



Sent via email

19 June 2023

Bureau of Policy, Intergovernmental and International Affairs, Food Directorate
Health Products and Food Branch, Health Canada
251 Sir Frederick Banting
Postal Locator 2204C
Ottawa, ON K1A 0K9
Email: bpia-bpaii@hc-sc.gc.ca

Re: Comments of the Canadian Association of Broadcasters with respect to Health Canada's Consultation on restricting food advertising primarily directed at children

Health Canada intends to amend the Food and Drug Regulations to restrict advertising to children of foods that contribute to excess intakes of sodium, sugars and saturated fat. As part of this process, it is seeking comments on a policy update on restricting food advertising primarily directed at children on television and digital media. As the national voice of Canada's private radio and television broadcasters, the Canadian Association of Broadcasters (CAB) is making this submission to urge the government to make small but meaningful adjustments to its proposed approach.

Introduction

Canadian broadcasters take the health and well-being of their young audiences to heart. They support initiatives that promote a healthy and active lifestyle for our children; they look for innovative ways to engage our children with pro-social messaging; they strictly comply with the provisions of applicable codes relating to children's programming and advertising; and they seek to improve their individual broadcasting practices with respect to our children on an ongoing basis.

Accordingly, we support the Government of Canada's efforts to take concrete steps to respond to childhood obesity, which we understand is an important public health challenge. Our members welcome the opportunity to be fully engaged partners with the government on this initiative.

That said, we continue to have reservations about the proposed approach, as set out in the following submission.

Introduction and summary

In previous submissions, the CAB had raised concerns that under the framework proposed by Health Canada at that time, the definition of “primarily directed at children,” would be too broad, with unintended and serious consequences for Canadian broadcasters and the advertisers on which they rely. We believe that the policy update is better in this respect, though we are concerned that elements of the proposed definition remain vague and may go result in overreach.

- Health Canada has described factors that would be considered in determining whether advertising is “primarily directed at children,” specifically:

Factor 1: *The nature and intended purpose of the medium where the ad is communicated*

Factor 2: *Whether the advertisement targets, or is reasonably expected to appeal particularly to, children*

Greater nuancing is required when defining mediums targeting children (Factor 1), and the concept of “reasonably expected to appeal” (Factor 2) remains imprecise and could result in overly broad interpretations, capturing advertising intended for adults.

Another key concern is with the proposed enforcement of the regime, specifically whether Health Canada and the Canadian Food Inspection Agency (CFIA) have the tools and resources to effectively implement the policy, and in particular to deal with ad clearance.

Canada's broadcasters and the advertising industry have a long history of a responsible self-regulation that can and should serve as a model for a measured approach to the advertising of food to children.

We have provided specific feedback on each of these concerns below.

Greater nuance is required when defining mediums targeting children

The first factor for determining whether advertising is “primarily directed at children” appears relatively straight-forward. It indicates that any advertising in a medium specifically intended for children – e.g., children’s television channels or programs specifically intended for children (rated C and C8) – would likely be considered primarily directed at them. In applying this factor, however, the CAB recommends that the policy acknowledge that there are times at which children’s television channels may be targeted to families or to parents/adults and may not be directed specifically to children, and that relatively few children watch during those times.

Accordingly, the policy should take into consideration that some children’s channels have program blocks that are not directed to children under 13. In particular, we recommend that Health Canada specify that the new restrictions should not apply to programs that air between 9:00 p.m. and 6:00 a.m. on linear television channels, regardless of their program ratings, or the characteristics of the channel. This post 9:00 p.m. “watershed hour” has long been distinguished by Canadian broadcast regulation as a period when it is safe to air content intended for adults (for example, see section 3 of the Canadian Association of Broadcasters’ [Violence Code](#)).

The definition of “primarily directed at children” is imprecise and could result in overreach

Although Factor 1 appears reasonable and straight-forward, the CAB remains concerned that Factor 2 is still too vague and may be interpreted too broadly, with unintended negative consequences for advertisers and broadcasters.

Factor 2 is described as follows:

An advertisement communicated in a medium intended for a general audience (for example, ad aired during broadcast of a hockey game) could be considered primarily directed at children if it targets, or is reasonably expected to appeal particularly to, children. In this case, while both children and other age groups may be the audience of the medium, the ad could be considered primarily directed at children based on a collective assessment of the design elements, characteristics and advertising techniques used in the advertisement.

The CAB is concerned that, despite some of the clarity provided in the policy update, this definition remains too broad, and could inadvertently capture a broad array of advertising that is not specifically directed at children under 13 years of age. As currently drafted, this factor could sweep in a large amount of advertising intended for adults based on a subjective determination of who might find it appealing. This would have important consequences for the broadcasting and advertising industries, as well as for any enforcement agency.

Additional precision and more specific guidance would be important to provide certainty to the industry, drawing from existing, well-established codes, practices, and resources. We outline some of these suggestions in the sections that follow. A preclearance function is also an important consideration, as discussed further below.

There are already robust measures in place to protect children

Canada’s broadcasters and the advertising industry have a long history of responsible advertising:

- Canadian broadcasters are required to adhere to the [Broadcast code for advertising to children](#) (the Children’s Code). Contrary to representations made in the preamble of Bill C-252, this is not a voluntary code, but a condition of licence imposed by the Canadian Radio-television and Telecommunication Commission (CRTC), with penalties for non-compliance.
- The Children’s Code already governs many advertising practices that Health Canada appears to be targeting in its policy update:
 - it already includes provisions covering the use of celebrities and public figures,
 - it specifically prohibits promotions and endorsements including “*puppets, persons and characters (including cartoon characters) well-known to children and/or featured on children’s programs,*” and
 - it prohibits calls to action (“buy now” or “ask your parents”) and engagement techniques primarily directed at children.

- The regime is administered by a recognized and respected expert body, Ad Standards, and includes an important preclearance process for commercials directed to children, as well as a process for responding to complaints about advertising under the broader [Canadian Code of Advertising Standards](#), which also includes specific provisions relating to advertising to children and minors.
- Further, a coalition of food industry experts has launched a comprehensive approach to [Responsible Advertising of Food and Beverage Products to Children](#), borrowing and improving on key elements from Health Canada’s previous strategy and Quebec’s *Consumer Protection Act*. The new [Code for Children’s Food and Beverage Advertising](#) responds to the concerns Health Canada’s proposed policy is intended to address, but without the vagueness, and adds preclearance and a complaints mechanism under Ad Standards.
 - The new Code will be fully implemented by Ad Standards starting on 28 June. Advertisers will be able to submit any food or beverage advertising that might reasonably be seen as primarily directed to children, in any media, for review and preclearance. Ad Standards analysts will consider a variety of factors, including the nature and intended purpose of the product being advertising (the ‘what’), the manner of presenting such advertisement (the ‘how’), and the time and place it is shown (the ‘where/when’), with no one factor as determinative, consistent with approaches used in the province of Quebec. Ad Standards will also enforce the code through complaints-based mechanisms, based on its years of experience.

Although Health Canada has suggested that self-regulatory approaches have not proven effective, the CAB believes that it would be appropriate to give some time for the implementation and assessment of those mechanisms before moving forward with the proposed policy update.

If it does choose to move forward, we urge Health Canada to adopt well-established definitions of “Factual Presentation”, “Avoiding Undue Pressure”, and “Promotion by Program Characters, Advertiser-Generated Characters, and Personal Endorsements” from the Children’s Code. As Health Canada appears to be predominantly focused on the medium of television, we urge it to attempt to make best efforts to borrow from, align with, and leverage the experience and operational practices of Canada’s television broadcasters and the advertising industry.

Ad Standards Canada is best equipped to administer any new Health Canada restrictions

Health Canada indicates that it is working with the Canadian Food Inspection Agency (CFIA) on potential governance options, informed by best practices from other organizations that regulate television and online advertising.

As noted above, there is already a respected mechanism in place for the regulation of responsible advertising, including the important additional step of a preclearance function – a step which provides guidance to advertisers in the development of advertising material.

Ad Standards has been providing preclearance services to advertisers since 1972, including with respect to other Health Canada policies. It currently provides assessments with respect to alcoholic beverages, children's advertising, cosmetics, food and non-alcoholic beverages, and health products. Ad Standards also responds to consumer complaints, and provides training and educational resources to marketing, legal and business leaders, relating to self-regulation and advertising clearance.

The question of whether an advertisement "targets, or is reasonably expected to appeal particularly to, children" is necessarily nuanced, and a level of experience and expertise will be required to administer it in a consistent and effective manner. Ad Standards has by far the most relevant experience in interpreting and administering advertising-related restrictions on broadcast platforms. It has earned the confidence of the broadcasting and advertising industries and it continues to oversee other Health Canada policies. It is clearly the best and most logical choice to oversee new food and beverage advertising rules.

Accordingly, we strongly urge Health Canada to recognize Ad Standards as the administrator of any new policy. This would improve the effectiveness of the new regime and mitigate administrative burdens for broadcasters, advertisers and Health Canada itself.

Practical challenges associated with enforcing new rules on digital platforms

The CAB acknowledges that Health Canada's proposed rules would apply to digital platforms. However, we fear they will prove easier to enforce on traditional Canadian broadcasters who have long fallen under Canadian regulatory jurisdiction, resulting in a disproportionate burden on the latter.

For example, we note that online advertising is predominantly automated, and automated systems are generally unable to ascertain context or weigh subjective factors, as Health Canada's rules would require. And, the borderless nature of the Internet will continue to expose Canadians of all ages to food and beverage advertising on websites, platforms and apps – as well as television stations – that are not based in Canada. We are concerned that Health Canada is underestimating this impact and overestimating its ability to effectively regulate it.

Finally, we note that Health Canada's proposed approach overlooks some key online access points for children under 13 online. For example, many social media platforms have terms and conditions that prohibit children under 13 from holding an account, or require parental permission for those under 13 years, yet we know that children under 13 are using and being influenced by this content. Similarly, the proposed definition of websites, online games, social media pages or mobile applications in this proposal – *"Digital media that is rated or described as being specifically intended for children, or where the content is clearly designed for, or to be engaged with by, children (such as websites with child-appealing subjects or themes, child influencer posts, and games intended for children"* – is insufficient to capture these sites like YouTube, Tiktok, Snapchat, Facebook, Instagram, etc.

In conclusion

We thank Health Canada for this opportunity to engage in a discussion on the proposed policy for advertising to kids and urge you to give serious consideration to the matters included in our submission, particularly the recommendation that Health Canada should give time for the new *Code for Children's Food and Beverage Advertising* to prove its efficacy. Failing that, the CAB recommends that Health Canada assign responsibility for administering its new policy to Ad Standards.

All of which is respectfully submitted.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'K. Desjardins', with a stylized flourish at the end.

Kevin Desjardins
President
Canadian Association of Broadcasters