

HOW DOES THE U.S. GOVERNMENT VIOLATE THE INTERNATIONAL CODE OF MARKETING OF BREAST-MILK SUBSTITUTES?

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ABSTRACT

The United States' Special Supplemental Nutrition Program for Women, Infants, and Children, commonly known as WIC, is based in the United States Department of Agriculture (USDA). It provides services to about half the infants born in the country, with many of them getting subsidized infant formula. WIC manages this in close collaboration with major manufacturers of formula. This commentary examines WIC's practices in relation to the International Code of Marketing of Breast-milk Substitutes, and concludes that the United States is a major violator of the aims and principles of the Code.

KEYWORDS: infant formula, baby milk, Special Supplemental Nutrition Program for Women, Infants, and Children, International Code of Marketing of Breastmilk Substitutes

THE WIC PROGRAM

The United States' Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) is based in the United States Department of Agriculture (USDA). It serves about half the infants born in the U.S., providing subsidized infant formula and other products and services. WIC's mission is clear:

The WIC program aims to safeguard the health of low-income women, infants, and children up to age 5 who are at nutrition risk by providing nutritious foods to supplement diets, information on healthy eating, and referrals to health care.
(USDA 2022)

WIC participants get Electronic Benefits Transfer (EBT) cards that function like debit or credit cards that can be used in participating stores . . .

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WIC does not provide a dollar amount to buy food items. Through WIC, you can get nutrition education, breastfeeding support and referrals, and nutritious foods based on your situation (pregnant, breastfeeding, postpartum woman, infant or child). WIC foods are chosen based on nutritional value and USDA standards. (Benefits.gov. 2021)

The benefits are different for different participants, and the rules vary from state to state. WIC participants are limited in what they can get with the EBT card. Getting more of one thing means getting less of other things. Because of this limitation, infant formula and other products are best understood as subsidized, not free.

The WIC system has been an effective marketing tool for infant formula (Greiner 2012; Kent 2017a; Kent 2017b; Pathak et al. 2022). The USDA's Economic Research Service (ERS) reported:

- ERS estimates that 57-68 percent of all infant formula sold in the United States in 2004-06 was purchased through WIC.
- When a State switches its WIC contract to a different manufacturer, the market share of the new brand increases dramatically.
- Most of the increase in market share is the direct effect of recipients purchasing the new WIC brand, but spillover effects also boost sales of the brand to non-WIC customers. (Oliveira 2011; also see USDA 2022a, USDA 2022b)

These impacts of the WIC program have been well documented over many years. The increases in market prices resulting from the WIC program were clearly anticipated (Betson 2009; Prell 2004). Alarms have been raised about WIC's displacing breastfeeding (GAO 2006). Nevertheless, the questionable practices have persisted.

The manufacture of infant formula in the United States is dominated by a few large companies:

The baby formula industry is comprised primarily of two longstanding giants (Abbott and Mead Johnson), each of which has a market share that hovers around 40 percent. A third manufacturer entered the market more recently (Nestle/Gerber), and there's a line of generic store brands (made largely by Paragon Nutritionals). Abbott, the producer of the Similac line and specialty formulas, had to shut down a Michigan plant in February over safety concerns (Scott 2022; also see Goodman and Moynihan 2022).

WIC's alliance with various leading manufacturers has created serious problems in relation to public health and also private wealth, as illustrated by the extreme shortage of formula in the United States that started in May 2022:

Concentration in the formula market has been exacerbated by regulation. About 98% of formula consumed in America is made domestically because of the FDA's stringent approval process for foreign factories. And more than half is purchased through a nutrition programme for low-income families, which in turn buys from a single supplier in each state. In 2007 when California switched its contract from

Abbott to Mead Johnson (now owned by Reckitt), Abbott's market share there fell from 90% to 5%, while Mead's rose from 5% to 95%. On May 13th a group of Democratic senators called for an antitrust review of the industry. If that were to happen, it would not solve the shortages at hand, but it could put the market on sounder footing. (The Economist 2022)

The monopoly dominated by a few manufacturers is maintained through their partnership with WIC, which serves as their primary marketing agent. The arrangement operates through direct contracts between WIC and the governments of states and territories of the United States.

Research from the Economic Research Service found that when a company holds a state's WIC contract, it ends up consuming almost all of the formula market in that state. The spillover effect is so dramatic that, in California, Abbott went from controlling about 90 percent of the market when it held the state's contract to about 5 percent the year after it lost the rights. (Scott 2022)

Four companies (Abbott, Gerber, Perrigo and Reckitt Benckiser) make nearly all of America's formula. The production stoppage occurred at a factory owned by Abbott, which controls around 40% of the market. It is an illustration of how reduced competition, seen in about three-quarters of American industries over the past 30 years, can serve the economy poorly. WIC took many actions to help families adjust to the sudden shortage of infant formula (Neuberger, Bergh, and Hall 2022), but those adjustment did not alter the reality of WIC's role in causing it.

WIC has had a rebate policy since the 1980s. The federal government provides the money for WIC, but states administer it. The states negotiate contracts with formula manufacturers to provide their brand for WIC participants in that state. The rebate funds are used for one major purpose:

. . . . the rebate program does save the government a lot of money — about \$1.6 billion annually — and helped expand the number of people covered by the program. But the importance of WIC to the overall US market, and this unusual feature resulting from federal policy, adds another barrier to a company attempting to enter the formula market. (Scott 2022; also see Carlson 2017)

Why use the rebate to expand the number of people covered by the program? WIC already serves about half the infants born in the United States. WIC's success should be measured by improvements in the health of WIC participants, not the number of participants.

From the companies' point of view, the explanation might be that increasing the number of participants is likely to win more customers devoted to products of the name-brand manufacturers that provide the rebates. Many parents will go on to use formula (or the unnecessary "follow up" formula) after it is no longer provided by WIC and nearly all will stick to the same brand. If the purpose of WIC were purely to supplement diets of vulnerable people while avoiding promoting any particular brand name, consumers would receive a product with

no brand name on it. The presence of WIC in the US helps manufacturers to keep their prices higher for customers who are not WIC participants.

Why does the United States government provide so much of the infant formula used in the country? Why provide that incentive to use formula when all the agencies involved, including the formula manufacturers, acknowledge that in most cases breastfeeding is better for the mothers' and the infants' health than feeding with formula?

WIC defends its practices by saying it simply responds to parents' choices about how to feed their infants. It also points to WIC's breastfeeding support program for mothers who choose that path. However, the scale of that support is small when compared with WIC's huge formula distribution program. In 2011, for example, WIC resources going into its infant formula program were about six times as much as that devoted to breastfeeding support. Another assessment showed that WIC participants viewed the formula provided as worth least sixty times as much as the breastfeeding support (Kent 2017, 48).

The World Health Organization said:

The impact of formula milk marketing is different from that of everyday items like shampoo, shoes, or refrigerators. The cynical marketing tactics used to push milk formula drives over-consumption, discourages breastfeeding, undermines mothers' confidence, and exploits parents' instinct to do the best for their children. (Clark and Ghebreyesus, 2022)

Aggressive promotion of infant formula is a serious concern in many countries. These concerns are especially serious in the United States because of the magnitude of the government's promotion through large-scale distribution of subsidized formula and related products. Parents who receive a supply of a name-brand product, implicitly endorsed by the government, are likely to remain faithful to that brand as the child moves from the infant phase to and beyond the toddler phase. The manufacturers provide their products at low cost to the United States government to promote their products. It is not a display of generosity.

THE CODE

The World Health Organization (WHO) is governed by its World Health Assembly (WHA), comprised of representatives of WHO's member nations. At its annual meeting in 1981 the WHA adopted the International Code of Marketing of Breast-milk Substitutes (Code) because of widespread concern that formula and other baby foods were being promoted in irresponsible ways. The problems were clear:

Before the adoption of the Code, egregious marketing and promotion practices were rampant. Companies sponsored "pretty baby" shows and hired "mothercraft nurses" to visit homes and maternity wards. Radio jingles and print ads led to widespread consumer recognition of the products. The medical profession was targeted as a promotional ally; free samples at the health clinic and supplies from the maternity ward meant, to mothers, that the product was medically endorsed. Doctors and health facilities received various material benefits, everything from

pens and key chains to cash payments and trips abroad, for their implied or explicit endorsement. (Margulies 1998) (See also Kent 2006a, Kent 2006b).

The Code has been treated as a living document, developed through subsequent resolutions by the WHA. The Code and the relevant WHA resolutions are available online (IBFAN 2022; WHO 2022b). References to the Code are commonly understood as being about the original International Code together with subsequent related WHA Resolutions. The guidance relates not only to infant formula but also to related services and products such as bottles and teats.

The Code is not like human rights treaties and other international agreements that become binding on nations through the signature and ratification process. The original Code and the subsequent relevant resolutions are adopted by the WHA through a voting process. The Code and the resolutions are recommendations for national legislation designed to be binding in their jurisdictions.

Efforts to implement the Code generally focus on the marketing of infant formula and other breast-milk substitutes by manufacturers. However, the Code says it also applies to health care systems, and "Health care system means governmental, nongovernmental or private institutions or organizations engaged, directly or indirectly, in health care for mothers, infants and pregnant women; and nurseries or child-care institutions" (WHO 220b, Article 3, p. 140). This means it applies to WIC.

While the writers of the Code knew that some national governments would not implement the Code effectively through national legislation, they would certainly not have supported an approach through which governments themselves became large-scale promoters of formula and related products by providing them to families at little or no cost. Governments can fail to implement the Code not only through their legislation but also through their roles in the marketplace. It is now clear that some governments have active roles in promoting the use of infant formula (Kent 2017).

IBFAN explains:

The International Code is a unique and indispensable tool to protect and promote breastfeeding - an equally unique but threatened practice - and to ensure that marketing of breastmilk substitutes, feeding bottles and teats is appropriate. The International Code was the first of its kind, an internationally adopted and endorsed basic minimum requirement to protect healthy practices in respect of infant and young child feeding. Although less binding than a treaty or a convention, the International Code is an international public health recommendation to regulate the marketing of breastmilk substitutes, adopted by the World Health Assembly (IBFAN 2022)

UNITED STATES POSITION ON THE CODE

Several parts of the Code relate to the role of governments as promoters of formula. For example:

Article 5.2 says, “Manufacturers and distributors should not provide, directly or indirectly, to pregnant women, mothers or members of their families, samples of products within the scope of this Code.”

Article 6.2 says, “No facility of a health care system should be used for the purpose of promoting infant formula or other products within the scope of this Code.

Article 7.3 says, “No financial or material inducements to promote products within the scope of this Code should be offered by manufacturers or distributors to health workers or members of their families, nor should these be accepted by health workers or members of their families.”

Several WHA resolutions are relevant:

Resolution WHA39.28, adopted in 1986, says in section 2(6) that breast-milk substitutes that may be needed for children in hospitals should be “made available through the normal procurement channels and not through free or subsidized supplies.” Section 3(2a) says, “any food or drink given before complementary feeding is nutritionally required may interfere with the initiation or maintenance of breast-feeding and therefore should neither be promoted nor encouraged for use by, infants during this period (World Health Assembly 1986).”

Resolution WHA47.5, adopted in 1994, called on all states “to ensure that there are no donations of free or subsidized supplies of breast-milk substitutes and other products covered by the International Code of Marketing of Breast-milk Substitutes in any part of the health care system (World Health Assembly 1994; World Health Organization, UNICEF, and IBFAN 2016, 25).

Resolution WHA 69.9, adopted in 2016 was titled, “Guidance on Ending the Inappropriate Promotion of Foods for Infants and Young Children.” It addressed promotion of a wide range of baby foods, not just formula.

The flow of WHA resolutions related to the Code continues, but the basic theme and the underlying aims and principles remain the same, as shown in Resolution WHA71.9, Adopted in 2018, titled “Infant nutrition and breastfeeding” and Resolution WHA73, adopted in 2020, titled “Maternal, infant and young child nutrition.”

ILLEGAL OR IMMORAL?

In 1981 the United States was the only country to vote against the adoption of the Code by the WHA. The dark story behind that refusal is documented (Mintz 2012). Even though the United States has not made a commitment to implement the Code, it is meaningful to ask whether its government has violated it. It is possible to violate the aims and principles of the Code even where there is no explicit binding law that addresses the issue.

The United States government actively supports and indirectly promotes the use of infant formula. Article 6.2 of the Code says, “No facility of a health care system should be used for the purpose of promoting infant formula or other products within the scope of this Code.” The WIC program, which can be considered part of the wider “health care system” engages in heavily

subsidized distribution of infant formula and related products. It is only logical for people to believe that the brands distributed by the government (WIC) are endorsed by the government.

During the extreme infant formula shortage in the United States that started in May 2022, the head of the USDA, Tom Vilsack, said, “WIC participants under 12 months of age consume an estimated 56% of infant formula in the US.” (USDA 2022, 2). Why should more than half of any commodity be funneled through a government agency?

He said “WIC families are depending on us for the vital nourishment their babies and children need to thrive. We cannot let them down.” (USDA 2022). Vilsack did not mention WIC’s role in causing that dependency. He did not mention the breastfeeding option. It is clear that the abundant supply of subsidized formula from the government has played a huge role in displacing breastfeeding.

Governments should subsidize children’s health, not corporations’ wealth (Burdick 2022). Large-scale provision of subsidized infant formula could be phased out and replaced with alternative approaches to protect children’s health. More could be done to support breastfeeding, at individual and societal levels. Drawing on the long history of wet nursing and adapting modern ideas from blood banking, well-regulated human milk banks and milk sharing systems could make infant formula less important. Instead of distributing subsidized formula, WIC could treat formula like any other commodity on supermarket shelves, with no contracts to favor dominant manufacturers. Infants who have special needs could be helped through special processes for meeting those needs.

The WIC program does a lot of good for a lot of people, but at the same time it favors infant formula manufacturers and sellers at the expense of families’ health and household budgets. The Code’s guidance, affirmed through the adherence to it by many countries around the world, informs us that it is wrong for any agency to distribute formula and other products in a way that displaces breastfeeding. The aims and principles of the Code can be violated not only by sellers of infant formula, but also by governments.

United Nations agencies, working together with the International Baby Food Action Network (IBFAN) have developed guidelines for assessing implementation of the Code (WHO and UNICEF. 2017). They have reported the status of the implementation country by country (WHO 2022c; also see Lester 1992; WHO 2020a). The research guidelines could be extended to guide systematic assessment of government-sponsored programs.

The United States government is a major violator of the aims and principles of the Code. This observation should lead to improvement of the Code through new WHA resolutions that address the issues discussed here.

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