of high-calorie foods as leading to increased obesity levels. To illustrate how difficult it is to identify high calorie foods as a cause of obesity, however, consider the results from a National Health and Nutrition Examination (NHANES) Survey carried out by the Centers for Disease Control and Prevention (CDC).

This survey examined energy intake for young people from samples taken between 1971-74 and 1999-2000. According to this research, calorie consumption for children age 6-11 decreased from 2045 to 2025 during this period. For males age 12 to 15, consumption declined from 2625 to 2460. Only for females 12-15 and 16-19 was there any increase in calorie intake. This data strongly suggests that food marketing has not led to a significant increase in caloric intake over the last few years.

The American Psychological Association (APA) also released a very provocative report last year, calling for restrictions on all advertising aimed at children under the age of eight. The APA would apparently allow no advertising to young children, even for products such as fruit or vegetables.

In fact, food and beverage marketers and restaurants are spending less in real dollars on TV advertising and children are seeing fewer TV commercials for food products. Last year, ANA and the Grocery Manufacturers of America (GMA) commissioned Nielsen

Media Research to quantify food advertising expenditures and exposures for the period from 1993 to 2003. This ten-year period has been cited as the time during which obesity rates grew the most and at the highest rate.

The data was analyzed by Georgetown Economic Services, LLC and the study drew the following conclusions:

- adjusting for inflation in order to hold the value of dollars constant, real expenditures on food and restaurant advertising on all television, including cable, fell over the ten-year period from 1993 to 2003. In 1994, ad spending in these categories reached \$5.92 billion. In 2003, ad spending in these categories had dropped to \$4.98 billion. This was a 13% drop from the first four years of the period to the last four years.
- Rather than being increasingly bombarded by restaurant and food ads, children under 12 in fact saw fewer ads on TV in these categories between 1993 and 2003. The Nielsen data showed that the number of food and restaurant ads reached 5,909 per year in 1994 but dropped to 5,038 in 2003.

ANA and GMA recently provided an update of the Nielsen report to the Institute of Medicine (IOM) Committee on Food Marketing, including numbers for 2004. The new study confirmed our earlier conclusion: that food advertising to children on television has decreased over the past decade, both in ad spending and ad exposures. The study also found that views of food and beverage company websites are infinitesimal compared to TV impressions and that screen time is migrating from TV to other media. Copies of the two Nielsen data studies are attached to this statement.

The Nielsen numbers clearly refute those critics who claim that children are being increasingly bombarded by TV ads for foods, beverages and restaurants. It's also important to note that advertising for these products is not a new phenomenon for parents or children. There have been television commercials for food and beverage products and restaurants since the beginning of television, long before the recent increase in childhood obesity rates. Therefore, we do not believe that increased obesity rates can be blamed on the food ads seen by children.

Todd Zywicki, Visiting Professor of Law at Georgetown University Law Center and former Director of the Office of Policy Planning at the FTC, has conducted a comprehensive review of existing literature on the causes of rising obesity rates, including the possible contribution of advertising to the obesity problem. A copy of his paper, "Obesity and Advertising Policy, is attached to our statement. Professor Zywicki concluded:

“Based on our review of the evidence and economic theory, we believe that a host of factors have contributed to the increased rate of obesity in the American population. Our review of the available evidence does not indicate that food marketing to children has grown markedly during the years that children's obesity

has increased. **Thus, it seems that food advertising is not a primary causal factor in children's increased obesity rate.** Furthermore, there may be negative consequences to banning or restricting truthful food advertising. As the public becomes more educated on the importance of weight control to health, there may be increased pressure on marketers to compete on calorie content; food ad restrictions could inhibit such competition.” (Emphasis added)

Restricting Food Advertising Will Not Combat Obesity

There is strong reason to believe that governmental manipulation of food marketing does not effectively combat obesity. In a number of countries, there are broad restrictions on food advertising. In fact, in Sweden and the Canadian province of Quebec, broad bans on advertising to children have been imposed. Recent analysis of these bans, however suggest that they have had minimal, if any, impact on obesity levels. Additionally, in the Netherlands and certain other European countries, where there are no ad restrictions and relatively high levels of food advertising, obesity levels are lower than in either Quebec or Sweden. A “white paper” from the Advertising Education Forum analyzing food advertising and obesity in the Netherlands, Sweden and Quebec is attached to our statement.

In the United States, the amount of advertising for food products is relatively uniform across this nation. Yet there are significant differences in obesity levels in different regions, cities and even closely contiguous areas. According to 2002 figures from the Centers for Disease Control, the city with the highest rate of obesity among adults was San Antonio, Texas at 31.1%. By contrast, the rate of obesity among adults in another southwestern city, Santa Fe, New Mexico, was only 15.1%. While the obesity rate was 28.8% in Gary, Indiana, it was only 14.2% in Denver, Colorado and 15% in Portland, Maine. This strongly suggests that food marketing is not a primary factor in the growth of obesity among children or other groups, or obesity rates would be far more uniform.

In fact, childhood obesity is becoming a serious challenge in countries like Ghana and Haiti, which do not have as extensive media operations or significant amounts of food advertising as the U.S. There are clearly other major factors at work in these countries.

Food Advertising Has Substantial First Amendment Protection

Any effort to ban or restrict food advertising aimed at children raises very serious First Amendment concerns. The FTC noted this fact when it closed consideration of the children's advertising rulemaking in 1981, and this conclusion has been reiterated by FTC staff recently. Furthermore, in the intervening years the U.S. Supreme Court has greatly strengthened the First Amendment protections for advertising.

The Court has made it clear that truthful, nondeceptive commercial speech cannot be banned or restricted unless the restriction “directly and materially advances” a

“substantial governmental interest” and is “narrowly tailored” to “reasonably fit” that interest. See *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). Any government restriction on commercial speech must also be “no more extensive than necessary.” *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2001).

In a series of cases, including *Greater New Orleans Broadcasting Association v. U.S.*, 527 U.S. 173 (1999) and *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Supreme Court has ruled that all products and services have the same protection under the First Amendment.

In a decision in the *Western States* case, the Supreme Court ruled that a federal law prohibiting pharmacists from advertising compounded drugs violated the First Amendment. See *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002). Writing for the majority, Justice O’Connor stated: “If the First Amendment means anything, it means that regulating speech must be a last – not first – resort.”

Given the complex and multifaceted causes of obesity and the welter of inconsistent studies on the role of advertising and media, we do not believe that bans or restrictions on food or beverage advertising aimed at children could meet the *Central Hudson* test. While the government has a substantial interest in protecting the health of children, it is not likely that a ban or restriction on food advertising would directly advance that interest. In addition, it would be very difficult to craft a “narrowly tailored” restriction on advertising to children that is no more extensive than necessary.

How do you define “children’s advertising?” What would be the appropriate age cutoff – six or nine or somewhere in between? How do you determine if an ad is targeted at a six year old or a nine year old? Children watch TV and see commercials at all hours of the day. According to a Nielsen survey from last January, the most popular broadcast program among children 9-12 was *Desperate Housewives*. It is simply not possible to hermetically seal children in a protective cocoon where they will not be exposed to any advertising.

Clearly, bans or restrictions on children’s advertising will impact adults. No child is going to drive himself to a quick service restaurant or supermarket, so the ads seen by these children are also intended for adults. The U.S Supreme Court has refused to allow a “child protection” rationale to justify blocking information from reaching adults. In *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983), the Court noted that communication in society cannot be lowered to the level of the sandbox under the guise of protecting children.

Conclusion: Look for Solutions that Work

The advertising community stands ready to work with the government, parents and the health community to take specific steps that address the problem of childhood obesity.

Many restaurants and food companies have made changes in their menus and products and are communicating these new features through advertising. The Ad Council is playing an active role through partnerships with HHS to educate consumers about the many small steps they can take to develop a healthier lifestyle. CARU, backed up by the powerful regulatory authority of the FTC, is actively working to see that children are protected in the marketplace. Given the restraints of the First Amendment, we believe that industry self-regulation can and will be far more effective than any speech restrictions that could be imposed by government.

There are numerous non-speech steps the government can take to directly address the childhood obesity problem. We stand ready to work with the FTC, HHS and all other interested parties to come up with solutions that work.