



# WILL FEDERAL FOOD AD “GUIDELINES” TREAD ON BRAND TRADEMARKS?

by

Joseph J. Lewczak and Angela M. Bozzuti

Kellogg’s, McDonald’s, General Mills, Campbell Soup Company – these company names are immediately recognizable to consumers and evoke certain feelings or emotions about these companies and their multiple brands. These names are trademarks: source identifiers that communicate brand integrity and established goodwill. Trademarks, which can include business and product names, logos, slogans, and characters, are among a company’s most valuable assets and are intrinsically tied to overall brand equity. For the companies listed above, they include such venerable brands and characters as Ronald McDonald, Tony the Tiger, Lucky the Leprechaun, and the Pepperidge Farm Goldfish. In April of this year, food and beverage companies received alarming news implicating the unsteady future of their trademark rights. The Interagency Working Group on Food Marketed to Children (“IWG”) – comprised of representatives from the Federal Trade Commission (“FTC”), the Food and Drug Administration, the Centers for Disease Control and Prevention, and the U.S. Department of Agriculture – issued for public comment its Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts (the “Proposal”).

If adopted in its current form, the Proposal would have disastrous effects on trademarks owned by food and beverage manufacturers. The industry is hopeful that will not be the case and has been exerting a tremendous amount of pressure on the IWG and FTC. The pressure seems to be working. In a Prepared Statement to a House subcommittee on October 12, 2011 (“Statement”), David Vladeck, the head of the Bureau of Consumer Protection of the FTC, recognized the importance of trademarks and stated that the Proposal will be altered to address industry concerns surrounding its onerous nutritional and marketing guidelines. Manufacturers, however, should not yet breathe a collective sigh of relief that their trademarks are safe, as uncertainty and potentially burdensome restrictions remain.

As currently drafted, the Proposal sets forth strict nutritional guidelines for food and beverages thought to be regularly consumed by children. Many major food manufacturers criticized the stringent criteria and pronounced that, not only would many of their current products fall short, but reformulation would not be a viable option. If products do not meet the nutritional guidelines, the Proposal calls for manufacturers to voluntarily refrain from marketing them to children. The Proposal defines “marketing to children” so broadly that virtually all forms of advertising, marketing, and promotional activities would be restricted, including product packaging design and use of beloved characters. Significantly, the Proposal indicates that use of animated characters is *per se* directed toward children.

The Proposal’s unbridled categorization of animated characters as marketing to children would severely limit, if not completely eliminate the use of character trademarks. Mascots like Tony the Tiger, the Pillsbury DoughBoy, and Mr. Peanut, brand representatives for generations, would have to be removed from

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**Joseph J. Lewczak** is a partner, and **Angela M. Bozzuti** is an associate, with the New York City law firm Davis & Gilbert LLP.

packaging and all forms of advertising. While future revisions to the Proposal may not consider the mere presence of animated figures to be directed toward children, food and beverage companies' trademarks, both character and non-character, may still be at risk. In his Statement, Mr. Vladeck explained that the IWG "does not *contemplate* recommending that food companies change the trade dress elements of their packaging or remove brand equity characters from food products that don't meet nutrition recommendations." (emphasis added). However, the IWG as a whole must vote on and approve any revised measures, the specificity and scope of which it has not shared publicly. Furthermore, his Statement indicates that the IWG will maintain that manufacturers should refrain from marketing to children (and using their trademarks) through major advertising channels, including television, radio, print, online and digital media, social networking, product placement, cross-promotions, sweepstakes, and premiums. Thus, even the revisions could be overly burdensome and weaken food companies' trademarks.

Trademarks serve as the visual identity of a brand and bring that brand to life in the hearts and minds of consumers. The absence or diminution of these trademarks would result in consumer disconnect and damage brand loyalty. Further, if certain trademarks were in fact banned from packaging, consumers would have difficulty locating their favorite foods and beverages, hindering them from differentiating between products and competitors. As such, if food and beverage companies were forced to surrender or "voluntarily" deflate their trademarks, sometimes iconic and famous, they would suffer an incalculable loss of goodwill, which could ultimately impact stock prices and overall market health.

The extent of the revisions to the Proposal will instruct on whether the government may have skirted potential constitutional challenges under the Fifth Amendment's Takings Clause, which prohibits government confiscation of private property for public use without just compensation. Intellectual property constitutes "private property" under the Fifth Amendment, and the U.S. Supreme Court has interpreted "public use" to include an indirect "public purpose" (essentially a public benefit), under which regulations aimed at curbing childhood obesity could arguably fall. *See D. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005). If the Takings Clause is implicated, the government could be required to pay billions of dollars to trademark owners as just compensation – certainly a strong motivation for shielding the food and beverage companies' trademarks in the revised Proposal.

It also remains to be seen whether the depth of the revisions will alleviate any potential First Amendment contests. Constitutional scholars believe that the current Proposal is vulnerable to a First Amendment attack, notwithstanding its voluntary nature. *See e.g.*, Martin H. Redish, *Childhood Obesity, Advertising and the First Amendment* (White Paper June 8, 2011). Truthful and non-misleading commercial speech is generally afforded broad protection and Mr. Vladeck's Statement explicitly notes that some forms of regulatory action could raise First Amendment concerns. Notably, Mr. Vladeck appears to imply that a revised Proposal may continue to violate food and beverage companies' constitutional rights.

It is indisputable that childhood obesity is a serious threat in the United States. However, the government should address this public health concern without suppressing overall food marketing and violating intellectual property rights and the Constitution.

It is chilling to imagine what could be next if the revised Proposal remains impractical and oppressive. Tobacco companies (perhaps an easier target) are already dealing with proposed plain packaging laws around the world. Government will undoubtedly turn its eye toward alcohol marketing, with perhaps video games and Hollywood to follow. While the majority of Americans likely welcome some government regulation to protect public health and welfare, such regulations should not be at the price of our long established freedoms and rights.