

27 December 2006

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BY POST and BY FAX

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Content & Standards
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For the attention of: Julia Richards

Dear Sirs

**STATEMENT AND FURTHER CONSULTATION ON THE TELEVISION
ADVERTISING OF FOOD AND DRINK PRODUCTS TO CHILDREN**

Our clients include a number of food and drink manufacturers affected by Ofcom's proposals on the regulation of television advertising of food and drink products to children, published on 17 November 2006, and hence we have been maintaining an interest in developments in this area. We should accordingly like to make some observations on the consultation. The views expressed are our own and not necessarily those of any particular client.

We are concerned that Ofcom has not conducted any or any sufficient, proportionality analysis of the impact of its proposals on food and drink manufacturers. Ofcom has gone to great lengths to consider the proportionality of imposing restrictions upon broadcasters but has not conducted the same analysis in relation to those whose products are advertised. This is particularly unfortunate given that some degree of harm to the manufacturers, in terms of lost sales, is not only foreseeable but intended. It is plainly necessary that an analysis is conducted to ensure that the restrictions are properly targeted (i.e. at genuinely "unhealthy" foods, determined under nutritionally and scientifically sound standards) and cause no greater harm to the manufacturers than is necessary to achieve any legitimate objectives.

Our view is that not only has Ofcom failed to conduct the necessary proportionality analysis but it has placed itself, or has been placed, in a position where such an analysis could not possibly be conducted fairly. The problem lies in the bifurcation of the overall decision-making and consultation process, with the Food Standards Agency ("FSA") first consulting on the nutrient profiling model ("the Model") alone and Ofcom then consulting on the advertising restrictions several months later. At

no point has there been a joined-up process looking at the merger of these proposals in the round. As a result, brand owners and advertisers have been afforded no fair opportunity to provide informed, integrated comments as to whether the proposed advertising restrictions are necessary and proportionate for any particular product or products, particularly after taking into account the application of the Model Ofcom has adopted.

Ofcom has declined to consult on the terms of the Model. This is somewhat understandable as we appreciate that Ofcom does not itself have nutritional expertise. Arguably, to place responsibility on Ofcom for these restrictions at all is to adopt a strained interpretation of Ofcom's remit. Nevertheless, Ofcom cannot safely rely wholesale on the consultation and analysis conducted by the FSA when adopting the Model. While advertising limits, as a concept, were certainly contemplated as a possible use for the Model, clearly the FSA did not know in compiling the Model exactly what the impact would be of classing a product as HFSS or Non-HFSS for the purposes of the limitations instituted by Ofcom. As such, even if it had wanted to do so, the FSA could not have conducted any fair proportionality analysis as to the allocation of any particular product in any particular category. The significance of the classification increases dramatically where the effect is to ban advertising to all under 16 year olds rather than the more limited restrictions targeted primarily at younger children.

It is essential that the propriety of the Model, or of using it as the basis for the restrictions, is reviewed again now that the proposed advertising restrictions have been announced. [...] In any event, though, it is primarily Ofcom's responsibility rather than the FSA's to consult on and assess the impact of the proposed restrictions given that they operate as restrictions on television broadcasting. In our view, the restrictions cannot be lawfully adopted until that has happened properly, fully and fairly.

It is our respectful submission that Ofcom must seek views on all aspects of the regulations simultaneously, including the workings of the Model, and must analyse the proportionality of the proposals as a whole for all affected parties. It may well be that such an analysis necessitates the bringing-in of outside expertise on nutrition. The consultation as presently conducted would appear to be flawed.

Yours faithfully

Baker & McKenzie LLP

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