



## Those 'Voluntary' Rules for Food Companies are Anything But Voluntary

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There's been a lot of talk of late about the cost to industry of government regulation. The president of the U.S. Chamber of Commerce, Tom Donohue, asserted at a job summit on Monday that recent government initiatives are "unjustified and uncalled for in a free society and a free economy" and are "killing American jobs."

Case in point: a recent set of proposed "voluntary" principles for food manufacturers set out by the FTC and three other government agencies. The proposed guidelines have caused quite a stir in the food industry for their breadth, their impending chilling effect on commercial speech, and their likely economic costs (one analysis suggested the guidelines would do away with 75,000 jobs annually). In fact, in response to the "voluntary" principles, food manufacturers themselves have just announced their own, less stringent guidelines, in an effort to supplant the government's efforts.

The government's proposed principles were put together by the Interagency Working Group (IWG), a group established by congressional directive and composed of representatives from the FTC, Food and Drug Administration, Department of Agriculture and Centers for Disease Control. The IWG was directed by Congress to develop principles to "guide industry efforts to improve the nutritional profile of foods marketed directly to children ages 2 to 17 years."

Hence, a sweeping set of principles was published at the end of April "suggesting" that "[b]y the year 2016, 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." The report comes with detailed formulations of how to arrive at Principles A and B. It also comes with "proposed definitions of advertising, promotion, and other marketing activities targeting children ages 2-11 years and adolescents ages 12-17 years to which the nutrition principles would apply."

The IWG report and principles clearly are directed at food manufacturers' commercial speech. And were the "principles" labeled "regulations" instead, there's little question that they wouldn't pass muster under the First Amendment. That is perhaps why the report and FTC statements regarding it repeat the term "voluntary" with annoying frequency. But how voluntary are these proposed guidelines? Dan Jaffe, of the Association of National Advertisers, has asked, "Can anyone doubt that these proposals



are not ‘voluntary’ but thinly veiled governmental commands?” And ever thin is the veil: just how voluntary is a guideline that comes with a five-year implementation period?

David Vladeck, the FTC’s consumer protection director, tried to dispel concerns over the force and impact of the report with a nonchalant blog post in which he suggested those concerned over the guidelines “switch to decaf.” Vladeck maintained the government position that the guidelines are merely voluntary. His statements do nothing to change a reality well understood by industry execs that “suggestions” by regulators come with consequences.

Fortunately, food manufacturers are not standing down...entirely. The Sensible Food Policy Coalition, which includes General Mills, Kellogg and PepsiCo, recently hired former Obama White House Communications Director Anita Dunn for this food fight, spending some \$6.6 million in lobbying efforts regarding obesity in the first quarter of this year alone.

Industry leaders have just announced they will establish their own standards. Though less stringent than those proposed by the government, the companies’ announcement could be seen as a concession, bowing to pressure from the feds. It will be interesting to see what happens to a company that listens neither to the government nor to these food companies’ guidelines. Will consumer groups be after them, armed with a new standard of “reasonableness”?

*FTC Beat is authored by the [Ifrah Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.*

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