

July 14, 2011

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Federal Trade Commission  
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Washington, DC 20580

Tom Vilsack, Secretary  
U.S. Department of Agriculture  
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Thomas Frieden, Director  
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Margaret Hamburg, Commissioner  
Food and Drug Administration  
10903 New Hampshire Avenue  
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**RE: Interagency Working Group on Food Marketed to Children: Proposed Nutrition Principles, General Comments, and Proposed Marketing Definitions: FTC Project No. P094513**

**Responses to Questions 29 and 30: Antitrust and the First Amendment**

Dear Chairman Leibowitz, Secretary Vilsack, Director Frieden, and Commissioner Hamburg:

Public Health Law & Policy (PHLP)<sup>1</sup>, along with the Public Health Law Center (PHLC), appreciates the opportunity to submit comments to the Interagency Working Group on Food Marketed to Children (IWG) in response to the IWG's Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts (FTC Project No. P094513).

PHLP and PHLC provide public health law resources and legal technical assistance to local, state, and federal officials and attorneys across the country. PHLP staff and consultants have written white papers, articles, and book chapters on food marketing and the First Amendment, and have presented on the subject at law schools and national conferences. PHLC staff have experience in state and national antitrust investigations and litigation, and have taught law school classes and presented at local and national conferences on antitrust enforcement issues.

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<sup>1</sup> PHLP is grateful to the Robert Wood Johnson Foundation (RWJF) for funding its obesity prevention work through the National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN) project. These comments reflect the views of PHLP and not necessarily those of RWJF.

Our comments address Questions 29 and 30 posed by the IWG:

*29. Are there antitrust implications to industry voluntary adherence to the proposed principles?*

*30. Do the proposed voluntary principles raise commercial speech issues? In particular, if Congress were to enact them into law, would such a law raise First Amendment concerns? If so, what are those concerns?*

We support the IWG’s thorough and thoughtful approach to developing the proposed principles. Given the careful design of the congressional charge to the IWG and the IWG’s scrupulous response to that charge, the concerns embodied in Questions 29 and 30 may readily be allayed.

## **I. The Voluntary Principles Raise No First Amendment Concerns**

Because industry has cried foul on a creative array of First Amendment theories, we begin by addressing Question 30. The principles proposed by the IWG simply do not implicate, much less violate, the First Amendment.

### **A. The Free Speech Clause does not limit government’s ability to encourage voluntary industry self-regulation**

The Free Speech Clause proscribes laws “abridging the freedom of speech.”<sup>2</sup> It applies only to government mandates restricting<sup>3</sup> or compelling<sup>4</sup> speech. It does not restrain the government from offering the opportunity to engage, voluntarily, in a particular type of expression.<sup>5</sup> The First Amendment simply does not apply to speech activity that is wholly voluntary, whether or not the activity may involve the government.<sup>6</sup>

The IWG’s voluntary principles, as the title of the Request for Comments makes clear, are designed “to guide industry self-regulatory efforts.” They neither restrain nor compel anyone’s speech. Accordingly, they do not raise First Amendment concerns.

Congress has directed here the submission of a “report” containing “findings and recommendations.” A report to Congress containing factual findings and recommended principles does not violate the Constitution. A report is not a law, a regulation, or an order, and it

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<sup>2</sup> U.S. Const. amend. I.

<sup>3</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Svce. Comm’n*, 447 U.S. 557 (1980).

<sup>4</sup> *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S.Ct. 1324 (2010).

<sup>5</sup> *See West Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 634 (1943); *Donaggio v. Arlington Cty., Va.*, 880 F.Supp. 446, 453-54 (E.D.Va. 1995).

<sup>6</sup> *See id.*

cannot be enforced. No amount of contortion or theorizing about overreach and chilling effects can make it otherwise.<sup>7</sup>

While many hope that food marketers choose to adopt the principles, there are no legal consequences for marketers if they choose not to do so. Marketers may decide to apply the principles partially, to ignore them entirely, or to energetically denigrate them in a pointed public relations campaign—all without threat of liability.

## **B. Government speech is exempt from First Amendment scrutiny**

If First Amendment doctrine bears directly on the IWG principles at all, it is only to provide that when the government engages in its own expression “the Free Speech Clause has no application.”<sup>8</sup> In other words, because “the Government’s own speech . . . is exempt from First Amendment scrutiny,”<sup>9</sup> the IWG is free to articulate its views of what food is appropriate to market to children in what media.

The Supreme Court has upheld against First Amendment challenges government speech far more controversial than the voluntary principles at issue here. In *Rust v. Sullivan*, for example, the Court upheld the government’s ability to use doctors in federally-funded family planning clinics to convey a government message, including prohibiting them from providing information or counseling about abortion.<sup>10</sup> The Court has also ruled that government is free to choose among different religious monuments to convey its own speech.<sup>11</sup> “It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens.”<sup>12</sup>

Government programs significantly more coercive than these voluntary principles have withstood First Amendment challenges. The government is free to levy assessments on agricultural producers to fund government speech that is objectionable to some of those growers.<sup>13</sup> Indeed, government is permitted to tax the tobacco industry in order to fund anti-tobacco advertisements.<sup>14</sup> That the First Amendment would allow the imposition of government assessments that fund targeted anti-industry messages but prohibit the government from issuing voluntary marketing principles is, to put it mildly, implausible.

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<sup>7</sup> In any event, with respect to any potential chilling effect, “the overbreadth doctrine does not apply to commercial speech.” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); accord *McKinley v. Abbott*, --- F.3d ---, 2011 WL 2206817, No. 10-50568, 2011 WL 2206817, at \*3 (5th Cir. June 8, 2011).

<sup>8</sup> *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125, 1131 (2009).

<sup>9</sup> *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 553 (2005)

<sup>10</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991); see *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (describing *Rust* as a case involving government speech).

<sup>11</sup> *Pleasant Grove City*, 129 S. Ct. 1125 (2009).

<sup>12</sup> *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000).

<sup>13</sup> *Johanns*, 544 U.S. 550 (2005).

<sup>14</sup> See *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2005).

Public service messages about the harms of smoking are but one example of the government's constitutional leeway to speak out on public health issues. No doubt, tobacco companies would rather the government not engage in smoking cessation campaigns.<sup>15</sup> Manufacturers of high-calorie, low-nutrient snack foods or full-fat dairy products would presumably prefer that the Department of Agriculture's food pyramid and new MyPlate program recommended consumption of their commodities rather than healthier alternatives.<sup>16</sup> Automobile manufacturers and oil companies could likewise do without government-funded reports and campaigns urging commuters to use bicycles or walk.<sup>17</sup> But government is permitted to encourage citizens to adopt certain behaviors and to encourage businesses to improve their conduct.

That is what the government has done here. And it may do so without concern about limitation by the First Amendment.

### **C. The IWG standards exemplify government's routine promulgation of voluntary guidelines aimed at promoting health and safety**

Applying First Amendment restraints to the IWG principles would call into question a wide array of voluntary governmental guidelines involving product marketing that have never been held to implicate (much less violate) the Free Speech Clause. The IWG principles fall comfortably within this longstanding tradition of governmental advisory programs.

For example, the Energy Star initiative run jointly by the Environmental Protection Agency and Department of Energy has served for the past two decades as "a voluntary labeling program designed to identify and promote energy-efficient products to reduce greenhouse gas emissions."<sup>18</sup> The program comprises product guidelines for 60 different product categories, includes 20,000 private and public sector organizations, and was responsible for savings of some \$18 billion in energy costs in 2010 alone.<sup>19</sup> The IWG guidelines are similarly voluntary, adaptable across a broad array of products, and able to contribute to the amelioration of an acute problem facing the nation.

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<sup>15</sup> See, e.g., Press Releases, NY City Dept. of Health and Mental Hygiene (Nov. 1, 2005), <http://www.nyc.gov/html/doh/html/pr/pr112-05.shtml>; Press Releases, NY City Dept. of Health and Mental Hygiene (Oct. 18, 2005), <http://www.nyc.gov/html/doh/html/pr/pr109-05.shtml>.

<sup>16</sup> See United States Dept. of Agric., Choose My Plate, <http://www.choosemyplate.gov> ("Drink water instead of sugary drinks.")

<sup>17</sup> See, e.g., CDC, Morbidity and Mortality Weekly Report, "Barriers to Children Walking and Biking to School—United States, 1999," 51(32):701–703, (Aug. 16, 2002), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5132a1.htm>.

<sup>18</sup> *History of Energy Star*, [http://www.energystar.gov/index.cfm?c=about.ab\\_history](http://www.energystar.gov/index.cfm?c=about.ab_history); 65 FR 17554-01 Rules and Regulations, Federal Trade Commission, 16 CFR Part 305, at 17558 (Apr. 3, 2000) ("The Energy Star logo is a strictly voluntary program").

<sup>19</sup> See *id.*

The First Amendment is not triggered even when the government—unlike here—requires that an industry develop and implement its own guidelines. In the Telecommunications Act of 1996, Congress called upon the entertainment industry to establish, within a year, a television rating system that would provide parents with information on content in programming that might be unsuitable for their children. If the industry failed to develop such a system, the FCC would develop its own rules.<sup>20</sup> This government effort addressed an industry whose product (television programming) is itself speech, and threatened imminent enforcement through the “V-chip” technology mandated by the FCC.<sup>21</sup> Yet even in those circumstances, and despite industry objection, no First Amendment challenges were filed against the industry-adopted guidelines or their subsequent implementation.

Voluntary guidelines are a standard feature of government efforts to enhance public health and safety and are a regular part of the work of the four agencies collaborating on the IWG principles.<sup>22</sup> There is nothing unusual about the issuance of voluntary marketing principles, nor anything about such principles that would raise credible First Amendment concerns. Given the prevalence of this type of government effort, one might fairly expect that if voluntary marketing guidelines could trigger a plausible claim under the First Amendment—whether on the basis that they were coercive or that they would somehow have a “chilling effect” on the speech of the businesses to which they applied—then casebooks and databases would be replete with records of these challenges. They are not. Routine governmental voluntary guidelines, like the IWG principles here, simply do not raise concerns under the Free Speech Clause.

**D. There is no reason to speculate about the constitutionality of hypothetical and improbable future regulations**

Whether transforming these voluntary principles into mandatory restraints would violate the First Amendment is a question of perhaps academic interest. No doubt it would engender lively debate about the effects of advertising, the cognitive capacity of children of various ages, and the proper standard to apply to restrictions on commercial speech. But the question is simply not relevant to the present proceeding. The answer to the initial query posed in Question 30—“Do the proposed voluntary principles raise commercial speech issues?”—is, definitively, “No, they do not.” There is therefore no reason to reach the further speculative questions that Question 30 sets out.

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<sup>20</sup> See Telecommunications Act of 1996, Pub L. 104-104, sec. 551 (“Parental Choice in Television Programming”); *V-chip: Viewing Television Responsibly*, <http://transition.fcc.gov/vchip> (noting the guidelines were then implemented through mandatory adoption of the V-chip).

<sup>21</sup> See FCC News (March 12, 1998), [http://transition.fcc.gov/Bureaus/Cable/News\\_Releases/1998/nrcb8003.html](http://transition.fcc.gov/Bureaus/Cable/News_Releases/1998/nrcb8003.html).

<sup>22</sup> See, e.g., <http://www.nytimes.com/2007/03/13/washington/13fda.html> (FDA produce safety guidance); <http://www.ams.usda.gov/AMSV1.0> (USDA ‘naturally raised’ and proposed leafy green marketing guidelines); <http://www.rense.com/general31/cdcc.htm> (CDC hand hygiene guidelines); <http://business.ftc.gov/documents/bus38-voluntary-guidelines-providers-weight-loss-products-or-services> (FTC weight loss product guidelines).

## II. There Are No Antitrust Implications to Industry Adherence to the Principles

It is a great stretch to envision a scenario in which industry voluntary adherence to the proposed principles would trigger antitrust problems. The goals that companies would be pursuing in choosing to abide by the principles lie far from the improper purposes and effects that antitrust law polices.

### A. Only Section 1 of the Sherman Act is even potentially relevant

On the small chance that antitrust issues were implicated, they would be most likely to raise concerns under Section 1 of the Sherman Act.<sup>23</sup> Section 1 prohibits any “contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . .”<sup>24</sup> The Supreme Court has construed this section to prohibit only those trade restraints that *unreasonably* restrict competition.<sup>25</sup>

Antitrust cases are very fact-specific, and outcomes depend heavily upon the relationship between the plaintiff and the defendant; the nature of the industry; the definition of the relevant market; how concentrated the market is; the type of practice being challenged; its effects upon the relevant market; and many other factors. So it is difficult to analyze a hypothetical (and hard-to-imagine) antitrust case based on industry adoption of the proposed principles. However, such a case would likely require a three-part inquiry into whether implementation of the proposed principles: 1) creates a “contract, combination, or conspiracy;” 2) causes anticompetitive effects, and if so, what kind; 3) results in pro-competitive benefits that outweigh any anticompetitive effects.

### B. Implementation of the proposed principles would not create a “contract, combination, or conspiracy”

With respect to the first factor, if companies independently decided to implement the proposed principles, there would be no Section 1 issue because unilateral conduct cannot constitute a violation of that section.<sup>26</sup> Concerns about a “contract, combination, or conspiracy” are more likely to arise if an industry trade association or self-regulatory body adopts the principles. Merely because a trade association is involved, however, does not mean that an agreement to unreasonably restrain trade will be found. A trade association has interests separate from those of

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<sup>23</sup> The antitrust laws also prohibit two other types of conduct: (1) attempts to improperly gain monopoly power, or to abuse monopoly power that was otherwise lawfully obtained (*see* 15 U.S.C.A. § 2 (2010)); and (2) price discrimination by sellers between purchasers in a way that substantially injures competition (*see* 15 U.S.C.A. § 13 (2010)). The proposed principles would plainly not implicate these last two types of concerns.

<sup>24</sup> 15 U.S.C.A. § 1 (2010).

<sup>25</sup> *See Standard Oil v. U.S.*, 221 U.S. 1, 58 (1911).

<sup>26</sup> *See, e.g., Fisher v. City of Berkeley*, 475 U.S. 260, 266-67 (1986).

its members, and it can seek to advance those interests without running afoul of antitrust laws.<sup>27</sup> The framework of the proposed principles is similar to the self-regulatory pledges implemented by the National Council of Better Business Bureau’s Children’s Food and Beverage Advertising Initiative (CFBAI) but with more defined standards and less oversight. It strains credulity to suggest that the CFBAI—or by extension the IWG guidelines—somehow involve a “contract, combination, or conspiracy” aimed at quashing competition.

### **C. Implementation of the proposed principles would not cause unreasonable anticompetitive effects**

The proposed principles are unlikely to result in unreasonable restraints on competition. The economic repercussions, if any, are likely to be insubstantial and no broader than necessary to achieve the important, non-economic goal of improving children’s health on a national level. Thus, any Section 1 challenge would demand a full rule-of-reason analysis—as opposed to the “quick look” or “per se” analyses that apply to practices that are evidently anticompetitive—especially given that the Supreme Court has shown reluctance to apply the strict per se rule in cases involving ethical or industry standards that arguably affect quality.<sup>28</sup>

Even restrictions on price advertising—a particularly suspect type of trade restraint—have been upheld under a rule of reason analysis when imposed by a trade association to correct market imperfections. In *California Dental Association v. FTC*,<sup>29</sup> the Supreme Court reversed a Ninth Circuit decision based on a “quick look” analysis that a dental association’s restrictions on price and quality advertising by members violated the antitrust law because it reduced competition among the vast majority of practicing dentists in the state. The Court directed the lower court to conduct a fuller analysis of the restriction’s pro-competitive effects, focusing on the “striking disparities” between information available to consumers and dentists relating to price and quality comparisons.<sup>30</sup> On remand, the Ninth Circuit upheld the advertising restrictions under a rule-of-reason analysis.<sup>31</sup>

A self-regulatory program inspired by the proposed principles would not create unreasonably anticompetitive effects. Just as in *California Dental Association*, informational disparities are a significant issue, here between food marketers and children. And although the proposed principles address advertising generally, they do not touch on the sensitive topic of pricing, thus

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<sup>27</sup> See, e.g., *Amer. Council of Certified Podiatric Physicians & Surgeons v. Amer. Bd. of Podiatric Surgery*, 185 F.3d 606 (6th Cir. 1999) (holding that association’s efforts to persuade hospitals and insurers that it should be the sole certification board for podiatric surgeons was not sufficient to establish a conspiracy between association and its members because conduct was as consistent with the association’s self-interest as with collusive activity).

<sup>28</sup> See ABA SECTION OF ANTITRUST LAW, ANTITRUST DEVELOPMENTS 57, and n.299 (and cases cited therein) (5th ed. 2002).

<sup>29</sup> 526 U.S. 756 (1999).

<sup>30</sup> *Id.* at 769-81.

<sup>31</sup> *California Dental Ass’n v. FTC*, 224 F.3d 942 (9th Cir. 2000).

raising even fewer antitrust concerns than those at issue in *California Dental Association*. Moreover, voluntary adherence to the principles is unlikely to produce unreasonable anticompetitive effects because the apparent purpose or effect is *not* to facilitate price or output stabilization, or otherwise suppress competition between members or with outside parties.<sup>32</sup> Instead, this situation is analogous to cases in which self-regulatory schemes were upheld because they promoted improved product safety, improved product quality, or lower product costs.<sup>33</sup>

#### **D. Implementation of the proposed principles would result in pro-competitive benefits**

The proposed principles promise many pro-competitive benefits. For instance, the goal of the proposed principles is to improve the overall nutritional profile of the foods most heavily marketed to children. A wider range of healthy food choices designed to appeal to children would promote consumer choice—a pro-competitive benefit. Implementation of the proposed principles by retailers could create shopping or restaurant environments that appeal to consumer-parents—another pro-competitive benefit. And “junk food ad” free magazines, programs, or websites could also be more appealing to consumers—yet another pro-competitive benefit.

In sum, as the Director of the National Advertising Division has observed, “where there is not a will to act in the interest of true self-regulation, antitrust can provide a handy scapegoat for industry claims that there is not a way to respond adequately to public pressure for change.”<sup>34</sup> The Interagency Working Group should not allow far-fetched speculation about hypothetical antitrust concerns to distract it from the important task of finalizing the Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts.

### **III. Conclusion**

With the obesity epidemic threatening to make the youth of this generation the first to have shorter lifespans than their parents, and the food marketing industry thus far unable to develop uniform and effective guidelines for marketing to children, there is great urgency to the work of the IWG. This is no time for chasing chimeras. The First Amendment and antitrust law clearly do not stand in the way of the IWG’s work on voluntary principles for food marketing to children. The questions may, and should, be put to rest.

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<sup>32</sup> See, e.g., *Nat’l Macaroni Mfrs. Ass’n v. FTC*, 345 F.2d 421 (7th Cir. 1965).

<sup>33</sup> See, e.g., *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 273 (5th Cir. 2008) (citing *Consolidated Metal Products, Inc. v. American Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988)); *McDaniel v. Appraisal Inst.*, 117 F.3d 421 (9th Cir. 1997); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 487-88 (1st Cir. 1988).

<sup>34</sup> Andrew Strenio et al., *Self-Regulatory Techniques for Threading the Antitrust Needle*, ANTITRUST, Summer 2004, at 57, 60, available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_magazine/antitrust\\_18-3\\_full.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_magazine/antitrust_18-3_full.authcheckdam.pdf).

We appreciate this opportunity to share our observations regarding the proposed regulations and would be pleased to provide any further information that might be useful.

Sincerely,



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