

Elaine D. Kolish
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Thank you for inviting me to discuss self-regulation and the self regulation program that I run, the Children's Food and Beverage Advertising Initiative. This program was created, five years ago this month, by BBB and 10 leading food companies, in part to respond to the FTC's call for additional self-regulation addressing food advertising directed to children because of childhood obesity.

At the outset, let me say that as a former FTC prosecutor, and regulator who oversaw dozens and dozens of rulemaking proceedings, I believe there clearly is a role for government regulation. Rules such as the Octane Posting rule, Fiber content and Care Labeling rules are rules we rely on and take for granted. These types of rules cure information deficits and based on standardized testing, provide useful, needed information, in a uniform fashion. Other rules, such as the Telemarketing Sales Rule, protect us from deception and give us options about who can call us at home. This rule was issued under former FTC Chairman Tim Muris, and he liked to quote Dave Barry who said that the FTC's "Do Not Call" amendment to the Telemarketing Sales Rule was the most popular government initiative since the Elvis stamp.

At the same time, I also believe that there are many topics not suitable for government regulation and where self regulation is the only practical and effective approach. Among these are areas that are not characterized by deceptive practices or systemic unfairness, or where serious First Amendment issues are present.

Food advertising to children is a perfect example of a topic that is wholly inappropriate for government regulation. In this area, the products being advertised to children are perfectly legal to sell, and indeed, in most instances the advertised products are being purchased by adults, not children. The purported rationale for government regulation in this area would be to reduce the “pester power” of children who ask their parents to purchase products for them. But, as the Washington Post recognized 30 years ago, protecting parents from their children is a role for a nanny, not the government. I worked on the FTC “kid-vid” rulemaking that provoked the Washington Post editorial, and I can definitely attest that self regulation is preferable to government regulation in this area.

But, of course, there other areas where self regulation also works very well, such as for the marketing of violent entertainment to children, and alcohol advertising. These areas are ones where industry, not government-led, restrictions are appropriate because they address pro-social and corporate social responsibility issues.

Other self-regulation programs – ones that address potentially deceptive or unfair practices, such as the National Advertising Division (NAD) or the Electronic Retailing Self-Regulation Program (ERSP) work differently. They are highly useful and critical adjuncts to government enforcement, providing quick, fair and relatively low-cost resolution of disputes that other wise might not get resolved at all or resolved only after lengthy, costly government proceedings or private litigation. These types of program demonstrate the industry’s interest in policing itself and maintaining a truthful marketplace that promotes consumer confidence.

As a senior official at the FTC, I supported and shared the agency's enthusiasm for well-designed and well-run self regulation programs. Every FTC chairman and many commissioners over the last 30 years have expressed support for effective *advertising* self regulation. As you may know, the FTC is a big admirer of the self-regulation programs jointly run by the Council of Better Bureaus and the National Advertising Review Council. Indeed, the agency's initial skepticism about advertising self regulation in the 1970's gave way to the view, as expressed in 1998 by former FTC Chairman Robert Pitofsky, "that *advertising* has the best self-regulatory system of any industry in this country." Of course since then other industries have stepped up and developed great self-regulatory programs too.

The FTC has consistently supported legitimate self-regulation in a variety of industries. That is, self regulation that does not harm competition and consumers by reducing competitive alternatives. Of course, the FTC is not shy about actively cajoling and encouraging industry to make their programs better, stronger and more transparent. It strongly encourages appropriate and strong self regulation because it recognizes that industry self regulation offers many advantages for consumers, regulators and industry.

One advantage is that self regulation can be more flexible and responsive to a changing marketplace than laws and regulations.

Another is that self-regulation can be quicker, more efficient and less costly than government legislation or regulation.

And our Children's Food and Beverage Advertising Initiative is a perfect example of all of these advantages. Speaking from experience, in less time than it might take

the government to propose and issue a rule, the CFBAI was not only created, but substantially enhanced several times.

Most recently, in a process that spanned about 13 months, the CFBAI developed, with its participants, new category-specific uniform nutrition criteria that will replace company-specific criteria by the end of 2013. It wasn't an easy job. The final version, with criteria for 10 different food categories, represented version 17f!!!

In contrast, the Interagency Working Group, charged by Congress in March 2009 to deliver a report to Congress by July 2010 with recommendations about food marketing to children and adolescents, took 9 months, until December 2009, to issue its first tentative proposed guidelines, and then another 16 months, until April 2011, to issue its revised Tentative Proposed Nutrition Principles for public comment.

But, in this case, quickness is less important than getting it right. By that I mean having the IWG ultimately submit a report to congress that has suggestions and recommendations that are reasonable and realistic, unlike its now infamous April 2011 proposed nutrition standards. In contrast, the new CFBAI nutrition criteria are tough, but realistic. After all one of the benefits of self regulation is that it brings the *accumulated judgment and experience of an industry to bear on an issue that is difficult for government to draw bright lines around*. And that point is truly exemplified in this situation.

While the IWG acknowledged there would be technological and consumer acceptance issues with reformulating products to its standards, it greatly underestimated the difficulty of overcoming both of those issues. Even experienced, well-informed regulators are unlikely to appreciate, as well as the scientists and other nutrition

professionals in companies working day-to-day on product development and reformulation issues, the enormity of a proposal that says whether you make bread, cereal, soup or lunch meat, your product needs to contain no more than 210 mg of sodium in five years even if that means reducing sodium by more than 50% in that period. This is where the “accumulated experience” of industry about the technical issues and consumer acceptance issues was far superior to the government and its unrealistic attempt to draw a bright line, in this case one sodium standard for all foods.

But, I am greatly cheered that the IWG has said that it thinks that the CFBAI’s new nutrition criteria are a significant development and one that it intends to take into account in preparing its report to Congress. Additionally, it has said that it intends to narrow the scope of advertising that it thinks should be covered by self regulation. Its April proposal was over broad, covering advertising to moms and families and unmanageable in many ways. As a lawyer, the only good thing I could see coming from it is that a lot of my unemployed brethren might have gotten back to work, helping food companies run the gauntlet of interpreting and applying the FTC’s definitions for 20 different advertising and marketing categories. While I am all in favor of adding jobs to help Americans and our economy recover, a new full employment act for lawyers probably isn’t the best idea.

So, the news from the IWG that it intends to change its April proposal to one that is supportive of CFBAI’s approach is good news. Many, however, are in favor of a slightly different result, and are urging the IWG to withdraw its proposal entirely, until such time as it has conducted a proper study to meet the originating legislation’s requirements and a cost-benefit analysis that the President has ordered

be done for all rules. That view has considerable merit, and certainly would be an appropriate outcome.

At the same time, I think that a report to Congress that substitutes the IWG's unrealistic April proposal with an acknowledgement of the great progress that has already been made under self regulation, the further progress that will occur under our newly adopted uniform nutrition criteria, and the fact that we have a carefully honed focus on advertising primarily directed to children under 12, is a good result too. By recognizing the substantial work that has been done by industry, the IWG will encourage, rather than undermine, self regulation in this *and* other areas. And it's a good and appropriate result even if the report offers some suggestions for further changes in self-regulation in the future. Using the bully pulpit to offer general suggestions - as opposed to thinly veiled threats of do what we say or else - is not offensive. Nor does it smack of co-regulation.

There is, of course, sometimes a fine line between government statements that, if you read between the lines, are insistent that industry do something a certain way, and general, not highly-specific suggestions on how certain changes could increase the benefits of self-regulation. For example, a suggestion that industry consider reducing even further the sodium content of foods or certain more sodium dense types of foods, is not, to my mind, an inappropriate or offensive use of the bully pulpit, as opposed to saying that the sodium content of foods needs to be reduced by 50% or more to 210 mg in five years.

While co-regulation works well in some industries, such as for broker-dealers in the securities industry, where there is a well-developed and well-accepted statutory framework, that's not the case here. I am firmly convinced that the "self" in self

regulation is critically important and needs to be maintained. The major players in the children's food industry stepped up and with BBB helped to create the CFBAI. Other major companies joined them and now are participating in the program too. As a result, CFBAI is successfully addressing concerns about food marketing to kids without formal oversight or participation from government. And it should and will stay that way.

This program works because responsible companies know that childhood obesity is a complex problem that requires the efforts of many to combat. Our participants want to be good corporate citizens and be part of the solution. And their good intentions are buttressed by good old-fashioned capitalism and the desire to maximize profits. The health and wellness food category is a *growth* category. These days consumers are interested in lower calorie foods, and foods with less sugar, fat and sodium and that are more nutrient dense.

That's not to say that Americans have lost their taste for sugary and salty foods. Of course not-how many of us here are still happily eating left over Halloween candy? I know I am! Some people buy candy they don't like so they're not tempted by the left overs. Sadly, I am not one of those people.

Halloween aside, empirical data show better-for-you foods are better for the bottom line. Last month, the Hudson Institute released a report showing that, "Food and beverage companies with a higher percentage of their sales coming from better-for-you foods and beverages perform better financially. The report analyzed the sales of 15 major food and beverage companies and found that sales of better-for-you (BFY) products drove more than 70 percent of sales growth from 2007 to 2011."

Because this is their business, what our companies know and appreciate even better than government, is what it takes to retrain consumers' taste buds to accept better-for-you foods, for example foods with a lower sodium content. They also understand that indulgence foods and treats, like Halloween candy for a several day period, will always have a role in most consumers' diets. But, their efforts, not government's, will succeed in getting children to like, for example, cereals with less sugar and more whole grains, and soups and pastas with less sodium.

So this brings me to what the FTC views as yet another (the third) characteristic of effective self-regulation. That is that compliance can be outstanding - as good as or even better than under regulation because the participants have helped shape the self regulation program and are committed to it. And here, as I've just discussed, there is a favorable confluence between the desire to act responsibly and the desire to maximize profits and shareholder value. These factors have led to a robust program that has gotten even stronger over its five-year existence and one where compliance is outstanding. Having signed up for CFBAI, the companies take exquisite care in making sure they honor their commitments.

So to sum up, it seems easy now - five years later - to take for granted that food companies will limit what they advertise to children to products that meet meaningful nutrition criteria. But, in 2006 that was an innovative idea. Since then the landscape of foods advertised to kids has changed dramatically, for the better. And, the program itself has evolved with our new nutrition criteria representing the latest in a series of significant program developments.

Would all of these changes have occurred if government and others had not continually been providing, shall we say, "feedback"? It's unclear. Certainly the

feedback has provided food for thought and perhaps accelerated the adoption of some changes. But, at the end of the day, the “self” in self regulation was never compromised.

Notwithstanding its so-called voluntary nature, that would not have been the case if the IWG had determined to retain its April 2011 proposal and approach. Luckily, it appears that will not happen. Thus, self regulation will continue to innovate and respond quickly and efficiently to marketplace and nutrition guidance changes in an appropriately *self-directed* fashion.

Thank you.