

## Mexico proposes to reinforce advertising guidelines for prepackaged foods and beverages

**The Federal Commission for the Protection against Health Risks (COFEPRIS) has proposed new guidelines regulating the advertising of food and non-alcoholic beverages with warning labels. These provisions include restrictions on advertising schedules, platforms and formats, as well as additional requirements to obtain permits, which has generated questions regarding their interpretation and application.**

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In response to growing concern about childhood obesity in Mexico, authorities have adopted a restrictive approach to the advertising of food and non-alcoholic beverages, especially those high in sugar, fat and sodium. Recent legal reforms have led to the development of new guidelines that regulate the promotion of these products in traditional and digital media. However, these guidelines raise some doubts due to their prohibitionist scope, regulatory ambiguities and possible negative implications for advertisers, agencies and platforms, as they generate uncertainty about their compliance and effective application.

In recent years, childhood obesity has been one of the main health problems in the country. Although one of the causes is the excessive consumption of high-calorie foods by minors, the truth is that the main factors of this obesity epidemic have to do with even more relevant issues such as the lack of education and the availability of physical and sports activities for this segment of the population.

Past administrations have taken a rather prohibitionist stance by seeking to limit the consumption of products considered “high calorie” or with an excess of certain ingredients such as fats, sugars, and sodium.

Among the several activities related to this type of products that have been given a particular prohibitionist approach is their advertising, both through traditional channels and innovative or interactive strategies that are presented in the different media with the purpose of publicizing the existence and characteristics of the products subject to such regulations.

The position of the Mexican authorities has been, among others, to restrict the advertising of prepackaged food and non-alcoholic beverages under the argument that such promotion and advertising is focused on products with a high content of certain ingredients.

As a result of such position, on November 8, 2019, a Decree was published in the Official Federal Gazette (DOF) amending and adding several provisions of the General Health Law, regarding overweight, obesity and labeling of food and non-alcoholic beverages.

Also, on March 27, 2020, the Official Mexican Standard NOM-051-SCFI/SSA1-2010, General Labeling Specifications for Prepackaged Foods and Non-Alcoholic Beverages - Commercial and Health Information, published on April 5, 2010, was amended and published in the DOF, with the purpose of regulating the labeling of pre-packaged foods and non-alcoholic beverages, which allows identifying the excess of certain ingredients of concern and other relevant considerations.

In addition, on September 8, 2022, the Decree was published in the DOF, which amended, added and repealed several provisions of the Regulation of Health Control of Products and Services and the Regulation of the General Health Law on Advertising, in which Article 22 Bis of the Regulation of the General Health Law on Advertising was amended to establish that the Federal Commission for the Protection against Health Risks, by means of guidelines to be published in the DOF, will be in charge of the protection of products and services, through guidelines to be published in the DOF, will establish the advertising requirements and procedures that food and non-alcoholic beverages must comply with in order to advertise in open television, restricted television, movie theaters, the internet and other digital platforms, as well as the conditions to issue the respective permit.

## The new guidelines

In order to comply with said article in connection with the third transitory provision of said decree, the Federal Commission for the Protection against Health Risks has proposed the possible issuance of the Guidelines establishing the requirements and procedures to be observed by those responsible for advertising, advertisers, advertising agencies and mass media to obtain a permit to advertise pre-packaged food and non-alcoholic beverages in open and restricted television, movie theaters, internet and other digital platforms, which are currently under analysis by the National Commission for Regulatory Improvement.

The objective is to establish with greater precision the requirements that must be met in order to obtain a permit to advertise pre-packaged food and non-alcoholic beverages, when they are subject to such requirements (front labels that include one or more elements of NOM-051-SCFI/SSA1-2010 regarding critical nutrients).

These guidelines establish the following schedules for the broadcasting of advertising spots for this type of products:

- a. Television (open and restricted): Monday through Sunday, between 00:00 and 18:59, and from 22:01 to 23:59 (local time).
- b. Cinemas: during movies classified as B, B15, C and D, according to the Federal Cinematography Law.
- c. Internet and digital platforms: when they are not directed to children and the schedules of fraction I are respected.

## Restrictions on social networks

On the other hand, the restrictions proposed for social networks may not be susceptible, according to the current regulations, to be regulated or subject to specific schedules and contents.

This situation may cause significant burdens on companies, advertisers and service providers in which information considered as advertising subject to regulation appears.

It is still unclear how advertising by the so-called “influencers” should be interpreted, since in many cases the information and media in which they appear is not subject to specific time or content requirements, and in many cases confusion may arise as to their appearance in social networks and platforms.

Among the general requirements that advertising guidelines must comply with are:

- a. Clear presentation of front labeling in the upper right-hand corner; and in audiovisual advertisements for at least one quarter of the total time.
- b. If product packaging appears in advertising, front labeling must be clearly and legibly displayed.
- c. The advertising permit number must be visible at the bottom right-hand side in audiovisual advertising or at the end of the audio, in the case of audio advertising.

On the other hand, several clarifications are established regarding the procedure that must be followed to obtain the corresponding permit from COFEPRIS, establishing the presentation of several documents and information, among which the following are worth mentioning:

- Product registration
- If the advertisement allows accessing, linking or downloading additional information, such information must be clearly described and comply with the applicable guidelines and laws.

The reference to the concept of “product registration” is notable, since in the case of prepackaged food and non-alcoholic beverages there is no requirement of “registration” or product registration, so it is unclear what this requirement refers to. Under current regulations it could be interpreted as the product having been included in the corresponding operating notice. However, it could be interpreted as meaning that manufacturers or marketers of this type of products may soon be required to register them.

If such a requirement for the registration of products is made, the industry will face a number of problems and restrictions, for which the corresponding legislation should be amended in order to establish the existence of such obligations.

The requirement regarding the possibility of accessing, linking or downloading additional information is also unclear as to its application, since it is limited to making reference to the applicable guidelines and laws. However, there are no provisions that, in terms of marking, labeling or advertising, restrict or limit the possibility or characteristics of accessing information available on the internet, social networks, links or downloads.

Again, this requirement goes beyond what is established by law and clearly applicable regulations and leaves the door open to arbitrary interpretation or determination by the corresponding authorities.

Also notable are the several express prohibitions contained in these guidelines. Although to a certain extent they are a reflection of the content of the NOM as well as of the Advertising Regulation, at times it seems to us that they go beyond what is established by these norms.

Among the most important prohibitions are the following :

- a. Use of characters, drawings, celebrities or attractive elements for minors, in order to promote their consumption.
- b. Misleading comparisons with natural products or exaggeration of their nutritional value.
- c. Creating an urgency to buy or consume.
- d. Promoting excessive consumption.

- e. Violating the provisions of Article 22 of the Regulation and other applicable rules.

We consider that several of these prohibitions are not clear as to their content and scope and could be subject to the discretion of the authorities, since there are no elements to determine compliance or non-compliance with such prohibition.

Although it is true that some of the concepts related to the prohibitions are “clarified” or specified to a certain extent in the various definitions set forth in such guidelines, it is no less true that such concepts are not precisely regulated in any applicable legal provision.

Likewise, from our point of view, such definitions or concepts are also very open to interpretation.

In particular, it seems that concepts such as animations, celebrities, visual space games and children's characters subject their field of application to the possibility or recognition that the child audience may have about them.

The possibility of being recognized by the child audience could apply to almost any animation, character or individual, among others, since it is not delimited. Also, it is left to the discretion of the person who carries out the review or analysis of such information to determine whether or not it is susceptible to being identified by the child audience, and the degree of relationship or effect it may have on it.

On the other hand, the guidelines also intend to establish what should be understood as a “digital download”, giving an extremely broad definition that consists of the transfer of information such as texts, images, sounds through a computer network or the internet.

This definition can be extremely broad, and the possibility of it being carried out can go far beyond what is under the control of the advertiser, the product manager or the media agency.

Advertising subject to permission is broadened by including the concept of “indirect advertising”, which would cover:

- a. The use of corporate names, trade names, trademarks, emblems, headings or any type of visual or auditory sign clearly associated with pre-packaged food and non-alcoholic beverages.
- b. When the product appears in a scene or image of the advertisement, even if the latter is not interacted with or mentioned.
- c. When the name of the product is mentioned or the product is actually or apparently consumed, making known its characteristics or benefits, even if it does not appear in the advertisement.

They go, therefore, beyond the situations that are under the direct control of the person responsible for the product or advertiser, and there may be situations in which such indirect advertising is configured without any type of action by said individual or legal entity.

## Requirements subject to analysis by the authorities

Finally, the guidelines also establish several requirements and information that must be submitted to the analysis of the authority in charge of issuing the corresponding permits. Additional requirements to those established both in the law and in the applicable regulations are established, by including concepts or information that are not established by such ordinances and that, as in previous cases, we consider leave a wide margin of interpretation to the authorities or are contrary to the procedures legally established for such purpose.

## Conclusion

In conclusion, although there is an intention to protect health and combat childhood obesity, the approach to advertising regulations has a prohibitionist scope that could generate uncertainty and legal gaps in our current legislation.

The guidelines for advertising any product should avoid containing vague concepts subject to interpretation. Otherwise, it makes it difficult for advertisers, manufacturers or product managers to comply with current legislation.

Furthermore, in a world where technology is advancing day by day, it would be advisable to strengthen a strategy based on the promotion of a healthy lifestyle focused on a balanced diet, not on prohibitions. If these policies are to be effective, the legal framework involving them should be aligned and consistent with applicable federal health and advertising laws.

Limiting and restricting advertising may be ineffective if the underlying causes are not addressed with plans and programs based on nutrition education, physical activity and other programs aimed at achieving a true understanding of the characteristics of food products and their effects on health.

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