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OPPENHEIMER WOLFF & DONNELLY LLP

WAR ON CHILDHOOD OBESITY

David P. Graham

Oppenheimer Wolff & Donnelly

Plaza VII, Suite 3300
45 South Seventh Street
Minneapolis, MN
55402-1609
t : 612.607.7000
f : 612.607.7100

Congressional Action

- » 2009 Omnibus Appropriations Act (H.R. 1105)
 - Established Interagency Working Group on Food Marketed to Children (IWG) – FTC, FDA, CDC and USDA
 - Study and make recommendations “for standards for the marketing of food to children”:
 - » Identify positive and negative contributions of certain nutrients
 - » Review “evidence concerning the role of consumption of nutrients in preventing and promoting obesity”
 - » Determine scope of media to which standards should apply

Whitehouse Task Force on Childhood Obesity

- » Established by President Obama in February 2010
- » 12 federal agencies
- » 2,500 public comments
- » Consulted experts
- » Goal: Solve the problem of childhood obesity in a generation (5% rate by 2030)

Report to the President May 2010

» Recommended

- Getting children a healthy start on life (less “screen time”, nutritious food in day care, physical activity)
- Empowering parents and caregivers (more actionable messages about nutritional choices, improve labels on food and menus, reduce marketing of unhealthy products to children)
- Providing healthy food in schools
- Improving access to healthy affordable foods (eliminating “food deserts” in urban and rural America, lowering prices of healthy food, developing or reformulating food products to be healthier)
- Increase physical activity

Interagency Working Group on Food Marketed to Children

- » Primary sources of scientific information
 - FTC’s 2008 Study on Marketing Food to Children and Adolescents
 - Dietary Guidelines for Americans (USDA/DHHS 2010)
 - Nutritional Labeling Education Act regulations promulgated by FDA
 - Dietary Reference Intake reports
 - Institute of Medicine of the National Academies of Science report on “Food Marketing to Children and Youth: Threat or Opportunity?” (2010)
 - Industry proposals such as recommendations from the Children’s Food and Beverage Advertising Initiative
 - Public Interest Proposals – e.g. “Guidelines for Responsible Food Marketing to Children” (Jan. 2005) Center for Science and the Public Interest

Recommendations for Food & Beverage Industry

- » Extend self-regulatory program to cover advertising to children
- » Adopt meaningful nutrition standards
- » Adopt uniform standards for what constitutes marketing to children

Benchmarks of Success

- » Substantial yearly increase in the proportion of healthy food and beverage advertisements targeting children
- » Substantial yearly decrease in the use of licensed characters to promote foods that are not healthy

Foods Marketed to Children

- » Breakfast cereal
- » Restaurant foods
- » Snack foods
- » Carbonated beverages
- » Fruit juice
- » Prepared foods and meals

IWG Nutritional Principles

- » Meaningful contribution to a healthful diet
 - Significant amount of at least one of fruits, vegetables, whole grains, fat free or low fat milk products, fish, extra lean meat or poultry, eggs, nuts and seeds, or beans.
 - Item would contain at least 50% by weight of listed group; or
 - Contributes the specified amount of referenced amount customarily consumed (RACC) of the listed foods for each 100 grams
 - Encourage children, through advertising and marketing, to choose foods that make a meaningful contribution to a healthful diet.

IWG Nutritional Principles (cont.)

- » Nutrients to limit:
 - Saturated fat, trans fat, added sugars, sodium
 - Based on RACC – limited by grams per RACC, e.g. saturated fat 1 gram or less per RACC and 15% or less of calories for individual foods

The Proposal

- » Food industry should significantly improve the nutritional quality of food marketed to children and adolescents
 - By 2016 foods reformulated to
 - » Make a meaningful contribution to a healthful diet
 - » Minimize nutrients that have a negative impact on health
 - Most products marketed to children now would not meet the proposed nutrition principles

Definition of Marketing to Children

- » 20 categories of advertising, including marketing and promotional activities, television and video games and social networking
- » Children ages 2 – 17
- » Whether children are targeted may be determined by audience share – (30% for children 2-11 years and 20% for adolescents) for measured media
- » Promotional activity – level of marketing to children determined by reference to marketing plans, opinion research, determinations by FTC and other subjective indicators

Reaction to IWG Proposal

- » Over 29,000 public comments
- » Industry developed alternative proposals
- » 100 Substantively distinct comments from industry and advocacy groups
- » Industry believed the recommendations to be unworkable

Revisions Contemplated by FTC as a Result of Public Comments

- » Not necessary to encompass adolescents 12-17 within scope of covered marketing
- » Philanthropic activities, charitable events, community programs, entertainment and sporting events, and theme parks directed at families or the general community do not warrant inclusion
- » Final proposal due later in the fall

Potential Constitutional Issues

- » First Amendment Commercial Speech Infringement
 - Recommendations not truly “voluntary”
 - » Sole intent is to regulate speech
 - » Such guidelines often lead to regulations
 - » Will spawn lawsuits
 - » Industry faced with costly choices
 - » Subject to more inspections and investigations
 - » Reputational consequences

Potential Constitutional Issues (cont.)

- Justiciable because of chilling effect on speech due to potential harms
- If not voluntary would violate First Amendment
 - » Overly broad
 - » No evidence that regulations would accomplish stated goals
- » **No commercial speech infringement**
 - » There are no regulations
 - » Guidelines are protected government speech