

## children's advertising: a special update

november 14, 2006

This is not an easy time for children's advertising. For the past several years, the children's advertising industry, including and in particular food and beverage advertisers, have faced non-stop criticism from politicians, such as Senator Tom Harkin, D-Iowa, and public interest groups, such as the Center for Science in the Public Interest, who have blamed children's advertisers for the rise in childhood obesity in this country. Industry members have responded to this criticism by instituting voluntary initiatives to combat childhood obesity, including modified packaging and portion control and reformulated products. Despite industry member's increased initiatives, the current political climate and recent government vigilance suggests that the challenges facing the industry will not dissipate but will only grow stronger in the upcoming months. In addition, the Children's Advertising Review Unit ("CARU") of the Council of Better Business Bureaus, the independent self-regulatory agency charged with ensuring responsible advertising to children under the age of 12, has just published its revised Self-Regulatory Guidelines for Children's Advertising that will impact the marketing of all products to children – and not simply food products. The following is a summary of important developments in children's advertising that will likely affect your marketing practices and those of your clients.

In July 2005, the Federal Trade Commission ("FTC") and the Department of Health and Human Services ("HHS") sponsored a joint-workshop on marketing, self-regulation and childhood. The joint workshop brought together representatives from the government, food and beverage companies, the media, medical and nutrition experts, consumer

advocates, and academics to review current food marketing practices, examine the actions that the food industry and media were taking to create and market healthier food, and examine current self-regulatory efforts governing food marketing to children, including the effectiveness of CARU. While the workshop highlighted the voluntary steps members of the food, media and entertainment companies had taken to promote a healthy lifestyle, the FTC advised industry members that the status quo was not acceptable and that they needed build on their current efforts to tackle childhood obesity. While some participants praised CARU and self-regulation, others called for a strengthening and expansion of CARU and its Self-Regulatory Guidelines for Children's Advertising ("Guidelines").

CARU participated in the joint workshop and afterwards announced that it would be assembling a Working Group to undertake a thorough review of its Guidelines to reflect the changing environment and full range of marketing issues that have become important in recent years, such as the Internet and interactive games. The Guidelines review project demonstrated broad industry support for self-regulation by bringing together more than 40 leading children's advertisers across industry sectors. As a member of the CARU Working Group, we are happy to announce that the National Advertising Review Council Board ("Board"), which sets policy and direction for CARU, voted to approve the revised Guidelines. After months of anticipation, the revised Guidelines have been made available to the public and reflect significant revisions. Please visit <http://www.caru.org/>, for a copy of the revised Guidelines.

Please note that these significant revisions are not limited to food advertisements but are intended to address the new media forms used by advertisers to market any products to children, such as video games, movies, and toys. Specifically, the revised Guidelines address the issue of "blurring," noting the fact that children may have difficulty distinguishing program/editorial content and advertising, and have added a provision, which applies across all media, by prohibiting advertising that "blurs the distinction between advertising and program/editorial content in ways that would be misleading to children." In addition, the revised Guidelines reflect changes that would cover (i) the use

of commercial messages in interactive games, sometimes referred to as advergaming, by requiring an advertiser, who integrates a “commercial message into the content of a game or activity, to make clear, in a manner that will be easily understood by the targeted audience, that it is an advertisement”; (ii) the appropriate use of program personalities or characters in advertisements to make clear that it is an advertisement; and (iii) videotapes, CD-Roms, DVDs, or software marketed to children that contain advertisements or promotions (e.g, trailers). Any advertiser who markets its products to children should review these revised Guidelines because they will not only affect the marketing of food products to children but will likely affect the marketing of all products to children, and the marketing techniques advertisers use to market such products to them. Notably, the NARC Board has further advised that the review project will continue as it has requested further discussions on the issues of product placement in children’s programming and the advertising of telephone services to children. Thus, additional changes to the Guidelines with respect to product placement in children’s programming and the advertising of telephone services to children may be forthcoming.

The revised Guidelines have also been strengthened to provide further guidance to food advertisers, such as clarifying that children’s food advertising should not depict over-consumption or discourage or disparage a healthy lifestyle. In addition, NARC has approved the establishment of the Children’s Food and Beverage Initiative (“Initiative”), a voluntary self-regulation program, administered by the CBBB, with ten of the largest food and beverage companies as charter participants (including Cadbury Schweppes USA; Campbell Soup Company; The Coca-Cola Company; General Mills, Inc.; The Hershey Company; Kellogg Company; Kraft Foods Inc.; McDonald’s; PepsiCo, Inc. and Unilever). The charter participants have agreed to, among other things, devote half their advertising directed to children on television, radio, print and Internet to promote healthier dietary choices and/or to messages that encourage good nutrition or healthy lifestyles; limit products shown in interactive games to healthier dietary choices; commit to reducing use of third party licensed characters except for in healthy messaging; and not engage in food and beverage product placement in program/editorial content.

While some critics may argue that the revised Guidelines have gone too far, and others may argue that they have not gone far enough, the truth is that the Guidelines have undergone an extensive review, reflect significant revisions and address the new media forms prevalent in today's industry. As you may be aware, our industry is at a critical juncture – not only is it facing an unfriendly political climate, with its toughest critic, Senator Harkin, the architect of several pieces of food-legislation, including the Harkin amendment, becoming the chairman of the Senate Agriculture Committee, but it is facing increased government vigilance. Therefore, it is important that the industry continue to support self-regulation and CARU and stand behind the revised Guidelines.

Indeed, in recent months, government regulators have made children's food advertising an important priority and have stepped up their efforts to monitor the food advertising industry. For example, in May of this year, the FTC released a report in response to the FTC/HHS joint workshop which recommended concrete steps the industry could take to change the marketing practices of food and beverage advertisers to make progress against childhood obesity. In addition to recommending changes to the CARU Guidelines discussed above, the report also recommended that food companies intensify their efforts to make foods lower in calories and more nutritious; help consumers control portion sizes and calories through smaller portions, single-serving packages, and other packaging cues; and review and revise their marketing practices with the goal of improving the overall nutritional profile of the foods marketed to children. With this report, the FTC is essentially putting the industry on notice and once again telling it that the status-quo is no longer acceptable and that individual food companies, and the private sector as a whole, need to implement positive steps to combat the childhood obesity problem.

Of most concern to the industry, particularly to food and beverage companies and their advertising agencies, is the fact that the FTC recently announced that it was preparing to collect information from the parent companies of approximately fifty food and beverage companies and quick service restaurants in the U.S., targeting those products that appear to be advertised to children most frequently, such as quick service restaurants

(e.g., McDonalds, Burger King, etc.), breakfast cereals, snack foods, candy, gum, carbonated and non-carbonated beverages, and frozen and chilled desserts. The information the FTC receives in response to such requests will be included in a report that will examine the types of food products marketed to children and the types of media techniques used to market such products to children, including traditional and non-traditional media (e.g., in-store marketing, events, package placement, and product placement in entertainment media).

However, prior to issuing these information requests, the FTC has invited public comments on whether the proposed collections of information are necessary and whether the information will have practical utility or would be too burdensome on the targeted food and beverage marketers. The FTC has stated that it intends to use this information to examine food and beverage advertisers marketing practices. Because the FTC's information requests could be the first step in increased but unnecessary government regulation of children's advertising, we encourage all industry members to seriously consider filing comments. Please note that all comments on the proposed information requests must be received on or before December 21, 2006. As usual, we would be happy to assist you with the filing of any comments.

Despite the positive steps taking by industry members and strong support of self-regulation, the industry continues to be blamed for the childhood obesity problem in this country. To meet the challenges facing the industry, the entire industry must work together, support self-regulation, and protect itself against overbearing government regulation, the first step of which would be to file comments with the FTC in response to the food and beverage information requests. As you know, the industry has created momentum to combat intrusive government regulators through enhanced self-regulation, as evidenced by the revised Guidelines, and it needs to continue to support self-regulation and improve its marketing practices to combat encroaching government regulators.

Please do not hesitate to contact Ronald R. Urbach, Stuart Lee Friedel or Allison Fitzpatrick if you have any questions, including with respect to the revised Guidelines, or would like our assistance in filing any Comments with the FTC.

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