

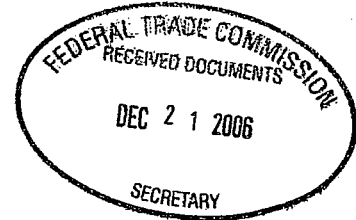
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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Room H-135 (Annex R)
Washington, D.C. 20580

Re: FOOD INDUSTRY MARKETING TO CHILDREN REPORT: PAPERWORK COMMENT
FTC FILE NO. P064504

Dear Sir or Madam:

Burger King Corporation ("BKC") respectfully submits these Comments in connection with the solicitation by the Federal Trade Commission ("FTC") for public comments on proposed information requests to food and beverage companies and quick food restaurants. See Agency Information Collection Activities; Comment Request, 71 Fed. Reg. 62,109 (Fed. Trade Comm'n Oct. 23, 2006) [hereinafter "COMMENT REQUEST"].¹

BACKGROUND

As the Federal Register Notice provides, the genesis for the solicitation is the Conference Report for the law appropriating funds for the Commission for FY 2006, which "incorporate[d] by reference language from the Senate Report instructing the FTC to prepare a report on food industry marketing activities and expenditures targeted to children and adolescents." COMMENT REQUEST. In particular, the Senate Committee on Appropriations, expressing concern "about the growing rate of childhood and adolescent obesity and the food industry's marketing practices for these populations," directed the FTC to submit a Report to the Committee "on marketing activities and expenditures of the food industry targeted toward children and adolescents," which should provide an analysis of:

- (i) "commercial advertising time on television, radio, and in print media;"
- (ii) "in-store marketing;"
- (iii) "direct payments for preferential shelf placement;"
- (iv) "events;"
- (v) "promotions on packaging;"

¹ The Federal Register Notice provides that the comments submitted will be considered by the staff of the FTC before the Commission submits a request for Office of Management and Budget review under the Paperwork Reduction Act of compulsory process orders to food and beverage manufacturers and quick service restaurant companies in order to obtain information from those companies concerning their marketing activities and expenditures targeted toward children and adolescents. COMMENT REQUEST.

- (vi) "all Internet activities;" and
- (vii) "product placements in television shows, movies, and video games."

S. Rep. No. 109-88, at 108 (2005) (to accompany H.R. 2862 concerning Departments of Commerce and Justice, Science, and related agencies appropriations bill of 2006).

Through its solicitation, the FTC is inviting comments on four (4) issues: (i) whether the proposed collections of information are necessary for the proper performance of the functions of the FTC, including whether the information will have practical utility;² (ii) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;³ (iii) ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) ways to minimize the burden of the collection of information. COMMENT REQUEST.

This submission on behalf of BKC is in three parts. Part One provides an overview of BKC, including a description of the diversity of its products; its commitment to health, wellness, nutrition, and consumer choice; and its philosophy of accuracy in connection with its marketing practices. Part Two provides a discussion of the substantive relevance of the proposed 6(b) requests. Part Three provides a discussion of the potential burden of such 6(b) requests on BKC and possible ways to minimize the burden so as to enable the FTC to discharge meaningfully its responsibilities in reporting to Congress.

- I -

OVERVIEW OF BURGER KING CORPORATION

BKC is an international quick service restaurant company that serves millions of customers daily. More than 90% of BURGER KING® restaurants are owned and operated by independent franchisees. BURGER KING® restaurant products include a diverse selection of food, beverage, and meal items that are designed to address customer preferences during the course of the entire day, including breakfast sandwiches, burgers, chicken, salads, fish, sides, and beverages, including milk and juice.

² The Federal Register Notices indicates that the information requests will seek data regarding: (i) the types of foods marketed to children and adolescents; (ii) the types of measured and unmeasured media techniques used to market products to children and adolescents; (iii) the amount spent to communicate marketing messages in measured and unmeasured media to children and adolescents; and (iv) the amount of commercial advertising time in measured and unmeasured media directed to children and adolescents that results from this spending. COMMENT REQUEST.

³ The FTC staff estimates that the time required to gather, organize, format, and produce such responses ranges between 80-120 hours per information request for companies that market a single category of product to children and adolescents, and that companies that market multiple categories of products to children and adolescents would spend between 120-300 hours to respond to an information request. COMMENT REQUEST.

Information concerning these products is provided to consumers through traditional marketing media, such as broadcast, print, radio, in-store, and Internet means; and nutritional information concerning these products is readily available through BKC's Web site, www.bk.com, as well as through in-restaurant materials. In fact, BKC requires nutritional posters to be posted in all BURGER KING® restaurants in the United States.

BKC's Web site illustrates its commitment to providing its customers with accurate and helpful information concerning its food and beverage products. There is, for example, a link to Nutrition, which provides the opportunity for the consumer to learn "All About Food" and "Meal Planning." www.bk.com/#menu=3,-1,-1. From this page, by clicking on "Food Pyramid," the consumer can then be directed to the United States Department of Agriculture's ("USDA") MyPyramid and "Steps to a Healthier You." www.mypyramid.gov. In that USDA site, a customer can then easily be directed to a link "For Kids" which provide materials that are designed specifically for children ages 6 to 11. www.mypyramid.gov/kids/index.html.

BKC's Web site also provides pages that contain information designed to educate consumers about nutrition and health in connection with its products, such as: (i) "What's Your Eating Strategy? Stay calorie conscious and eat like a king!" www.bk.com/Nutrition/PDFs/eatingstrategy.pdf; (ii) "Quick Nutrition Guide" which provides recommendations concerning age groups that are based on the American Heart Association U.S. Dietary Guidelines, *id.*; and (iii) "Nutrition Tips and Resources," *id.*, which provides links to (a) www.mypyramid.gov; (b) U.S. Dietary Guidelines for Americans, www.health.gov/dietaryguidelines/dga2005/recommendations.htm; and (c) Dietary Guidelines for Healthy Children, www.health.gov/dietaryguidelines/dga2005/healthieryou/thml/chapter12.html.

Furthermore, the Web site provides concrete information, tips, and recommendations for consumers on weight and nutrition issues such as: (i) "Watching Calories?" www.bk.com/Nutrition/PDFs/Low%20Calorie%20handout%204-3-06.pdf; (ii) "Interested in lowering the fat?" www.bk.com/Nutrition/PDFs/Lowing%20the%20Fat%20handout%203-3-06.pdf; and (iii) "Counting Carbs?" www.bk.com/Nutrition/PDFs/Low%20Carb%20handout%204-3-06.pdf."

BKC is also a participant in a new web site entitled "Healthy Dining Finder," www.healthydiningfinder.com,⁴ which will be officially launched in January of 2007.⁵ It is designed to equip consumers with information about (i) restaurants that provide meals that meet established nutrition criteria for calories, fat, and saturated fat; (ii) nutrition basics; and (iii) the importance of fruits, vegetables, lean protein, and whole grains.

⁴ See www.healthydiningfinder.com/site/diners/findrestaurants/restaurant_group.php?id=burgerking

⁵ The website is in collaboration with the National Restaurant Association.

In addition to providing its customers with accurate and helpful information concerning its products, BKC is committed to providing appropriate and necessary information about its products to children and adolescents. For example, BKC is an active member of the Children's Advertising Review Unit of the Council of Better Business Bureau ("CARU"), *see* www.caru.org, and was an active participant in CARU's recent revision to its Guidelines.

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RELEVANCE OF THE 6(b) REQUESTS

The determination of "whether the proposed collections of information are necessary for the proper performance of the functions of the FTC, including whether the information will have practical utility" squarely presents the issue of both legal and practical relevance. Obviously, the criteria to evaluate legal relevance are derived from the mission and statutory authority of the Commission in connection with its role to regulate or investigate advertising and marketing practices.

Under Section 5 of the FTC Act, unfair or deceptive acts or practices in commerce are prohibited. 15 U.S.C. § 45. Deception is "a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." Deception Policy Statement appended to *Cliffdate Associates, Inc.*, 103 F.T.C. 110, 176 (1984). On the other hand, unfairness is an act or practice: (i) that causes or is likely to cause substantial consumer injury; (ii) where the injury is not reasonably avoidable by consumers; and (iii) where the injury is not offset by countervailing benefits to consumers or competition. Unfairness Policy Statement, appended to *International Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984). Therefore, if a 6(b) information request is not probative of a commercial act or practice that is potentially deceptive or unfair, it is not relevant, and should not be propounded by the Commission.

Yet, as a practical matter, the issue of relevance is substantially complicated by the realization that any such 6(b) requests would be derived from a Congressional concern about childhood obesity, *see* S. Rep. No. 109-88, at 108 (2005) (to accompany H.R. 2862 concerning Departments of Commerce and Justice, Science, and related agencies appropriations bill of 2006) - - which implicitly presupposes a link between marketing and obesity (or consumer consumption decisions). As aptly pointed out by former Chairman Timothy J. Muris, however: "Even our dogs and cats are fat, and it is not because they are watching too much advertising." *Don't Blame TV*, WALL ST. J., June 25, 2004, at A10. This difficulty with causation was recently reiterated by current Chairman Majoras, when she stated:

Many in the U.S. and around the world are engaged in a vigorous debate about who is to blame for rising childhood obesity rates. Some blame city planner for failing to provide bike paths and sidewalks for our children. Some blame schools for cutting physical education classes. Some blame television and video games for enticing our children indoors and keeping them sedentary. Some blame families in which both parents work outside the home, leaving no time for either parent to prepare nutritious meals. Some blame restaurants for larger portion sizes. Some blame the food and beverage industry for offering too many good-tasting, convenient foods that are too high in calories and marketing them in ways that are too appealing to our children. *The only point on which there may be consensus is that obesity is a complex problem with many contributing factors.*

Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, *The United States Federal Trade Commission Promoting Solutions to Childhood Obesity: Perspectives on Food Marketing and Self-Regulation* (May 11, 2006), at 3-4 (emphasis added).

Further complicating the issue of relevance is the First Amendment: there are significant constitutional constraints on the government's ability to regulate non-misleading commercial advertising. See generally J. Howard Beales, III, Former Dir. of the Bureau of Consumer Protection, Fed. Trade Comm'n, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, Speech at the George Mason Law Review 2004 Symposium on Antitrust and Consumer Protection.

These practical and legal hurdles demonstrate that the FTC must move cautiously, judiciously, and prudently in connection with its use of its power under 6(b) of the FTC Act. To be sure, an appreciation for the appropriate role of the agency in a vibrant public policy debate is one of the lessons from the "kidvid" rulemaking effort over twenty-five years ago. As former Director of Consumer Protection Howard Beales instructs: "[T]he kidvid experience is a lesson in the proper role of government." J. Howard Beales, III, Former Dir. of the Bureau of Consumer Protection, Fed. Trade Comm'n, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, Speech at the George Mason Law Review 2004 Symposium on Antitrust and Consumer Protection, at 9.

Accordingly, appropriate care should be given to limiting the scope and substance of any 6(b) requests. Congress has not asked the Commission to study the link between advertising and obesity - - a complex social problem that is obviously caused by many factors, not the least of which is the aspect of personal choice and responsibility. Rather, the agency has been asked to provide empirical data about advertising practices and expenditures. The jurisdictional mission of the agency is to address potential deceptive and unfair acts and practices, and within constitutional bounds - - not to examine the social utility or benefits of products or services. Indeed, the "kidvid" initiative reveals the consequences of attempts to overreach. As a result, from a relevance perspective, any requests should be appropriately and narrowly drafted to address the types of data that Congress is seeking.

- III -

ANTICIPATED BURDEN AND OPTIONS

The Federal Register Notice provides:

The information requests will seek data regarding, among other things: (1) the types of foods marketed to children and adolescents; (2) the types of measured and unmeasured media techniques used to market products to children and adolescents; (3) the amount spent to communicate marketing messages in measured and unmeasured media to children and adolescents; and (4) the amount of commercial advertising time in measured media directed to children and adolescents that results from this spending.

COMMENT REQUEST.

Since the precise substance, scope, and nature of the informational requests have not been revealed, it is simply a guess to determine the burden such requests would have on BKC.

Like any major corporate entity in any industry with many affiliates or franchisees, BKC has a centralized corporate marketing department, which includes different functional groups such as Youth and Family Marketing, Advertising, Promotions, Merchandising, Research & Performance Analysis, Interactive Media, and Field Marketing, among others. These functional groups within BKC's corporate marketing department, although mostly centralized in one city or location, work with agencies and vendors throughout the country, and could entail tens of employees. Accordingly, if the 6(b) requests are broad and wide-ranging, seeking information beyond the empirical data needed to satisfy the Congressional inquiry, the potential burden, time, and cost could be substantial - - and far exceed the estimates provided in the Federal Register Notice.

To be sure, for BKC, "marketing," broadly defined, can occur at the national, regional and/or local levels, or even at an individual franchise level. Thus, if the scope of the requests attempt to reach beyond BKC's centralized corporate marketing departments, the requests would not only be unduly burdensome and expensive, but oppressive.

Accordingly, from a relevance, burdensomeness, and cost perspective, and by way of example, BKC would propose that any 6(b) requests ask for respondents to identify the following with the highest degree of confidential and proprietary treatment:

- (a) the types of food and beverage products that the company currently advertises to consumers under the age of 13;
- (b) the amount of commercial time that the company currently devotes to advertising to consumers under the age of 13 on television in the United States;
- (c) the amount of money that the company spends on such television advertising;
- (d) the amount of commercial time that the company currently devotes to advertising to consumers under the age of 13 on radio in the United States;
- (e) the amount of money that the company spends on such radio advertising;
- (f) the types of print media, such as newspapers and magazines, that the company currently uses to advertise to consumers under the age of 13;
- (g) the amount of money that the company currently spends on advertising to consumers under the age of 13 for such print media;
- (h) the types of in-store marketing the company currently use to advertise to consumers under the age of 13;
- (i) the types of events that the company currently engages in to promote its products to consumers under the age of 13;
- (j) the types of promotions on packages that the company currently uses to promote its products to consumers under the age of 13;
- (k) the types of Internet activities that the company currently uses to promote its products to consumers under the age of 13; and
- (l) the ways in which the company currently uses product placements in (i) television shows, (ii) movies, and (ii) video games.

In conclusion, BKC has provided - - and remains committed to providing - - accurate information about its products to consumers. It has educated - - and remains committed to educating - - consumers about the nutritional value of its food options and health matters concerning their consumption decisions.

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BKC looks forward to assisting the Commission in discharging its responsibility to Congress in providing relevant data that certain of its members seek and to working with the Commission and other public and private organizations in their efforts to address health and wellness.

DATED: Washington, D.C.
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Respectfully Submitted,

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