

NPLAN Food Marketing Research Summary

April 2011

When concerned advocates and policymakers identify what should be done to reverse the childhood obesity epidemic, they almost invariably point to the need to limit marketing of obesogenic products. If marketing to children is such a significant driver of the obesity epidemic, why has government shied away from addressing the issue? The answer is that food marketing to children presents a series of complex legal and policy challenges. Many advocates, and even many government officials, have not felt adequately equipped either to handle the First Amendment issues or to address the potential political opposition of food marketing companies and their allies.

NPLAN provides analysis, policy tools, and technical assistance to support advocates and policymakers. Both as a direct resource for government agencies and legislative bodies in need of regulatory models and legal analyses, and as a key part of coalitions (including, most importantly, the national Food Marketing Workgroup), NPLAN has supported and advanced federal, state, and local efforts to improve the food marketing environment. What follows is a summary of the food marketing related research and resources developed by NPLAN since its founding in the fall of 2007.

I. LEGAL RESEARCH RELATING TO FOOD MARKETING

NPLAN has worked with expert academics and practitioners from around the country to lay a foundation with focused legal research. This research has spanned the legal landscape of food marketing to children, addressing issues from where First Amendment case law leaves room for restrictions on food marketing, to the implications of the Commerce Clause for local efforts to restrict marketing to children, to the risk of federal law preempting states' efforts to address nutrition disclosures. Some of these manuscripts have been published or submitted for publication, some has been distributed to target audiences, and some serve as internal practice guides—providing the basis for the fact sheets and model policies highlighted below, as well as comments to federal agencies and technical assistance to the field.

General Background and Constitutional Issues

1. Harris J and Graff S. “Understanding the effects of food marketing on young people: A conflict between the first amendment and the psychology of consumer behavior?” Under revision for *AJPH*.
2. Kappagoda M, Graff S, and Wong S. “Public Health Crisis: Medical-Legal Approaches to Obesity Prevention,” in Tobin Tyler E, et al. (Eds.), *Poverty, Health and Law: Readings and Cases for Medical-Legal Partnership*. Durham, NC: Carolina Academic Press, 2011. Highlights local policy strategies for reducing junk food marketing to children.

3. Kramer K. *Legal Perspectives on Targeted Marketing of Junk Food to Ethnic Minority Youth*. NPLAN internal reference document; informing NPLAN and national Food Marketing Workgroup strategy around targeted marketing.
4. Kunkel D, Mermin S, and Graff S. "Cognitive Development and 'Inherently Misleading' Speech: Implications for First Amendment Jurisprudence of Current Research Into Children's Cognitive Capacity." Submitted for publication in March 2011.
5. Mermin S and Graff S. "A Legal Primer for the Obesity Prevention Movement." *American Journal of Public Health* 99(10): 1799-1805, 2009.
6. Pomeranz J, Mermin S, and Le T. *Constitutional Barriers to Legislating Restrictions on Food Marketing to Children: The Aftermath of Lorillard v. Reilly*. NPLAN internal reference document; undergirds our food marketing technical assistance and products.
7. Pomeranz J, "Extending the Fantasy in the Supermarket: Where Unhealthy Food Promotions Meet Children and How the Government Can Intervene." To be submitted for publication in Spring 2011.
8. Schwartz P and Solove D. "Information Privacy Law Approaches to Restricting Junk Food Marketing to Children." Accepted by *New York University Law Review*.
9. Schwartz PM and Solove DJ. *Protecting Children from Harmful Content and Marketing: Legal Frameworks, Policy Lessons, and Information Privacy*. Report distributed at NPLAN symposium; served as the launching point for digital marketing issue briefs and further work on privacy issues.

Federal Approaches

1. Mello M. "Federal Trade Commission Regulation of Food Advertising to Children: Possibilities for a Reinvigorated Role." *Journal of Health Politics, Policy & Law*, 35(2): 227-276, 2010.
2. Pomeranz J. "Television Food Marketing to Children Revisited: the Federal Trade Commission has the Constitutional and Statutory Authority to Regulate." *Journal of Law, Medicine & Ethics* 38: 98-116, 2010.
3. Pomeranz J. *Federal Trade Commission's Authority to Regulate Marketing to Children: Deceptive v. Unfair Rulemaking*. NPLAN internal reference document that informs our contributions to the national Food Marketing Workgroup and our interactions with the FTC.
4. Wolfman B. *The Significance for Childhood Obesity Prevention of FTC Act Improvements in H.R. 4173*. Memo distributed to national Food Marketing Workgroup at a key point in the legislative process explaining the importance of the FTC's being granted APA rulemaking authority.

State and Local Approaches

1. Bolen E and Mermin S. *Federal Menu Labeling Preemption*. Memo distributed to interested government attorneys and FDA staff after passage of the federal menu labeling law; serves as the basis for ongoing menu labeling technical assistance.
2. Denning B. *Dormant Commerce Clause Doctrine Analysis of Chain Store Child Meal Giveaway Ordinance*. NPLAN internal reference document that informed NPLAN's model policy; shared with select government attorneys working on toy giveaway and other local food marketing policies.
3. Diller P. *Local Government Regulatory Authority to Enact Food Retail Policies (20 State Survey)*. NPLAN internal reference document that serves as the basis for NPLAN technical assistance.
4. Diller P and Graff S. "Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?" *Journal of Law, Medicine, and Ethics* 39(s1): 89-93, 2011.
5. Graff S. "First Amendment Implications of Restricting Food and Beverage Marketing in Schools." *Annals of the American Academy of Political and Social Science* 615: 158-177, 2008.
6. Graff S and Mermin S. *Sampling Restrictions and the First Amendment*. NPLAN internal reference document that informs NPLAN technical assistance on questions regarding restricting food company promotional activities.
7. Harris J and Graff S. "Possibilities for Local Government To Fulfill Its Obligation To Protect Children from Harmful Food-Marketing Practices." In press at *Preventing Chronic Disease*.
8. Lye L. *Toy Giveaway Ordinance: First Amendment and State Preemption Issues*. The research memo behind the NPLAN model toy giveaway ordinance; shared with select government attorneys working on toy giveaway and other local food marketing policies.
9. Mermin S. *Sign Law Restrictions and the First Amendment*. NPLAN memo that informs NPLAN technical assistance on sign laws; distributed to advocates working on sign laws.
10. Pomeranz J. "Compelled Speech under the Commercial Speech Doctrine: The Case of Menu Label Laws." *Journal of Health Care Law & Policy* 12(2): 159-194, 2009.
11. Pomeranz J. *In-Store Product Displays and the First Amendment*. NPLAN internal reference document; informs our technical assistance on local marketing regulations.
12. Yancy A, Cole B, Brown R, Williams J, Hillier A, Kline R, Ashe M, Grier S, Backman D, and McCarthy W. "A Cross-Sectional Prevalence Study of Ethnically Targeted and General Audience Outdoor Obesity-Related Advertising." *Milbank Quarterly* 87(1): 155-184 (2009).

Industry Self-Regulation

1. Armstrong K. *Front-of-Package Food Labels & Nutrition Rating Systems: Reducing Consumer Confusion at the Grocery Store, or Adding to It?* Report available on NPLAN website; distributed to IOM committee as background reading and to FDA staff.
2. Williams J and Drumwright M, *Industry Codes of Ethics Relating to Food Marketing to Children*. To be submitted for publication.

II. DIGITAL MARKETING ACTIVITIES

NPLAN has twice convened researchers working on issues of pressing and cutting-edge interest to advocates and to policymakers. With the Berkeley Media Studies Group and Center for Digital Democracy, NPLAN provided the first-ever fora for media researchers, child development scholars, and attorneys to review and discuss the latest findings in digital food marketing. Several symposium attendees produced research briefs which are published on the NPLAN website—and which have served as a highly regarded resource for continued exploration of this cutting-edge field by scientists, advocates, and government:

1. Campbell A. *Recent Federal Regulatory Developments Concerning Food and Beverage Marketing to Children and Adolescents*. NPLAN/BMSG 2009.
2. Chester J and Montgomery K. *Opportunities for Addressing Interactive Food & Beverage Marketing to Youth*. NPLAN/BMSG 2009.
3. Grier S. *African American & Hispanic Youth Vulnerability to Target Marketing*. NPLAN/BMSG 2009.
4. Leslie F, Levine L, Loughlin S, and Pechmann C. *Adolescents' Psychological & Neurobiological Development: Implications for Digital Marketing*. NPLAN/BMSG 2009.
5. Meredith D and Meinrath S. *Data Collection Techniques on Selected Web Sites*. NPLAN/BMSG 2009.
6. Moses L. *Research on Child Development: Implications for How Children Understand and Cope with Digital Marketing*. NPLAN/BMSG 2009.
7. Nairn A. *Changing the Rules of the Game: Implicit Persuasion and Interactive Children's Marketing*. NPLAN/BMSG 2009.
8. Schwartz P and Solove D. *Notice and Choice: Implications for Digital Marketing to Youth*. NPLAN/BMSG 2009.
9. Schwartz P and Solove D. *The FTC's Role in Privacy Protection: Implications for Food & Beverage Marketing*. NPLAN/BMSG 2009.

The goal of the two symposia and the research briefs was to achieve a better understanding of—and ultimately to explore possible regulatory responses to—the highly sophisticated technological tools that the food industry is using to reach children and adolescents through direct pathways to the subconscious regions of the brain. In addition to commissioning the above papers, NPLAN has funded Professor Kathryn Montgomery to produce a set of case studies elucidating in detail the range of digital food marketing techniques being employed by the food industry.

As noted in the above section of this report, Professors Paul Schwartz and Dan Solove are producing groundbreaking research for NPLAN on the link between privacy principles and digital food marketing to children. The relationship between privacy and food marketing is direct and very real: food companies are tracking and collecting information about youth in order to target them with tailored advertisements and promotional activities. The FTC recently released a Preliminary Staff Report on Protecting Consumer Privacy in an Era of Rapid Change, and the Schwartz/Solove research is aimed at influencing federal privacy policy.

NPLAN has paid particular attention to the issue of digital junk food marketing to African American and Hispanic youth—who often live in neighborhoods saturated with unhealthy food options, who are disproportionately targeted with advertising for unhealthy food, and who are suffering from disproportionately high obesity rates. In line with the recommendation of its Marketing to Children Learning Community, NPLAN is working with advocates on raising awareness before considering possibilities for legal or policy action.

III. FACT SHEETS, GUIDES, AND MODEL POLICIES ON NPLAN WEBSITE

NPLAN provides advocates and government personnel at the local, state, and federal levels with products that synthesize cutting-edge scientific and legal research and apply established legal standards to new situations. Focusing on on-the-ground results as well as evidence-based research, NPLAN also offers practical guides to achieving obesity prevention steps through a variety of channels, from model ordinances, to contractual agreements that prevent food marketing in schools, to blueprints for approaching state and federal enforcement agencies.

NPLAN Marketing-Related Products Available at www.nplan.org

1. *Model Healthy Food Zone Ordinance and Fact Sheet*: Resources on restricting the marketing and sale of unhealthy foods near schools.
2. *Model Ordinance for Healthier Toy Giveaway Meals and Fact Sheet*. The inspiration for ordinances recently enacted in Santa Clara and San Francisco requiring that restaurants limit toy giveaways to kids' meals that meet basic nutrition criteria.
3. *Model District Policy Restricting Food and Beverage Advertising on School Grounds and Fact Sheet*: Resources on limiting food marketing inside and on the grounds of schools.
4. *District Policy Establishing a Healthy Vending Program and Fact Sheet*: Model wellness policy language.

5. *Model Healthy Beverage Vending Agreement and Fact Sheet*: Provides the language and tools necessary to negotiate a healthy vending agreement.
6. *Model Sugar-Sweetened Beverage Tax Legislation and Findings*: Guidance on creating a state-level SSB tax.
7. *Participating in Federal Rulemaking: The What's and How's of the Comments Process*. Explains the federal rulemaking process and offers tips for how to get involved.
8. *State Attorneys General: Potential Allies in Childhood Obesity Prevention*. These four fact sheets, produced in conjunction with the Public Health Law Center, lay out a roadmap for advocates interested in engaging and cooperating with state attorneys general in addressing, among other things, deceptive or unfair food marketing practices.
9. *The FTC's Enforcement of Section 5 Prohibition of Deceptive or Unfair Marketing: A Q&A for Advocates and Scientists*. This practical guide developed by Angela Campbell at the Institute for Public Representation provides a blueprint of the FTC's authority to regulate food marketing and of how advocates and researchers can inform and encourage FTC action.
10. *Preemption and Public Health: A Guide for the Non-Lawyer*. This detailed analysis of preemption addresses menu labeling as well as other federal laws affecting state and local restrictions on marketing.
11. *Resources for Understanding Preemption*. This fact sheet series, produced with the Public Health Law Center, explains the fundamentals of preemption, the consequences of preemption for public health advocacy, and how to recognize and negotiate preemption—all essential information for advocates seeking to address food marketing at the state and local levels.

IV. COMMENTS

As part of its work with national coalition partners, NPLAN has helped draft formal comments to federal agencies engaged in administrative rulemaking. The impact of the more recently submitted comments has yet to be seen, but the 2009 FTC comments clearly informed the FTC's decision to ask for new information in the 2010 subpoenas relating to neuromarketing, data collection practices, and social media.

1. Federal Trade Commission—Notice of Inquiry on marketing expenditures study. Food Marketing to Children Work Group 2009.
2. Federal Communications Commission—Notice of Inquiry on marketing to children. Food Marketing to Children Work Group 2010.
3. Food and Drug Administration—Rulemaking effectuating national menu labeling law. NPLAN, Rudd Center, Public Health Law Center joint filing 2010.

4. White House Task Force on Childhood Obesity—Request for Information regarding reducing childhood obesity. Food Marketing to Children Work Group 2010.

V. NPLAN MARKETING TO CHILDREN LEARNING COMMUNITY

This advisory group provides essential guidance to NPLAN on all of our food marketing related endeavors. It also serves as a forum for leading experts from various fields to build relationships, share knowledge, and develop strategies for using law and policy to improve the food marketing environment. The bi-monthly learning community conference calls include the voluntary participation of lawyers from the Institute for Public Representation, the Rudd Center, and the Public Health Law Center—all key players in the movement to protect children from junk food marketing—as well as Professor Tamara Piety, a national expert on the evolution of the First Amendment commercial speech doctrine. The presence of these attorneys ensures that the topics tackled by the learning community get a complete legal vetting.

Current Learning Community Roster: David Britt; Jeff Chester; Lori Dorfman; Vivica Kraak; Ellen Wartella; Jerome Williams; Margo Wootan

VI. TECHNICAL ASSISTANCE

NPLAN provides ongoing support on food marketing issues to a broad community of obesity prevention advocates, especially the national Food Marketing Workgroup and other members of the Robert Wood Johnson Foundation family. NPLAN's technical assistance has ranged from presentations on the First Amendment and marketing to children, to meetings with federal agencies on enforcement approaches to food marketing, to one-on-one discussions with localities about the effect on local ordinances of the new federal menu labeling law. The forms and topics of NPLAN's technical assistance are as varied as the approaches being explored by obesity prevention advocates, industry, legislative bodies, and government agencies to improve the food marketing environment.

Sample Technical Assistance Requests

1. How would the First Amendment apply to government restrictions on the free distribution of infant formula samples?
2. Which policies relating to fast food marketing might be doable—and appealing—to local lawmakers?
3. If the government is going to allow school districts to sell advertising space on the side of school buses, can it disallow junk food advertising?
4. What is the legality of mandating junk-food-free checkout aisles?
5. Are there legal problems with restricting advertising in schools?
6. Do you have an analysis of on-package nutrition rating systems?
7. Could the IRS eliminate the tax deductibility of advertising for unhealthy foods?
8. Could a state or community regulate portion size in prepared foods?

9. What is the preemptive effect of the new federal menu labeling law on existing state and local laws?
10. Should toy giveaway ordinances be considered advertising regulations?
11. Is industry raising a valid dormant Commerce Clause argument against toy giveaway regulations?
12. Can school officials confiscate food that violates the school's junk food ban?

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