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Federal Trade Commission Attacks Food Marketing

Over the years, the Federal Trade Commission?s promotion of "consumer protection" has escalated, and a dominant role the agency currently holds involves regulating corporate marketing strategies. The FTC?s latest victim in the arena of consumer protection is food marketing, more specifically, food marketing to children. Legislated in 1914 by President Woodrow Wilson, the Federal Trade Commission Act was a "trust-busting" prescription of the Progressive Era, but it further evolved into a broad, regulatory regime that now envelopes the private marketplace.

In addition to preventing what it calls "harmful, anti-competitive business practices," the FTC targets deceptive marketing in commerce, a loosely defined notion that suggests, "there [is] a representation, omission or practice that is likely to mislead the consumer." A misleading "omission" stems from information that a corporate entity misrepresents to a consumer, which could involve businesses marketing products that alter consumer behavior in, what the FTC might judge, an adverse manner.

The Interagency Working Group, a coordination of four federal agencies including the FTC, Department of Agriculture, the Food and Drug Administration, and the Centers for Disease Control and Prevention is recommending "voluntary" guidelines on food advertising for products that can cause weight problems or do not contribute to a healthy diet.

A report by the group says that within the next five years, "all food products within the categories most heavily marketed directly to children should meet two basic nutrition principles. Such foods should be formulated to: (A) make a meaningful contribution to a healthful diet; and (B) minimize the content of nutrients that could have a negative impact on health and weight."

Proponents claim the new guidelines would urge food manufacturers to slow production of foods that contain high amounts of fat, salt, and sugar, which contribute to childhood obesity and other health-related problems. However, critics declare it is an attack on the First Amendment, as well as an arbitrary regulatory influence that interferes with private commerce.

In response to the FTCs pandering on the American diet, the food industry has retaliated. The U.S. Chamber of Commerce assailed the guidelines last Thursday through a panel of experts. "What theyre doing is trying to simultaneously suppress speech, while insulating it from judicial review," asserted Northwestern law Professor Martin Redish, a panelist at the Chamber of Commerce discussion. "Because if these regulations were truly just advisory, there would be no case or controversy."

Professor Redish believes the FTCs assertions could strike a damaging blow to commercial speech, which could amplify a few critical episodes: class-action lawsuits, regulatory control over the food industry, reputational damage for companies, and a major reduction of food advertising.

George Washington University Professor Howard Beales took an economic approach to the dissenting argument, as he labeled the FTCs proposal a real cost program with speculative benefits. Beales laid on the table similar advertising restrictions in Quebec that led to higher food prices, particularly on products such as childrens cereals. Further, as a result of the restrictions, companies in Quebec with non-established brands ended up with 38 percent lower market share than in the rest of Canada.

The FTC has gone on the defensive, as David Vladeck, director of the Bureau of Consumer Protection, wrote on the FTC blog, “Weve [heard] amped-up stories claiming to know what this project is really about and suggesting that the agencies are trying to ban almost all food marketing to kids and punish food companies that dont adhere strictly to the principles Frankly, these folks might want to switch to decaf.”

The FTC claims the dissenters concerns are mythical. “A report is not a law, a regulation, or an order, and it cant be enforced,” Vladeck further noted. “While we hope companies voluntarily choose to adopt the principles (when finalized), theres no legal consequence if they dont. So theres no effect on their free speech rights.”

Dan Jaffe, executive vice president of the Association of National Advertisers, countered Vladecks remarks, telling CNSNews.com that whenever the government issues “voluntary” industry guidelines, it might as well be a mandate. Jaffes assumption is that companies who do not follow the guidelines may be subject to lawful FTC regulations, such as “unfair advertising” or Federal Communications Commission regulations that require broadcasting stations to work in the “public interest.”

The question is whether a government voice has an impact on the consumer, and further, whether it is the governments responsibility to preach to the diets of children. So despite any tangible legislation, a spouting government may handicap food manufacturers which in turn could prompt higher prices and job layoffs.

And maybe the most potent of all consequences: If the government kills Tony the Tiger, the U.S. could experience a nationwide youth revolt.