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FOOD MARKETING: CAN "VOLUNTARY" GOVERNMENT RESTRICTIONS IMPROVE CHILDREN'S HEALTH?

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE

AND THE

SUBCOMMITTEE ON HEALTH

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

OCTOBER 12, 2011

Serial No. 112–94

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FOOD MARKETING: CAN "VOLUNTARY" GOVERNMENT RESTRICTIONS IMPROVE CHILDREN'S HEALTH?

WEDNESDAY, OCTOBER 12, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE,
JOINT WITH
SUBCOMMITTEE ON HEALTH,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittees met, pursuant to call, at 10:30 a.m., in room 2123, Rayburn House Office Building, Hon. Joseph R. Pitts (chairman of the Subcommittee on Health) presiding.

Members present: Representatives Pitts, Bono Mack, Barton, Shimkus, Terry, Murphy, Burgess, Blackburn, Bass, Gingrey, Latta, Harper, Lance, Cassidy, Guthrie, Olson, McKinley, Pompeo, Kinzinger, Upton (ex officio), Dingell, Towns, Pallone, Engel, Capps, Schakowsky, Gonzalez, Butterfield, and Waxman (ex officio).

Staff present: Clay Alspach, Counsel, Health; Charlotte Baker, Press Secretary; Jim Barnette, General Counsel; Debbee Keller, Press Secretary; Ryan Long, Chief Counsel, Health; Brian McCullough, Senior Professional Staff Member, CMT; Carly McWilliams, Legislative Clerk; Jeff Mortier, Professional Staff Member; Gib Mullan, Chief Counsel, CMT; Monica Popp, Professional Staff Member, Health; Chris Sarley, Policy Coordinator, Environment and Economy; Heidi Stirrup, Health Policy Coordinator; Stephen Cha, Minority Senior Professional Staff Member; Alli Corr, Minority Policy Analyst; Eric Flamm, Minority FDA Detailee; Karen Lightfoot, Minority Communications Director and Senior Policy Advisor; Felipe Mendoza, Minority Counsel; and Will Wallace, Minority Policy Analyst.

OPENING STATEMENT OF HON. JOSEPH R. PITTS, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. PITTS. The subcommittees will come to order.

I am pleased today to be holding a joint hearing with the Health Subcommittee and the Commerce, Manufacturing and Trade Subcommittee on such an important issue. The Chair recognizes himself for 5 minutes for an opening statement.

The fiscal year 2009 Omnibus Appropriations Act directed the USDA, the FTC, CDC, and FTC to complete a study on food marketing to children and report back to Congress. Instead, what these 4 agencies, collectively known as the Interagency Working Group on Food Marketed to Children, or IWG, delivered was a sweeping set of voluntary principles for marketing foods to kids. These principles are based on nutritional standards that exceed and conflict with those of other government programs, some administered by these same agencies, such as the WIC program, the school lunch program, and the SNAP, the food stamp program.

The guidelines are so restrictive that many healthy foods like low-fat yogurts, whole-wheat bread, and 2 percent milk could not be marketed to those 17 and under. Cereals, even non-sweetened cereals would not meet the IWG guidelines, including Cheerios. According to one analysis, 88 out of the 100 most advertised foods and drinks would be in violation of these standards.

Please don't misunderstand. I am very concerned about the obesity epidemic in our Nation. I have 4 young grandchildren. I want them to make good dietary and lifestyle choices and grow up healthy. And the parents, not government bureaucrats, are in the best position to see that that happens. Frankly, banning peanut butter commercials during hours when they may be watching TV is not going to accomplish that goal.

The IWG should completely withdraw these recommendations and do what they were instructed to do by Congress in the fiscal year 2009 omnibus, conduct a study and report the findings of the study and their recommendations to Congress. That report was due July 15, 2010.

I yield the remainder of my time to the chairman of the full committee, Mr. Upton.

[The prepared statement of Mr. Pitts follows:]

Opening Statement of the Honorable Joseph R. Pitts
Joint Hearing of Energy and Commerce Subcommittees on Health and on Commerce, Manufacturing, and Trade
"Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health?"
October 12, 2011
(*As Prepared for Delivery*)

The FY2009 Omnibus Appropriations Act directed the USDA, CDC, and FTC to complete a study on food marketing to children and report back to Congress.

Instead, what these four agencies, collectively known as the Interagency Working Group on Food Marketed to Children, or IWG, delivered was a sweeping set of "voluntary" principles for marketing foods to kids.

These principles are based on nutritional standards that exceed and conflict with those of other government programs, some administered by these same agencies – such as the WIC program, the school lunch program, and SNAP (food stamps) program.

The guidelines are so restrictive that many healthy foods, like low-fat yogurts, whole wheat bread, and 2% milk could not be marketed to those 17 and under.

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That report was due July 15, 2010.

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OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Thank you, Mr. Chairman. I appreciate you going out of order as I have another supercommittee meeting this morning. So I need to be there. But I thank you and Chairman Bono Mack for calling this hearing today.

You know, 2½ years ago, Congress established an Interagency Working Group, IWG, composed of the FDA, the Center for Disease Control and Prevention, USDA, and FTC. The IWG was created to conduct a study and develop recommendations for standards in the marketing of food to children and teenagers. The study results and recommendations were supposed to take the form of a report to Congress, which we as the representative branch of government can consider as we decide whether and how to proceed.

But instead of conducting the study or providing recommendations, the IWG unilaterally proposed guidelines that were so extreme that they would prevent the marketing to children of foods that most parents consider a win if their kids eat, such as yogurt, cheese sticks, even soup.

Moreover, the IWG's definition of marketing was so broad that it endangered the philanthropic funding that many community sports programs and schools rely on to fund athletic activities, the one thing proven to combat childhood obesity.

And while the initiative was portrayed as a helping hand to parents to reduce children's exposure to advertising for foods with limited nutritional value, to many of us and our constituents that appeared to be the first step towards Uncle Sam planning our family meals. The IWG's preliminary proposal states flatly that foods would have to be reformulated and in some cases may disappear altogether.

While the testimony suggests that the agencies are dealing with some of the most extreme aspects of the proposal, significant concerns still remain. These guidelines are labeled as voluntary, which to me means they are largely aspirational. But what happens when a litigious group sues a food manufacturer because it showed a commercial advertising a new kind of chocolate treat? Regardless of whether a child sees a commercial for that treat, the ultimate purchasing decision rests with the parent who purchases the groceries, and those groceries carry nutritional labels that every parent can read.

I am also very concerned regarding the impact of the guidelines on jobs. According to a study by IHS Consulting, the guidelines would lead to a loss of as many as 74,000 in just 1 year and perhaps 378,000 jobs over 4 years.

The Senate report language called for a study and a report to Congress. We have neither a study nor a report. Rather, we have a quasi-regulatory maneuver that has drawn fire from a broad range of organizations and Members of Congress.

I am concerned about both the IWG's recommendations and the manner in which they were produced going beyond the scope of that charge. I believe that this approach opens the door to needless and expensive litigation, and ultimately I believe there are much better approaches to improve the health of our children.

I yield back.

[The prepared statement of Mr. Upton follows:]

Statement of the Honorable Fred Upton
Chairman, Committee on Energy & Commerce
October 12, 2011
Hearing on "Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health?"

Thank you, Chairman Pitts and Chairman Bono Mack, for calling this hearing today.

Two and a half years ago, Congress established an Interagency Working Group comprised of the Food and Drug Administration, the Centers for Disease Control and Prevention, the U.S. Department of Agriculture, and the Federal Trade Commission. The IWG was created to conduct a study and develop recommendations for standards on the marketing of food to children and teenagers.

The study results and recommendations were supposed to take the form of a report to Congress, which we as the representative branch of government can consider as we decide whether and how to proceed. Instead of conducting the study or providing recommendations, the IWG unilaterally proposed guidelines that were so extreme that they would prevent the marketing to children of foods that most parents consider a win if their kids eat – such as yogurt, cheese sticks, and even soup. Moreover, the IWG's definition of marketing was so broad that it endangered the philanthropic funding that many community sports programs and schools rely on to fund athletic activities – the one thing proven to combat childhood obesity.

While this initiative was portrayed as a helping hand to parents – to reduce children's exposure to advertising for foods with limited nutritional value – to many of us and our constituents, this appears to be a first step toward Uncle Sam planning our family meals. The IWG's preliminary proposal states flatly that foods would have to be reformulated, and in some cases may disappear altogether.

While the testimony suggests the agencies are dealing with some of the most extreme aspects of the proposal, significant concerns remain. These guidelines are labeled as voluntary, which to me means they are largely aspirational. But what happens when a litigious group sues a food manufacturer because it showed a commercial advertising a new kind of chocolate treat? Regardless of whether a child sees a commercial for that treat, the ultimate purchasing decision rests with the parent who purchases the groceries – and those groceries carry nutrition labels that every parent can read.

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The Senate report language called for a study and a report to Congress. We have neither a study nor a report; rather, we have a quasi-regulatory maneuver that has drawn fire from a broad range of organizations and members of Congress. I am concerned about both the IWG's recommendations and the manner in which they were produced going beyond the scope of their charge. I believe this approach opens the door to needless and expensive litigation, and ultimately, I believe there are much better approaches to improve the health of our children.

Mr. PITTS. The Chair thanks the gentleman and recognizes the ranking member of the Subcommittee on Health, Mr. Pallone, for 5 minutes.

OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you, Chairman Pitts.

Childhood obesity is a tragic public health epidemic in this country, and the statistics are alarming. One out of every 3 children is affected by obesity, and over the last 3 decades rates have skyrocketed. According to data from the Center for Disease Control and Prevention, rates of obesity have doubled in children and tripled in teens. In addition, there are millions more kids who are just at the cusp and are in endanger of becoming obese.

As a result of this epidemic, health problems that were rarely seen in children 30 years ago are now quite common. A report conducted by the Trust for America's Health in 2009 highlighted that more and more children are being diagnosed with Type 2 diabetes, hypertension, sleep apnea, joint problems, and depression, to name just a few. Shockingly, 1 in 3 children born in the year 2000 is expected to develop diabetes during his or her lifetime; and 25 percent of children between the ages of 5 and 10 years old have early warning signs for heart disease such as high blood pressure and high cholesterol levels.

What is so important to understand is that these children are likely to continue having health problems as they age into adulthood. Studies have shown that up to 80 percent of obese children will become obese adults. Some experts have even predicted that if the trends in childhood obesity continue, we will for the first time in American history see a generation that lives sicker and dies earlier than their parents.

Many factors contribute to the public health problem. Personal habits definitely play a part, but so does less exercise and lack of access to healthy foods. Regardless of the reasons, the bottom line is that children's diets are too high in calories, saturated in trans fat, refined sugars, and salt, and too low in fruits, vegetables, whole grains and calcium. As a result, they have an increased risk of many serious and costly diseases.

We also know that marketing is a factor in the types of foods children eat. A 2008 FTC report found that the food industry spent more than $1.6 billion in 2006 alone to market messages to kids promoting foods that often are high in calories and low in nutrition.

In 2006, the Institute of Medicine released a study on food marketing to children that examined the role that marketing may play as a determinate of the nutritional status of children and the ways in which marketing approaches might be adopted to help address the epidemic of childhood obesity. In fact, as a result of this study, the industry launched their own initiative designed to shift the mix of foods advertised to children to encourage healthier dietary choices and healthy lifestyles.

I believe that our government has an obligation to work with industry leaders, parents, schools, and advocates to address and hopefully reverse the trends of childhood obesity. The recommenda-

tions by the IWG being examined today are one step in that direction. I, for one, certainly share the goal of improving children's diets and addressing the high rates of childhood obesity.

Is the IWG proposal perfect? No, not at all. In fact, I think, as written, many of these recommendations are unworkable. But today we will hear from many witnesses, including the consumer advocates who will attest to that. But that is why the proposal poses 30 specific questions designed to elicit input on a variety of issues. So I fully expect the IWG to carefully consider the many comments that were received.

I do not agree with some of our witnesses who believe that the IWG proposal should be withdrawn completely and instead endorse an industry-only approach. Today's hearing will allow our witnesses to publicly provide important input into the development of a complete set of recommendations to Congress. If we want to facilitate and induce real change, it is critical that any voluntary guidelines encourage and incentivize American companies to participate.

I look forward to working with my colleagues, and I would like to now yield the remainder of my time to Representative Schakowsky.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. I thank the gentleman for yielding to me.

You know, we are going to spend our time today attacking the Interagency Working Group, whose mission was simply to—I am looking for exactly the words. The working group's job was to submit a report to Congress. And that is it. And that is what Congress told the group to do.

This is not a regulatory document. It doesn't enforce, but it does inform the conversation we have about a very serious problem, and that is childhood obesity.

I did want to refer Mr. Vladeck to a myths and facts article that you wrote some time ago and refer to what the chairman was saying, it is the parents that are supposed to do this. And the myth is that this proposal represents the government's attempt to do a parent's job. Absolutely not. Parents, not the government, make decisions. But the proposal is designed to support, not supplant, moms and dads. After all, the more marketing that kids see that is for foods that make up a healthy diet, kids will start asking for healthier foods. And so I think that we need an open mind to listen to these reasonable proposals.

Thank you.

OPENING STATEMENT OF HON. MARY BONO MACK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. BONO MACK [presiding]. I thank the gentlelady, and the Chair now recognizes herself for 5 minutes for my opening statement.

Today, the evidence is all around us. There is an indisputable link between childhood obesity and diabetes. It is an issue that I

have been working on for many years. More and more overweight kids are leading to more and more cases of full-blown diabetes among children all across America. That alarming trend demands our attention.

But what is far less clear to me is whether the Interagency Working Group's proposed nutrition principles are even achievable for most food groups and what effect they could have on food prices. Hopefully, we can get some straight answer to these and some other very important questions before committing to a national policy that may shrink family budgets but no waistlines.

Clearly, the IWG's initial proposal went way too far. It had a dangerously high content of plausibility. To its credit, the FTC did substitute a little commonsense for an otherwise rigid menu that could leave American businesses as well as consumers with a bad case of heartburn. People are smart enough to recognize that Girl Scout cookies or cake bought at a bake sale are not health foods, and they should act accordingly. But, that said, I still remain very concerned that healthy foods like yogurt could wind up not meeting these new standards. So much for counting calories.

I am also concerned by a lack of science-based evidence in some of the IWG's recommendations. For example, despite study after study, the link between saturated fat and obesity remains inconclusive. Is there a plausible connection? Yes. But is there a definitive one? No. Over the years, Americans have decreased their saturated animal fat intake, and yet cardiovascular disease rates remain mostly unchanged.

I am also worried about what may happen every time there is a new cook in the kitchen. While these standards are voluntary, they can be changed on a whim, creating uncertainty for both businesses and consumers. Let us rethink that approach before the standards become finalized.

As a former small business owner, I am troubled as well by the impact that the IWG's nutrition principles could have on smaller U.S. companies, which often struggle to comply with these type of standards. I am anxious to learn what steps are being taken to ensure that thousands of Americans don't lose their jobs at a time when unemployment nationwide stands at a stubborn 9.1 percent.

And, finally, why hasn't this committee received the IWG report which was supposed to have been delivered to Congress by July 15, 2010? Frankly, we would like to find out what you have been cooking up in the kitchen. Right now, I am not sure I like the smell of it.

And at that point, I will yield the balance of my time to the vice chair of the Commerce, Manufacturing, and Trade Subcommittee, Mrs. Blackburn.

[The prepared statement of Mrs. Bono Mack follows:]

The Honorable Mary Bono Maek
Opening Statement
October 12, 2011
Subcommittee on Commerce, Manufacturing and Trade and Subcommittee on Health Joint Hearing
"Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health?

Today, the evidence is all around us. There is an indisputable link between childhood obesity and diabetes. More and more overweight kids are leading to more and more cases of full-blown diabetes among children all across America. That alarming trend demands our attention.

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Clearly, the IWG's initial proposal went way too far. It had a dangerously-high content of "plausibility." To its credit, the Federal Trade Commission did substitute a little common sense for an otherwise rigid menu that could leave American businesses, as well as consumers, with a bad case of heartburn.

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And finally, why hasn't this committee received the IWG report which was supposed to be delivered to Congress by July 15, 2010? Frankly, we'd like to find out what you have been cooking up in kitchen. Right now, I'm not sure that I like the smell of it.

OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mrs. BLACKBURN. Thank you, Madam Chairman.

Welcome to our witnesses.

As a mother and a grandmother, I have always been concerned with diet, nutrition, obesity. This goes back to my interest in foods and nutrition when I was a young 4–H Club member in South Mississippi. I love that issue, and for decades I have watched as government has tried to dictate portion sizes and regulation. But I have come to realize nothing replaces understanding of the food pyramid and the basic food groups and how those impact your body and your life.

I think that the nanny state, that government should be held responsible for how its IWG marketing rules will suppress free speech, choice, harm our economy, and fail at reducing, fail at reducing childhood obesity. The government should stop pretending after all of these decades that it has the answers, because it does not. Big government is no replacement for parental involvement in our children's everyday lives and their understanding of the food that they consume, what they eat and the individuals that they become.

Furthermore, private industries are already sensitive to consumer demands and they are bowing to parental concerns. I see this in the choices for my grandchildren. These broad marketing restrictions are supposedly voluntary, but it is clear they will inevitably form the basis for NGO attacks, shareholder actions, and private litigation.

This hearing is an opportunity to explore these concerns further. I thank you all for your interest in being here today. I want to let both panels know that we look forward to having them here, that we look forward to furthering this discussion, and to visiting with you about what is a thoughtful way to move forward with helping to educate parents and children as to what they are consuming.

Now, I am one of those that I cook for my children and grandchildren every single weekend. One of the favorite incentives I have for my 2 grandchildren is an old Mr. M&M. And when you flip his hand, he dispenses a little M&M. After they eat the appropriate amounts of meat and veggies and a little bread and drink their milk, Mr. M&M gives them that candy token that they are looking for as their reward for doing things right.

It is my choice as a grandmother. We don't need the FTC. We don't need the IWG. We do not need the Federal Government weighing in. Yep.

Mrs. BONO MACK. The Chair now recognizes Mr. Butterfield for 5 minutes.

OPENING STATEMENT OF HON. G.K. BUTTERFIELD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. BUTTERFIELD. Thank you.

To the 2 subcommittee chairs and Chairman Pitts and Chairman Bono Mack, thank you for holding today's hearing on the Inter-

agency Working Group's preliminary proposed nutrition principles on food marketed to children.

Children's health and well-being are paramount. I think we can all agree on that. We must do all we can to ensure the next generation of leaders are as healthy as possible. To that end, Congress directed the Federal Trade Commission, the Food and Drug Administration, the Center for Disease Control, and USDA to conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger.

It seems that the working group took that charge and tried to complete as thorough a document as possible, resulting in the preliminary proposed nutrition principles to guide industry self-regulatory efforts. The working group proposal includes many great suggestions like incorporating more fresh fruits and vegetables and whole grains into a child's daily diet in addition to the M&Ms. The working group also suggests limiting nutrients that are generally accepted as not being healthy in large quantities, like sodium and saturated fat, trans fat, and added sugars.

I agree with these principles. I also believe, however, that certain parts of the preliminary working group report recommended overly specific standards that would be difficult, difficult for industry to meet.

In 2006, in response to an Institute of Medicine report, the Council of Better Business Bureaus and the member companies of its Children's Food and Beverage Advertising Initiative instituted a wide-reaching self-regulatory standard. Representing the overwhelming majority of companies marketing food products to children, this initiative's goal was to devote at least half, half of all advertising directed at children to healthier food options and a healthier lifestyle.

The initiative's self-regulatory requirements were recently expanded to be more rigorous. Now, when marketing to children 12 and under, member companies must advertise healthier products, healthier products and 100 percent of the time. Member companies cannot pay for or actively seek product placement in programming directed to children. Member companies are not permitted to advertise in schools serving pre-kindergarten through 6th grade. Member companies have also reformulated more than 100 products advertised to children. They have decreased caloric levels and reduced sodium, sugar, and fat levels, all of these voluntarily.

It is true that children want what is advertised to them on television, magazines, or in a store, whether it is a sugary cereal or the Red Rider BB gun made famous recently, but it is ultimately the responsibility of parents and caregivers to make informed and thoughtful decisions about the kind of food their child eats, just as they do for the kind of toys they play with.

The government can play a role, however, in the overall health of our children, nutritional education, and to both parents and children who can go a long way in helping to develop long-term, healthy eating habits.

Last month, the USDA retired the 20-year-old food pyramid and replaced it with My Plate, a simpler and more relatable way to teach parents and children what they should be eating and how

much. The government also runs the Web site, nutrition.gov, where anyone can learn more about weight management, dietary supplements, and even provides recommendations for healthy shopping, cooking, and meal planning.

I share the President's goal of ending childhood obesity and related conditions like high blood pressure, heart disease, and diabetes. I respect the working group's commitment to the same. But I also believe that children's food and beverage advertising initiatives should be encouraged and given a chance to test out their impact.

Moreover, government entities involved in the working group should not ignore or forget their important role, providing nutritional education in schools and on television, in print and on line. Parents must be able to make informed decisions about what their children eat through exposure to all food choices, the ones that are good for them, the ones that they should enjoy sparingly.

And so, Madam Chair, Mr. Chairman, thank you very much for convening the hearing. I look forward to the remainder.

I yield back.

Mrs. BONO MACK. I thank the gentleman, and the Chair now recognizes Mr. Barton for 5 minutes.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. Thank you, Madam Chairman.

I have an opening statement I am going to put in the record.

I want to do a little focus group with all of the people in this room. We have got about 200 people. How many had a sit-down, home-cooked meal with your family last night? Raise your hand.

I am impressed that that many of you did. That is good. We had about, I would say, 25 percent of the audience. You folks are the solution to our problem.

It is not the government giving these guidelines, and the agencies here are well-meaning, I am sure. It is the fact that we don't take the time to do what we know is right.

I have a little condo here in Washington. I know this is about children's obesity, but this is illustrative. I have a gas stove that has an oven and a 4-top cooker—burners. It hasn't been connected for 20 years. OK? I have a microwave that I use to do microwave popcorn.

When I got elected to Congress, I weighed 160 pounds. I weigh 215 on a good day now. It is not because I don't know what is nutritious to eat. It is because I don't take the time. I go to a reception or I go to the Whip's office or I go to a dinner or I stop at McDonald's. If I am really trying to be healthy, I will stop at Subway and maybe get a sandwich.

My wife is an excellent cook. And when I am in Texas at home, I would say about half the time we actually have a sit-down meal with her and my 6-year-old son. But she works full time, too. So we go to fast food, whether it is Pizza Hut or McDonald's or Braum's or Wendy's or Popeye's Chicken or whatever, and on the weekends maybe we have the meals.

The problem is not government guidelines. The problem is not knowing what is nutritious. The problem is that in our world today

we just don't take the time to do what we know we need to do, and you can't regulate that. You can't mandate that. We can't mandate that everybody sit down with their family for an hour and a half and have a balanced meal like Congresswoman Blackburn does with her children and grandchildren when she is in Tennessee.

So this is going to be a good hearing. We are going to have a lot of good sound bites. But I haven't heard anybody on either side of the aisle, my friends on the Democratic side or the Republican side over here, saying that the government giving us mandatory—even voluntary regulations is going to solve this problem. It is up to each of us individually to do what we know needs to be done.

And with that, Madam Chairwoman, I want to yield, I think, a minute to Mr. Olson of Texas.

[The prepared statement of Mr.Barton follows:]

Opening Statement of the Honorable Joe Barton
Chairman Emeritus, Committee on Energy and Commerce
JOINT HEARING: Subcommittee on Health &
Subcommittee on Commerce, Manufacturing, and Trade
"Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health?"
October 12, 2011

Madame Chairwoman, childhood obesity rates are increasing at an astounding pace. However I am highly skeptical of anyone who would make the claim that "Tony the Tiger" or his friends "Lucky the Leprechaun" or a silly rabbit who just wants some "Trix" are to blame.

When Congress formed the Interagency Working Group on Food Marketed to Children (IWG) we assigned them with a simple task; conduct a study and then send the results of that study back for us to review. Instead of getting what we asked for in a timely manner, we received an unfortunate defacto-regulatory proposal much later than originally anticipated. Simply stated, their agencies did not do what was asked of them.

The agencies represented by our first panel took it upon themselves to draft guidelines that will never become true federal regulations but instead regulations by intimidation. These agencies represent the governing authority over this industry. While these guidelines do not carry the weight of law, I would be hard pressed to believe that this industry is going to thumb their nose at the very agencies that regulate them.

As for the guidelines themselves, I have some serious reservations. Setting impractical standards on an industry that has already taken voluntary measures such as "Front-of-Pack Labeling" seems a bit aggressive especially without having done the requested study. I understand these government agencies have all indicated that the principles established in their proposed document go as far as they do because they know

the comment period will help bring it back to reality. Yet had they done the study, it is possible that the agencies would have come to the conclusion that the voluntary measures this industry already imposed on themselves is more than adequate. Additionally, major flaws exist in these guidelines especially when the foods approved for the Women, Infants and Children (WIC) Program do not meet the threshold for what is deemed nutritional.

It seems as though these agencies are trying their hardest to blame advertisers in effort to solve the problem of our kids' expanding waist lines. Well folks, I am here to tell you that Ronald McDonald is not to blame for this tragic epidemic nor are commercials on television or characters on a cereal box. As parents we need to make informed decisions about the nutrition of kids. This is something I take to heart each time I go to the grocery store with my six year old, Jack.

The dramatic rise of childhood obesity is a serious matter Madame Chairwoman, and I thank you for holding this hearing.

Mrs. BONO MACK. I am happy to recognize Mr. Olson.

OPENING STATEMENT OF HON. PETE OLSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. OLSON. I want to thank the chairman emeritus and my colleague from Texas. I would like to thank Chairmen Upton, Bono Mack, and Pitts for calling this very important hearing.

Last year, I visited a Frito-Lay plant in the district I represent with my 11-year-old son. The plant has 465 employees. There is another Frito-Lay office in my home district which has 181 employees. That is 646 Frito-Lay jobs in the 22nd Congressional District of Texas.

These jobs involve the manufacture, sale, distribution, and marketing of snack food products, including products that qualify as healthy under FDA regulations. However, under the proposal by the Interagency Working Group on Food Marketed to Children, many of these products would be restricted, and the jobs that produce them would be at risk.

It is my job as a parent, not the government's job, to ensure that my children eat healthy foods and develop healthy habits. We don't need the Federal Government dictating which foods can be marketed to children.

Thank you. I look forward to hearing from our witnesses. I yield back.

Mr. BARTON. I would like to yield the balance of my time to Mr. Kinzinger.

OPENING STATEMENT OF HON. ADAM KINZINGER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. KINZINGER. Thank you for yielding and for the opportunity for the witnesses to come in and testify today.

The 2009 report language included in the Omnibus Appropriation Act directed the IWG to complete a study and submit a report to Congress with its recommendations. Congress is still waiting. Instead, the IWG devised voluntary nutrition standards for food marketing to children that would require product reformulation with no scientific evidence that these new marketing restrictions would lead to long-term changes in eating behaviors or obesity rates.

I was elected to Congress by Illinois families that want a government that fosters a safe and free economy, a government that is limited in its scope and effective in its goals. This proposal is counter to that. As many as 74,000 food manufacturing jobs are in jeopardy with these guidelines. These jobs are held by parents working hard to feed their children.

It is time we return government to the people and rein in Washington's culture of senseless regulation. I look forward to hearing from the witnesses and hope the IWG sees the need in providing a science-based report that includes how the proposal will benefit children's health and what it will do to the cost of our Nation and jobs and economic growth. And I yield back.

Mrs. BONO MACK. The Chair recognizes Mr. Waxman for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Madam Chair.

Let me get this straight. Congress said that we should create an interactive task force from the Centers for Disease Control, the Food and Drug Administration, the United States Department of Agriculture, the Federal Trade Commission. We asked that this task force be set up to give recommendations about a real problem.

And what is this real problem? There is an epidemic of obesity among our children. This is a serious health matter. A third of our kids are now overweight or obese. It is a public health problem. It is also a problem of national defense. The Pentagon complains they can't find enough kids who are not so overweight that they can't go into the military. It is a problem any way you look at it. It is a complex problem. But the food industry can contribute to this effort of helping to educate the public.

Now, how can they do that? Well, they could talk about safer foods, healthier foods, and not target our kids. The food industry spends $1.6 billion on marketing to the kids each year. And when they are marketing candy, they are not saying take only one M&M from your grandmother. They are saying eat M&Ms, eat candy, eat all the food that we know is not great. But kids don't know.

So we have got this interagency task force, and they came out with a preliminary report. And our committee is going crazy. We have called a hearing. The Republicans who run this committee called a hearing. It is a preliminary report. It means they want to get comments. So before they get comments from anybody else, we are going to give them our comments.

And what are the comments of the Republicans? "Their preliminary proposal is extreme. We don't want Uncle Sam planning our family meals. It is going to have an impact on jobs." That is what they always say. They even have a figure, 70,000—or 700,000 jobs would be lost each year. I don't know where they got that figure.

"This is going to lead to litigation." Well, I don't know how it is going to lead to litigation. If there is a reason to sue because people manufacture and sell legal products that may or may not be healthy, that is not a tort as I understood everything I studied in law school. And just because there is a government guideline for a voluntary effort, I don't know how that leads to more litigation.

So the Republicans say it is going to lead to litigation, it is big government, we better find out what the impacts are on our prices for food, there is not enough of a scientific basis to even deal with this issue, big government is not a replacement for parents, as if anybody said big government was a replacement for parents.

This is a way for the industry to do something on a voluntary basis to help deal with a real public health problem. It is a way to educate the public. It is a way not to have our kids subjected to advertising that they don't know how to deal with. They are kids.

And then we hear it is too difficult to implement. Well, if it is too difficult to implement, then the industry doesn't have to implement it.

I cannot believe this hearing. I cannot believe the statements that I have been hearing from the other side of the aisle.

This is an interim report. They are asking for comments. The comments seem to suggest that they shouldn't have a task force. Well, the Congress set it up. All the rhetoric. "We want limited government, freedom in our country, no regulated markets," on and on and on.

Well, let me tell my Republican friends, if we did nothing, the epidemic of obesity in children is not going to stop. It is going to continue. The food manufacturers and advertisers are not going to change what has been working for them, because what has been working for them is adding to their profits.

So somebody should do something. If not government suggesting ideas, will industry act on its own?

I just find this an amazing hearing. The only thing I can analogize it to is the hearing we had, after all of the tobacco issues that we discussed for many years, the Republicans took charge, and we never heard anything more about tobacco. And suddenly we had a hearing about tobacco, and the hearing was how smokeless tobacco should be encouraged as a way for smokers to give up smoking. It was geared to promoting an industry that no doubt supported financially many of the Members. I wonder if this hearing is about the same subject.

I yield back my time.

Mrs. BONO MACK. I thank the gentleman, and now we will turn our attention to the panel.

Our first panel of witnesses will include William Dietz, Director of the Division of Nutrition, Physical Activity, and Obesity at the Centers for Disease Control and Prevention. Then we have Dr. Robert Post, Deputy Director of the Center for Nutrition Policy and Promotion at the U.S. Department of Agriculture. And then David Vladeck, Director of the Bureau of Consumer Protection at the Federal Trade Commission.

Thank you all very much for coming today. We have your prepared statements in front of us all, and we recognize you to summarize them. And we will begin with you, Dr. Dietz.

STATEMENTS OF WILLIAM H. DIETZ, DIRECTOR, DIVISION OF NUTRITION, PHYSICAL ACTIVITY, AND OBESITY, CENTERS FOR DISEASE CONTROL AND PREVENTION, DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT POST, DEPUTY DIRECTOR, CENTER FOR NUTRITION POLICY AND PROMOTION, DEPARTMENT OF AGRICULTURE; AND DAVID C. VLADECK, DIRECTOR, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION

STATEMENT OF WILLIAM H. DIETZ

Mr. DIETZ. Thank you, Chairwoman Bono Mack and members of the subcommittees. It is a great honor for me to be here today to talk to you about the Interagency Working Group on Food Marketed to Children.

Mrs. BONO MACK. Excuse me, Doctor. Would you please pull the microphone closer to your mouth and make sure that it is turned on?

Mr. DIETZ. Is this better?

Mrs. BONO MACK. Yes, thank you.

Mr. DIETZ. Before coming to CDC, I was a professor of pediatrics at Tufts University School of Medicine in Boston; and I am a prior President of the Obesity Society and prior President of the American Society for Clinical Nutrition. My statement provides background on the burden of childhood obesity and cardiovascular disease risk factors, a discussion of how advertising and the marketing of foods and beverages influence the diets of children and youth, and an overview of the Institute of Medicine's 2006 report on food marketed to children and youth.

The 2 greatest diet-related health threats to children and adolescents in the United States are obesity and the development of cardiovascular disease risk factors. Our most recent data indicate that 17 percent of U.S. children and adolescents are obese.

The caloric imbalance necessary to reverse the obesity epidemic in children is surprisingly small and ranges from 30 to 170 calories, depending on the age of the child. Modest shifts in consumption can reduce this excess.

Obese children are at a greater risk for a variety of health conditions. Approximately 30 percent of obese children have high blood pressure, 10 percent of all children have elevated cholesterol, and obesity increases the risk of elevated cholesterol even further.

Obese children also have an increased risk of Type 2 diabetes and multiple other health problems. Virtually every system in the body is affected.

In addition, obesity may lead to severe psychological and social problems, such as absenteeism from school, discrimination, victimization, and poor self-esteem.

Although elevated blood pressure and elevated cholesterol accompany obesity, sodium and saturated fat in the diets are also important contributors. Reductions in salt intake could decrease adult heart attacks by 9 percent and adult strokes by 14 percent.

The poor quality of the diets of 0- to 5-year-old children is emphasized by recent data from the feeding infants and toddler study conducted by Nestle. This study showed that 45 percent of 1- to 2-year-old children and 78 percent of 2- to 4-year-old children have sodium intakes above the upper limit recommended by the National Academy of Sciences. 75 percent of children consume excessive saturated fat. Approximately 30 percent of children consumed no vegetables on the survey day, and 20 to 30 percent of children consumed no fruit. Approximately 30 percent of children are consuming pre-sweetened cereals. High-caloric-density foods are frequently consumed as snacks, and almost 40 percent of 2- to 4-year-old children consume fruit-flavored drinks daily. These dietary patterns increase the risk of obesity and cardiovascular disease.

Furthermore, food marketing to children leads to increased consumption of foods of low nutritional value. The 2006 IOM report on food marketing concluded that, quote, food and beverage marketing practices geared to children and youth are out of balance with healthful diets and contribute to an environment that puts their health at risk. Specifically, the IOM report found that in 2- to 11-year-olds there is strong evidence of the effect of food marketing on food and beverage preferences, food and beverage purchases, food

and purchase requests, short-term consumption, and moderate evidence on the effects of food advertising on food and beverage beliefs and usual dietary intake among 2 to 5-year-olds.

We also know that there is a linear relationship between television viewing and obesity, and it appears that food marketing to children plays an important role. The more television a child watches, the more likely they are to consume foods while watching television, and those foods are more likely to be the foods that are advertised on television.

Furthermore, several studies have now shown that reductions in television time are associated with weight reduction without increases in physical activity. This observation suggests that the effects of television on childhood obesity are not due to television viewing displacing more vigorous physical activity. Multiple studies have shown that among products marketed most frequently to children are sugar sweetened beverages, sugar sweetened cereals, restaurant foods, and salty snacks, the same types of foods that contribute to obesity and cardiovascular disease risk factors. Foods containing meaningful amounts of fruits, vegetables, or whole grains are rarely advertised.

We want to support parents in providing healthful foods to their children. The advertising directed at children prompts them to nag their parents to purchase the products that are marketed to them. The high-fat, high-salt, and h-i-g-h sugar foods consumed as a result of these ads increases the risk of obesity and cardiovascular disease, while the provision of meaningful amounts of healthful alternatives to these foods reduces these risks. The Interagency Working Group is committed to developing principles for foods marketed to children that can improve the health of our children and ultimately reduce health care costs.

[The prepared statement of Mr. Dietz follows:]

Testimony before the
Subcommittee on Health and Subcommittee
on Commerce, Manufacturing, and Trade
Committee on Energy & Commerce
U.S. House of Representatives

Statement of
William H. Dietz, MD, PhD
Director, Division of Nutrition, Physical Activity and Obesity
Centers for Disease Control & Prevention,
U.S. Department of Health & Human Services

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Statement of William H. Dietz, MD, PhD
Director, Division of Nutrition, Physical Activity, Obesity
Centers for Disease Control and Prevention
Before
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Health
Subcommittee on Commerce, Manufacturing, and Trade

Hearing on the Interagency Workgroup (IWG) on Food Marketed to Children

October 12, 2011

Introduction

Chairmen Mack and Pitts and members of the Committee, it is a great honor for me to provide this statement for the record for today's hearing on the Interagency Workgroup (IWG) on Food Marketed to Children. Health-related behaviors such as eating habits and physical activity patterns develop early in life and often extend into adulthood. Today, America's children and adolescents are not achieving basic nutritional goals–their dietary intakes of saturated fats, trans fatty acids, and sodium are consistently higher than recommended. In addition, childhood obesity has become and remains an epidemic in the United States. Many other factors contribute to the obesity epidemic through their effects on food consumption. The best available research finds that foods high in calories, sugars, salt, and fat, and low in nutrients are heavily advertised and marketed through media targeting children and adolescents, while, in comparison, advertising for healthy food is almost nonexistent.[1] Creating conditions in which children and youth can grow up to be healthy adults should be a priority for this nation. Ensuring that our nation supports approaches that promote good health is a responsibility that we all share, requiring collaborative efforts across both the public and private sector.[2]

I am Dr. William Dietz, Director, of the Division of Nutrition, Physical Activity, and Obesity in the Department of Health and Human Services (DHHS) Centers for Disease Control and Prevention (CDC). CDC works 24/7 to keep America safe from health threats no matter where they originate—chronic or acute, curable or preventable, naturally occurring or deliberate attack. CDC science and actions save lives and keep the nation secure. My statement provides background on the burden of childhood obesity, a discussion of how advertising and marketing of foods and beverages influences the diets and health of children and youth, an overview of the Institute of Medicine's (IOM) 2006 report on Food Marketing to Children and Youth and an overview of the work of the Interagency Working Group on Food Marketed to Children (IWG).

State of Childhood Obesity

The Problem

Childhood obesity is an epidemic in the United States, one that is negatively impacting the physical and emotional health and well-being of our children, their families, and society as a whole. Obesity in children is defined using the Body Mass Index (BMI), a calculation of a child's height and weight in comparison to children of the same age and sex in CDC's Growth Charts for the United States. A child is considered overweight if his or her BMI is between the 85th and 95th percentiles, and obese if his or her BMI is greater than or equal to the 95th percentile.

The prevalence of overweight and obesity among American children and adolescents has nearly tripled since 1980, when it was approximately 5 percent, and continues to be a significant public health problem in the United States. By 2008, the prevalence had increased to 17 percent, or approximately 12.5 million children and youth.[3]

There are significant ethnic and racial disparities in obesity prevalence among children. In 2007—2008, Hispanic boys aged 2 to 19 years were significantly more likely to be obese than non-Hispanic white boys, 24.4% compared to 15.7% respectively, and non-Hispanic black girls were significantly more likely to be obese than non-Hispanic white girls, 22.7% compared to 14.9% respectively.[4]

Among low-income preschool children, one out of three are obese or overweight before their fifth birthday. Socioeconomic, racial, and ethnic disparities in obesity prevalence exist even among the youngest Americans. In 2010, the prevalence of obesity among low income children aged 2 to 4 years was 14.4%[5], compared to approximately 10.4% of all children.[6] Among low income children ages 2 to 4 years, the highest prevalence of obesity was among American Indian or Alaska Native children at 21.1% and Hispanic children at 17.6%, while the lowest prevalence was among white (12.1%), black (11.6%), and Asian or Pacific Islander (11.3%) children.[7]

The consequences of childhood obesity are serious and costly. Obese children are at greater risk for a variety of debilitating health conditions, including: high blood pressure and high cholesterol, which are risk factors for cardiovascular disease (CVD)[8]; insulin resistance and type 2 diabetes[9]; breathing problems such as sleep apnea and asthma[10,11]; joint problems and musculoskeletal problems[12,13]; fatty liver disease; and gallstones. Not only does obesity increase the likelihood of a child developing these types of serious physical issues, but it may also lead to severe psychological and social problems, such as absenteeism from school, discrimination, victimization, and poor self-esteem.[14,15,16]

Preventing childhood obesity has significance not only for an individual's health but also for the U.S. health care system. Obese children and adolescents are more likely to become obese adults.[17,18,19] One study found that after age six, obese children have a greater than 50 percent chance of becoming obese adults, regardless of parental obesity status.[20] The care and treatment of obesity and its co-morbidities over the lifespan can be costly. The direct costs of childhood obesity have been estimated at $3 billion per year.[21] National data comparing1998 and 2006 revealed that obesity increased medical costs by

37 percent in 1998 and 2006, regardless of the payer source. Across all payers, obese people had medical spending that was $1,429 greater than spending for normal-weight people in 2006.[22] An estimated $147 billion was spent in 2006 on obesity-related medical care expenditures, or approximately 9.1 percent of total annual medical expenditures.[23] Direct medical costs of diabetes—for which obesity is a risk factor—totaled $116 billion in 2007.[24]

Causes of Childhood Obesity

The underlying causes of the obesity epidemic are complex and numerous. Obesity is caused by an imbalance of energy intake (nutrition) and energy expended (physical activity). Though there are non-nutritional variables that may contribute to weight gain, such as a genetic predisposition, these variables do not account for the explosive increase in obesity prevalence among adults observed from 1980 (15%) through 2008 (34%).[25] Overall, children and youth are not achieving basic nutritional goals. The diets of America's children and adolescents depart substantially from recommendations in the Dietary Guidelines for Americans and reflect a pattern that puts their health at risk.[26] Children and youth consume excessive calories and exceed recommended intakes of total fat, saturated fats, added sugars, and sodium.[27]

The 2001 *Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity* in combination with the Institute of Medicine reports, *Preventing Childhood Obesity* (released September 2004) and *Progress in Preventing Childhood Obesity* (released September 2006), provide evidence for the causal link between key risk factors and childhood obesity: increased portion sizes; increased consumption of high calorie, processed foods and beverages; increased screen time; decreased physical activity during leisure time; and decreased physical activity during the school day. The 2006 IOM Report on Food Marketing to Children and Youth concludes that behavior and environment play a large role in causing people to be overweight and obese. These are areas of greatest potential impact for prevention and treatment.

Far too many children and their families do not have healthy nutrition and physical activity as part of their daily lives. The 2008 Physical Activity Guidelines for Americans recommend that children and adolescents do one hour or more of physical activity every day. However, nationally, among students in grades 9-12, only 18% achieved one hour or more of daily physical activity, and only 33% participated in daily physical education in 2009.[28] Fruits and vegetables provide essential vitamins and minerals, fiber and other substances for good health. However, only 9% of adolescents met national recommendations for daily fruit and vegetable intake.[29] Moreover, 29% of high school students drank one or more sodas per day and 32% watched more than 3 hours of TV per day.[30] Among children ages 6 to 17, 50% had televisions in their bedrooms.[31] And, among children ages 12-17, 31% did not eat meals as a family on most days of the week. Studies indicate that family meals are one protective factor against obesity among youth.

The interplay of many factors, including genetics and biology, cultures and values, economic status, physical and social environments, and commercial and media environments influence the dietary and related health patterns of children and youth. However, among the various environmental influences, the media, in its multiple forms and broad reach, plays a central socializing role for young people and is an important channel for promoting branded food and beverage products in the marketplace.[32] It is urgent that we focus on solutions to reverse the epidemic. Multiple factors and intersecting causes mean interventions that rely on comprehensive, public-private partnership approaches are more likely to be effective than those that focus on single targets. CDC is working to improve nutrition and physical activity and reduce obesity through grants to states and communities, technical assistance and training, surveillance and applied research, program implementation and evaluation, translation and dissemination, and partnership development. Five target areas for preventing and reducing obesity serve as the basis for CDC's work. These are to (1) increase consumption of fruits and vegetables; (2) increase regular physical activity; (3) increase breastfeeding initiation, duration, and exclusivity; (4) decrease consumption of added sugar, and (5) decrease consumption of high-calorie, low nutrient foods by implementing state and community programs, conducting research and evaluation, and translating research into practice.

Impact/Influence of Food and Beverage Marketing to Children

Along with many other intersecting factors, food and beverage marketing influences the diets and health outcomes of children and youth. Through a Congressional directive, CDC requested that the IOM conduct a study to review the influence of food marketing on the diets and health of children and youth in the United States. According to the 2006 IOM Report, "Food Marketing to Children and Youth: Threat or Opportunity?", there is significant evidence linking food marketing to children's eating requests, preferences and consumption patterns.

The IOM report—along with recent reports from the Federal Trade Commission and the Kaiser Family Foundation—makes several findings about food marketing practices and their effect on children's food and beverage preferences and purchases:

Marketing practices

- With annual sales now approaching $900 billion, the food, beverage, and restaurant industries take a central place in the American marketplace. Children and youth represent a primary focus of food and beverage marketing initiatives.[33]
- Advertising and marketing messages reach young consumers through a variety of vehicles such as television, radio, magazines, music, and the Internet, and through many different venues including homes, schools, child-care settings, grocery stores, shopping malls, theaters, sporting events, and airports.[34]
- Food and beverage marketing practices geared to children and youth are out of balance with recommended healthful diets and contribute to an environment that puts their health at risk.[35]
- A 2007 Kaiser Family Foundation report indicated that food marketing is a predominant part of the television advertising landscape for children, and that

young people's exposure to such messages is substantial, while their exposure to countervailing health messages on TV is minimal.[36]

- In 2007, the Federal Trade Commission (FTC) required forty-four food and beverage companies to disclose their child marketing practices and found that approximately $1.6B is spent on marketing food and beverages to children and adolescents.[37]
- Between 1994 and 2004, the rate of increase in the introduction of new food and beverage products targeted to children and youth substantially outpaced the rate for those targeting the total market.[38] However, in recent years, there appears to be some progress in industry voluntarily reducing the number of unhealthy food products marketed to children.

Effect of marketing on preferences and purchases of food and beverages

- Of the more than $200 billion children and youth collectively spend annually, the leading items children ages 8–12 years independently select are high-calorie and low-nutrient foods and beverages.[39] Among teens ages 13-17 years, food and beverages were ranked among the leading items purchased with their own money,[40] especially candy, carbonated soft drinks, and salty snacks.
- Although children's choices are strongly influenced by their parents and siblings, they are making decisions at younger ages in the marketplace. Children have a greater influence on their parent's purchases as they get older. That influence currently amounts to an estimated $500 billion for 2–14 year-olds.[41]

Some conclusions of the 2006 IOM report include:

- There is strong evidence that food and beverage marketing to children has an effect on the food and beverage preferences, food and beverage purchase requests, and short-term consumption of children ages 2-11 years.[42]
- Food and beverage companies, restaurants, and marketers have underutilized the potential to devote creativity and resources in promoting food, beverages, and meals that support healthful diets for children and youth.[43]
- Achieving healthful diets for children and youth will require continued, multi-sectoral, and integrated efforts that include industry leadership and initiative.

Proposed Nutrition Principles for Marketing Foods to Children

In an effort to find solutions to the problem of childhood obesity, Congress directed the FTC, together with the Food and Drug Administration (FDA), CDC, and the United States Department of Agriculture (USDA) to establish an IWG of federal nutrition, health, and marketing experts. Congress directed the IWG to "conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children."[44]

Since May 2009, the IWG, led by the FTC, has met regularly to study and assess the science, examine the components of voluntary efforts already being employed by various organizations, and work through scenarios of applying different criteria to individual foods and foods marketed as meals. In developing a set of proposed recommendations, the IWG was guided primarily by dietary recommendations developed by USDA and HHS, as delineated in the 2010 Dietary Guidelines for Americans, and by regulations promulgated by the FDA and USDA governing nutrient content and health claims in food labeling. To satisfy the directive of the 2009 Omnibus Appropriations Act accompanying statement, which called for the creation of the IWG, the Working Group reviewed the Dietary Guidelines for Americans, the Dietary Guidelines Advisory Committee's report on nutrition research, regulations promulgated by the FDA and USDA governing nutrient content and health claims in food labeling, relevant IOM reports, and nutrition standards developed by industry groups and various public and private entities prior to developing recommendations. The recommendations represent "voluntary recommendations" that might inform and guide industry efforts to voluntarily change the promotion of foods and beverages to children.

The IWG proposal supports voluntary industry efforts to address childhood obesity by improving the nutritional quality of foods marketed to children. The proposed principles are designed to encourage children, through advertising and marketing, to choose foods that make a meaningful contribution to a healthful diet; and contain limited amounts of nutrients that have a negative impact on health or weight (saturated fat, trans fat, added sugars, and sodium). The proposal reflects the belief that a voluntary approach is preferable to government-imposed restrictions on food marketed to children.

The IWG proposed principles were released for public comment on April 28, 2011. In addition, a half day meeting was convened at HHS in May to receive public comments. The public and industry input received during the comment period will inform the IWG in shaping the final recommendations.

Conclusion

Childhood obesity is one of the most important public health challenges of the 21st century. Achieving healthful diets for children and youth will require continued, public-private partnership, and integrated efforts that include industry leadership and initiative. The success of our efforts to prevent and reduce childhood obesity will be determined by our success in mitigating poor diet and physical inactivity. Environmental supports aimed at helping America's children and families have lifelong healthful eating and physical activity habits are our best levers. The IWG believes that (given the persuasive powers of advertising) the marketing of healthy foods to children can be a part of the solution.

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[1] Institute of Medicine, Food Marketing to Children and Youth: Threat or Opportunity? Washington, DC, National Academies Press, 2006.

[2] Adler NE, Stewart J. Reducing Obesity: Motivating Action While Not Blaming the Victim. Milbank Quarterly. March 2009; 56-57.
[3] Ogden CL, Carroll MD, Curtin LR, Lamb MM, Flegal KM. Prevalence of high body mass index in U.S children and adolescents, 2007-2008. JAMA 303(3).242-9. 2010.
[4] Ogden CL, Carroll MD, Curtin LR, Lamb MM, Flegal KM. Prevalence of High Body Mass Index in US Children and Adolescents, 2007 – 2008. JAMA. 2010,303(3):242-249.
[5] Centers for Disease Control and Prevention. *Pediatric Nutrition Surveillance, 2010 full report* Atlanta: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, 2011.
[6] Ogden CL, Carroll MD, Curtin LR. Lamb MM, Flegal KM. Prevalence of High Body Mass Index in US Children and Adolescents, 2007 – 2008. JAMA. 2010;303(3):242-249.
[7] Centers for Disease Control and Prevention. *Pediatric Nutrition Surveillance, 2010 full report.* Atlanta: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, 2011.
[8] Freedman DS, Mei Z, Srinivasan SR, Berenson GS, Dietz WH. Cardiovascular risk factors and excess adiposity among overweight children and adolescents: the Bogalusa Heart Study. J Pediatr. 2007;150(1):12—17.e2.
[9] Whitlock EP, Williams SB, Gold R, Smith PR, Shipman SA. Screening and interventions for childhood overweight: a summary of evidence for the US Preventive Services Task Force. *Pediatrics* 2005;116(1):e125—144.
[10] JC, Lawlor DA, Kimm SY. Childhood obesity. *Lancet* May 15 2010;375(9727):1737—1748.
[11] Sutherland ER. Obesity and asthma. Immunol Allergy Clin North Am. 2008;28(3).589—602, ix.
[12] Han JC, Lawlor DA, Kimm SY. Childhood obesity. *Lancet* May 15 2010;375(9727):1737—1748.
[13] Taylor ED, Theim KR, Mirch MC, et al. Orthopedic complications of overweight in children and adolescents. *Pediatrics* Jun 2006;117(6):2167—2174.
[14] Whitlock EP, Williams SB, Gold R, Smith PR, Shipman SA. Screening and interventions for childhood overweight: a summary of evidence for the US Preventive Services Task Force. *Pediatrics* 2005,116(1).e125—144
[15] Dietz W. Health consequences of obesity in youth: Childhood predictors of adult disease. *Pediatrics* 1998;101 518—525.
[16] Swartz MB and Puhl R. Childhood obesity: a societal problem to solve. *Obesity Reviews* 2003; 4(1):57—71.
[17] Biro FM, Wien M. Childhood obesity and adult morbidities. Am J Clin Nutr. May 2010;91(5):1499S—1505S.
[18] Whitaker RC, Wright JA, Pepe MS, Seidel KD, Dietz WH. Predicting obesity in young adulthood from childhood and parental obesity. *N Engl J Med* 1997,37(13):869—873.
[19] Serdula MK, Ivery D, Coates RJ, Freedman DS. Williamson DF. Byers T. Do obese children become obese adults? A review of the literature. *Prev Med* 1993;22:167—177.
[20] Whitaker RC, Wright JA, Pepe MS, Seidel KD, Dietz WH. Predicting Obesity in young adulthood from childhood and parental obesity. N Engl J Med 1997;337(13): 869-73.
[21] Trasande, Leonardo, How Much Should We Invest in Preventing Childhood Obesity, Health Affairs, 29, no.3 (2010).372-378
[22] Finkelstein EA, Trogdon JG, Cohen JW, Dietz WH. Annual Medical Spending Attributable to Obesity: Payer and Service Specific Estimates. *Health Affairs* 2009; 28(5)w822-w831.
[23] Ibid.
[24] American Diabetes Association. Economic Costs of Diabetes in the United States in 2007. *Diabetes Care* 31(3):596–615, 2008.
[25] Ogden CL, Carroll MD, Curtin LR, Lamb MM, Flegal KM. Prevalence of High Body Mass Index in US Children and Adolescents, 2007 – 2008. JAMA. 2010;303(3):242-249.
[26] Institute of Medicine, Food Marketing to Children and Youth: Threat or Opportunity? Washington, DC, National Academies Press; 2006.
[27] Ibid.
[28] Centers for Disease Control and Prevention. *Youth Risk Behavior Survey 2009* http://www.cdc.gov/healthyyouth/yrbs/pdf/us_physical_trend_yrbs.pdf.
[29] Centers for Disease Control and Prevention. *Youth Risk Behavior Survey 2009* http://www.cdc.gov/healthyyouth/yrbs/factsheets/index.htm
[30] Ibid.

[31] National Survey of Children's Health. NSCH 2007. Data query from the Child and Adolescent Health Measurement Initiative, Data Resource Center for Child and Adolescent Health website. Retrieved 10/03/11 from www.childhealthdata.org.
[32] Ibid.
[33] Institute of Medicine, Food Marketing to Children and Youth: Threat or Opportunity? Washington, DC, National Academies Press; 2006.
[34] Ibid.
[35] Ibid
[36] The Kaiser Family Foundation Report. Food for Thought: Television Food Advertising to Children in the United States. 2007. http://www.kff.org/entmedia/upload/7618ES.pdf.
[37] Federal Trade Commission, Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation; July 2008:12.
[38] Institute of Medicine, Food Marketing to Children and Youth· Threat or Opportunity? Washington, DC, National Academies Press; 2006.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] FY 2009 Omnibus Appropriations Act (H.R. 1105).

Mrs. BONO MACK. Thank you, Dr. Dietz.

Dr. Post, you are recognized for 5 minutes.

STATEMENT OF ROBERT POST

Mr. POST. Thank you.

Chairman Bono Mack and Chairman Pitts and members of the committee and subcommittees, it is an honor to have this opportunity to provide this statement for today's hearing on the Interagency Working Group on Food Marketed to Children.

I am Dr. Robert Post. I am Deputy Director for the Center for Nutrition Policy and Promotion in the U.S. Department of Agriculture. I represent USDA on the IWG.

My role of reviewing the technical basis for the IWG's nutrition principles is commensurate with my role as the policy official leading the development of the 2010 Dietary Guidelines for Americans.

The current epidemic of overweight and obese children in the United States is a major concern for USDA. The 2010 Dietary Guidelines for Americans reports that eating patterns established in childhood often track into later life, making early intervention on adopting healthy nutrition and physical activity behaviors a priority.

As you know, the USDA supports a number of food and nutrition policies and programs that aim to improve not only the nutrition but also the overall health and well-being of America's youth. Primary prevention of obesity and related risk factors is the single most powerful public health approach to reversing America's obesity epidemic over the long term. Lifelong habits are developed throughout childhood, and every opportunity should be provided to build healthy habits at the earliest stages of life.

Among the strategies reported in the dietary guidelines that can be used to help create and promote healthy lifestyles for children is supporting effective policies to limit food and beverage marketing of unhealthy products to children. Since May 2009, the IWG has met regularly to study and assess the science, critically examine the components of voluntary efforts already being employed by various organizations, and exhaustively work through scenarios of applying different criteria to individual foods and foods marketed as meals.

To satisfy the directive of the 2009 Omnibus Appropriations Act, which called for the creation of the IWG, the working group reviewed the 2010 Dietary Guideline Advisory Committee's comprehensive report on nutrition research, the Dietary Guidelines for Americans, regulations promulgated by the FDA and USDA concerning nutrient content and health claims, and relevant IOM reports, as well as nutrition standards developed by industry groups and various public and private entities prior to developing recommendations. The recommendations represent voluntary recommendations that might inform and guide industry efforts to voluntarily change the promotion of foods and beverages to children.

Based on this study, in April of 2011, the IWG released for public comment a draft set of preliminary proposed nutrition principles for foods marketed to children and solicited public comment on the draft recommendations to gain insights on the practicality and feasibility of the proposed recommendations that would be in a report

to Congress. About 29,000 comments were received, 100 or so of which provided substantive discussion of the tentative proposed nutrition recommendations.

Also during this period, the Children's Food and Beverage Advertising Initiative, CFBAI, and its participants released a new set of food-category-specific uniform nutrition criteria that are being adopted by all members of the CFBAI. The CFBAI is a voluntary self-regulation program comprising many of the Nation's largest food and beverage companies. It is designed to encourage advertising of healthier dietary choices to children under the age of 12. There are 17 food manufacturers and restaurant chains that have signed on to this effort.

The newly released criteria represent a significant change on how the program operates, as each participating company has now agreed to follow a unified set of nutrition criteria. The goal is that participating companies will adopt these new criteria by December 31, 2013. According to the organization, its new criteria impose significant challenges on the participating companies and require reformulation of many of their products if they wish to continue advertising them after the criteria go into affect. The CFBAI estimates that one-third of the products currently advertised to children do not meet the criteria.

On review, it appears that with the new uniform criteria, the industry has made considerable efforts to design and reformulate its products closer to the principles tentatively proposed by the IWG. The new nutrition criteria of the CFBAI appear to be a step forward in changing the food advertising landscape, while also taking into consideration the feasibility of manufacturers making meaningful changes to the nutrient content of food products.

There are many aspects—or several aspects—of the criteria that are helpful in simplifying the IWG's preliminary approach. Overall, the CFBAI standards present in many respects a reasonable set of criteria to consider for revising the IWG preliminary proposal. While the criteria represent a very good start towards the marketing of healthier foods, food manufacturers should continue to work in improving the nutritional content of foods that they intend to market to children. We believe that additional changes to nutrition principles for advertising can be considered over time, and we believe that manufacturers will in fact make earnest progress.

Thank you very much, Chairman and members of the committee and subcommittees, for this opportunity to provide USDA's views.

[The prepared statement of Mr. Post follows:]

Statement of Dr. Robert Post

Deputy Director, Center for Nutrition Policy and Promotion (CNPP)

Before the Subcommittee on Commerce, Manufacturing, and Trade, and

the Subcommittee on Health

Committee on Energy and Commerce

Thank you, Madame Chairman, Mr. Chairman, and members of the Subcommittees, for this opportunity to discuss the Interagency Working Group (IWG) on Food Marketed to Children. I represent the U.S. Department of Agriculture (USDA) on the IWG and brought to it nearly 30 years of experience in food and nutrition policy, and food production, from within and external to the Federal sector, as well as years of experience as a professor of nutrition and food science. My role of reviewing the technical basis that served as the foundation for the IWG's nutrition principles was supported by many other highly qualified nutritionists in the USDA. Many of these individuals supported my role as USDA's policy official leading the development of the 2010 *Dietary Guidelines for Americans*, which USDA released jointly with Department of Health and Human Services (HHS) in January of this year.

The *Dietary Guidelines for Americans* is the key element that brings USDA into this forum. The 2010 *Dietary Guidelines for Americans* were released at a time of rising concern about the health of the American population. Its recommendations accommodate the reality that a large percentage of Americans are overweight or obese and/or at risk of various chronic diseases. The current epidemic of overweight and obese children in the United States is a major concern for USDA. Today, too many children are consuming diets with too many calories and not enough nutrients, and are not getting enough physical activity. Approximately 32 percent of

children and adolescents ages 2 to 19 years are overweight or obese, with 17 percent of children being obese. Risk factors for adult chronic diseases, such as cardiovascular disease and type 2 diabetes, are increasingly found in younger ages. Eating patterns established in childhood often track into later life, making early intervention on adopting healthy nutrition and physical activity behaviors a priority. The USDA supports a number of food and nutrition policies and programs that aim to improve not only the nutrition, but also the overall health and well-being of America's youth. This includes the *Dietary Guidelines for Americans*, as well as MyPlate, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) the Supplemental Nutrition Assistance Program (SNAP), and the National School Lunch and Breakfast programs.

The *Dietary Guidelines,* which are developed jointly by the USDA and HHS every five years, establish the scientific and policy basis for all Federal nutrition programs, including research, education, nutrition assistance, labeling, and nutrition promotion. The *Dietary Guidelines* offer advice for healthy Americans ages 2 years and over about making food choices that promote health and reduce disease risk. The *Dietary Guidelines* provide a consistent, science-based foundation for nutrition efforts by the various Government agencies. All federally-issued dietary guidance for the general public is required by law to be consistent with the *Dietary Guidelines for Americans*. For the 2010 *Dietary Guidelines for Americans,* children were a particularly important focus because of the growing body of evidence documenting the vital role that optimal nutrition plays throughout the lifespan.

The 2010 edition of the *Dietary Guidelines* comes at a critical juncture for America's health and prosperity. The 2010 *Guidelines* included two overarching principles, the first of which focuses on "maintaining calorie balance over time to achieve and sustain a healthy weight." The second principle focuses on "consuming nutrient-dense foods and beverages." By adopting the recommendations in the *Dietary Guidelines*, Americans can live healthier lives.

A review of scientific evidence that supported the 2010 *Dietary Guidelines* found that the overall environment in which many Americans now live, work, learn, and play has contributed to the obesity epidemic. Specifically, moderately strong evidence indicates that the food environment is associated with dietary intake, especially the under-consumption of vegetables and fruits and higher body weight. Ultimately, individuals choose the type and amount of food they eat and how physically active they are. However, choices are often limited by what is available in a person's environment, including stores, restaurants, schools, and worksites. Environment affects both sides of the calorie balance equation—it can promote the consumption of too many calories and discourage physical activity. Many children have a usual calorie intake that exceeds their daily needs, and they are not physically active enough to compensate for the calories they consume. The combination sets them on a track to gain weight.

Primary prevention of obesity and related risk factors is the single most powerful public health approach to reversing America's obesity epidemic over the long term. Lifelong habits are developed throughout childhood, and every opportunity should be provided to build healthy habits at the earliest stages of life. Therefore, a coordinated systems-wide approach is needed—an approach that engages all sectors of society, including individuals and families, educators,

communities and organizations, health professionals, small and large businesses, and policymakers.

For example, parents and caregivers serve as important role models for children and are responsible for providing them with nutritious foods and opportunities for physical activity. At the same time, outside influencers (e.g., policymakers, educators, health professionals, and the food industry) should build upon existing systems and infrastructures to support parents, caregivers, schools, and communities in facilitating positive eating and physical activity choices throughout life. Some examples of strategies that can be used to help create and promote healthy lifestyles for children include reducing children's television and computer screen time and developing and supporting effective policies to limit food and beverage marketing of unhealthy products to children.

In light of these concerns regarding the current childhood obesity epidemic in the United States, the 2009 Omnibus Appropriations Act called for the formation of an IWG to address the issue of food and beverage marketing to children. The working group was to be made up of Federal nutrition, health, and marketing experts from USDA, the Food and Drug Administration (FDA), the Centers for Disease Control and Prevention (CDC), and the Federal Trade Commission (FTC). As part of this effort, the USDA, represented by the Center for Nutrition Policy and Promotion, in collaboration with the CDC and FDA, contributed their expertise related to nutrition policy and regulations, as well as public health and science. The FTC representation was needed to provide leadership and expertise in food marketing trends and definitions.

Since May 2009, the IWG, led by the FTC, has met regularly to study and assess the science, examine the components of voluntary efforts already being employed by various organizations, and work through scenarios of applying different criteria to individual foods and foods marketed as meals. In developing a set of proposed recommendations, the IWG was guided primarily by dietary recommendations developed by USDA and HHS, as delineated in the 2010 Dietary Guidelines for Americans, and by regulations promulgated by the FDA and USDA governing nutrient content and health claims in food labeling. To satisfy the directive of the 2009 Omnibus Appropriations Act accompanying statement, which called for the creation of the IWG, the Working Group reviewed the Dietary Guidelines for Americans, the Dietary Guidelines Advisory Committee's report on nutrition research, regulations promulgated by the FDA and USDA governing nutrient content and health claims in food labeling, relevant IOM reports, and nutrition standards developed by industry groups and various public and private entities prior to developing recommendations. The recommendations represent "voluntary recommendations" that might inform and guide industry efforts to voluntarily change the promotion of foods and beverages to children.

In April 2011, the IWG released for public comment a draft set of proposed nutrition principles for food marketed to children and solicited public comment on the draft recommendations between April and July 2011. Soliciting comments was intended to gain insights on the practicality and feasibility of the proposed recommendations that would be in a report to Congress. About 29,000 comments were received, a number of which provided substantive discussion of the proposed nutrition recommendations.

Also, during this period, in July 2011, the Children's Food and Beverage Advertising Initiative (CFBAI) of the Council of Better Business Bureaus (BBB) and its participants released a new set of food category-specific, uniform nutrition criteria that are being adopted by all members of the CFBAI.

The CFBAI is a voluntary self-regulation program comprising many of the Nation's largest food and beverage companies, which was designed to encourage the advertising of healthier dietary choices and lifestyles to children under the age of 12. There are 17 food manufacturers and restaurant chains that have signed onto the CFBAI effort. Prior to July 2011, the CFBAI criteria consisted of company-specific nutrition standards that each participating company developed and adopted independently. This lack of uniformity limited the success of this voluntary effort in getting healthier products marketed to children. Therefore, the newly released CFBAI uniform nutrition criteria represent a significant change in how the program operates, as each participating company has now agreed to follow a unified set of nutrition criteria. The goal is that the participating companies will fulfill their pledges and adopt these new criteria by December 31, 2013. According to the CFBAI, the unified set of nutrition criteria impose significant challenges on the participants and require reformulation of many of their products that they currently advertise if they wish to continue advertising them after the criteria go into effect. The CFBAI estimates that one-third of the products currently advertised to children do not meet the new CFBAI criteria.

On review, it appears that, with the new uniform CFBAI criteria, the food industry has made considerable efforts to design and reformulate its products closer to the principles proposed by

the IWG. The new uniform CFBAI nutrition criteria appear to be a step forward in changing the food advertising landscape, while also taking into consideration the feasibility of manufacturers making meaningful changes to the nutrient content of food products. In particular, there are several aspects of the CFBAI criteria that are helpful in simplifying the IWG's proposed approach.

- The CFBAI sets criteria for 10 product categories that were developed based on grouping foods with similar nutrient profiles and, in some cases, similar processing methods. Therefore, nutrition criteria can be created and tailored to each category, accounting for differences in naturally occurring levels of food components and nutrients, such as sugar or sodium; and the challenges posed by processing techniques in reformulating the foods.
- The CFBAI uses *labeled serving size* combined with calorie limits as the basis to apply the criteria. The IWG's proposal uses the Reference Amount Customarily Consumed concept as the basis for applying nutrition criteria, which is a concept that is part of the Federal nutrition labeling regulations. It ensures uniformity in declaring nutrients on Nutrition Facts across similar foods and standardizes the basis for nutrient content claims. However, the use of *labeled serving size,* in combination with proposed limits on the calories per serving, provides a mechanism to simplify the application of the nutrition criteria to foods as packaged.
- The CFBAI criteria include limits for saturated fat, trans fat, total sugar, and sodium, which are the same nutrients and food components targeted by the IWG's proposed criteria. While there are some differences between the IWG and CFBAI in the thresholds for these nutrients and food components, these differences are, for the most part, not critieal.

- Other aspects of the CFBAI criteria are still under review.

Overall, the CFBAI standards present, in many respects, a reasonable set of criteria to consider for revising the IWG draft proposal. However, while the CFBAI criteria represent a very good start towards the marketing of healthier foods to children, food manufacturers should continue to work at improving the nutritional content of foods that they intend to market to children. Additional changes to the nutrition principles for advertising can be considered over time in order to strengthen the criteria and better align them with Federal policies, including the 2010 *Dietary Guidelines* (and future editions); FDA and USDA regulations governing nutrient content and health claims in food labeling; the Dietary Reference Intakes; and other child-focused Federal nutrition programs. It is USDA's expectation and that of the IWG members that food manufacturers will make earnest progress in reformulating products that are advertised to children.

Thank you, Madame Chairman and Mr. Chairman, and members of the Subcommittees, for this opportunity to provide USDA's views on the IWG's proposed voluntary nutrition principles to guide industry self-regulatory efforts for marketing foods to children.

Mrs. BONO MACK. Thank you, Dr. Post.

Mr. Vladeck, you are recognized for 5 minutes.

STATEMENT OF DAVID C. VLADECK

Mr. VLADECK. Good morning, Chairman Bono Mack and members of the subcommittee. I am David Vladeck, Director of the Federal Trade Commission's Bureau of Consumer Protection. I appreciate the opportunity to be here today to discuss the important issue of food marketing to children.

Every parent knows how difficult it is to get children to eat a healthy diet. We rarely see children having tantrums in the produce aisles pleading for mom or dad to load up the shopping cart with broccoli or Brussels sprouts. Indeed, a cottage industry has formed to advise parents on ways to smuggle healthy ingredients into foods their children will eat.

The FTC wants to support parents in their challenging quest to get their kids to eat healthier foods, including, by the way, yogurt, peanut butter, Cheerios, some of the other foods that were mentioned this morning. But let me be clear about this. Not by issuing regulations. The FTC has long encouraged strong and meaningful industry self-regulation. We have sent reports to Congress with recommendations on a broad range of self-regulatory initiatives, including media violence and alcohol marketing, in addition to food marketing to children.

Regardless of what role marketing may or may not play in the problem of childhood obesity, the marketing ingenuity of America's food manufacturers and entertainment providers can be an important part of the solution. The Commission began to focus on the issue of childhood obesity in July, 2005, when the FTC and the Department of Health and Human Services held a workshop on marketing, self-regulation, and childhood obesity which, by the way, sparked the industry self-regulatory program.

Several months ago, acting pursuant to a bipartisan directive from Congress, the working group released for comment proposed recommendations for voluntary industry self-regulation—voluntary industry self-regulation. 29,000 comments were received.

Now, Congress did not require us to seek public comment or engage with stakeholders, but we did so because we wanted the working group process that was used to shape these recommendations to be as open and transparent as possible. And because it is ultimately up to the food companies to decide whether to adopt the guidelines, we needed their input to ensure that our recommendations to Congress would be attainable for industry.

The working group took Congress' directive seriously, and the draft recommendations we issued were ambitious. As we studied the comments, however, we realized that perhaps we were too ambitious.

One significant comment came from the Children's Food and Beverage Advertising Initiative, the industry self-regulatory group, the CFBAI. The CFBAI's comments announced substantial improvements in its self-regulatory program, not just by tightening standards but most notably by adopting uniform nutritional criteria for its 17 member companies, making the program much more transparent and strong.

The framework of the CFBAI program has much to commend it, and I am confident that this framework will be reflected in the final working group report. But the FTC's focus and expertise is on marketing, not nutrition. So let me highlight for you the 3 most significant marketing changes that I contemplate with respect to the final working group report. Of course, these changes will have to be approved by the Commission and the other working group agencies, but I believe that these changes will focus the final report on ads targeted directly to children and will thereby avoid having the working group's recommendations covering marketing activities that are family oriented or directed to a more general audience.

First, I anticipate that the final report will not encompass adolescents 12 to 17 within the scope of covered marketing, except for certain in-school marketing activities; second, philanthropic activities, entertainment and sporting events also do not appear to warrant inclusion with marketing that is child directed; and, third, I do not anticipate that the final report will recommend that food companies change the trade dress elements of their packaging or remove brand equity characters from food products that do not meet the nutritional recommendations.

Parents don't have an easy task when it comes to getting their kids to eat healthier foods. The FTC is committed to working with its sister agencies and all stakeholders to make that burden on parents less daunting.

On behalf of the Commission, I would like to thank the committee and subcommittees for this opportunity to present testimony on this important issue. Thank you very much.

[The prepared statement of Mr. Vladeck follows:]

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

ON THE

INTERAGENCY WORKING GROUP ON FOOD MARKETED TO CHILDREN

Before the

House Energy and Commerce Committee
Subcommittee on Commerce, Manufacturing, and Trade
and the
Subcommittee on Health

United States House of Representatives

Washington, D.C.

October 12, 2011

Chairmen, Ranking Members and Members of the Committee and Subcommittees, I am David C. Vladeck, Director of the Bureau of Consumer Protection of the Federal Trade Commission (FTC or Commission).[1] The Commission is pleased to have this opportunity to provide information about the FTC's efforts to address childhood obesity and, in particular, to describe our participation in the Interagency Working Group on Food Marketed to Children and to highlight the Group's progress in recent months. Simply put, the Commission and other agencies are taking into account the comments of stakeholders, including input from members of Congress, and substantially modifying the Working Group's recommendations.

Working Group Charge

As you are aware, the Interagency Working Group was convened in 2009 in response to a bipartisan effort led by Senator Harkin and former Senator Brownback. The Working Group, with its four member agencies – the Centers for Disease Control and Prevention (CDC), the FTC, the Food and Drug Administration (FDA), and the U.S. Department of Agriculture (USDA) – was charged by the Appropriations Committee with developing nutrition standards for foods marketed to children and defining the scope of marketing to which those standards would apply.

Specifically, the directive set out in the accompanying statement to the 2009 Omnibus Appropriations Act (H.R. 1105) reads:

> The FTC, together with the Commissioner of the Food and Drug Administration, the Director of the Centers for Disease Control and Prevention, and the Secretary

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[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily represent the views of the Commission or of any Commissioner.

> of Agriculture, who have expertise and experience in child nutrition, child health, psychology, education, marketing, and other fields relevant to food and beverage marketing and child nutrition standards shall establish the Interagency Working Group on Food Marketed to Children (Working Group). The Working Group is directed to conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children. In developing such standards, the Working Group is directed to consider (1) positive and negative contributions of nutrients, ingredients, and food (including calories, portion size, saturated fat, *trans* fat, sodium, added sugars, and the presence of nutrients, fruits, vegetables, and whole grains) to the diets of such children; and (2) evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children. The Working Group will determine the scope of the media to which such standards should apply. The Working Group shall submit to Congress, not later than July 15, 2010, a report containing the findings and recommendations of the Working Group.[2]

This testimony will describe the Commission's efforts to fulfill that charge by developing recommendations to Congress for voluntary principles to guide industry self-regulation. The testimony will focus on the FTC's role, as the agency with marketing expertise, to develop workable parameters for defining children's marketing. This testimony leaves to the Department of Health and Human Services (HHS) and USDA, as the agencies with health and nutrition expertise, the discussion of how the Working Group is shaping its proposal on the nutritional principles for food marketed to children. First, however, the Commission would like to put this current effort in context by explaining the FTC's activities preceding the formation of the Working Group.

FTC Focus on Self-Regulation

The FTC has long been an advocate for strong and meaningful self-regulation to improve

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[2] Omnibus Appropriations Act, 2009, Division D – Financial Services and General Federal Government, Appropriations Act, 2009, Pub. L. No. 111-8, House Appropriations Committee Print at 983-84.

the nutritional profile of the foods marketed directly to children. Childhood obesity now represents one of the most serious and costly health threats facing the United States. Over the past three decades, rates of obesity have grown at an alarming pace.[3] Tackling childhood obesity is a complex task that requires the combined and cooperative efforts of all segments of society – family, schools, communities, government, and the marketplace.

In keeping with our jurisdiction and expertise, the FTC's efforts have focused on the marketplace. The Commission has always taken the view that, regardless of whether or to what extent food marketing may have contributed to the problem of childhood obesity, it is clear that marketing can be an important part of the solution. Marketing can be an effective tool to encourage children to make more healthful choices, and many food marketers have already pledged to play a role in improving children's nutrition and health through marketing.

In addition, the Institute of Medicine has reported that there is strong evidence that television advertising influences the food and beverage preferences, purchase requests, and short-term diets of children under 12.[4] That evidence does not factor in the other avenues, in addition to TV advertising, that marketers use to reach children. The FTC's 2008 report to Congress on food marketing expenditures and activities revealed that, in the year studied, the industry spent more than $1.6 billion dollars to market food to children using not just TV advertising, but also highly integrated marketing campaigns that weave together Internet, digital

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[3] Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963-65 Through 2007-2008, *available at* www.cdc.gov/nchs/data/hestat/obesity_child_07_08.htm.

[4] Institute of Medicine, *Food Marketing to Children and Youth: Threat or Opportunity?* (The National Academies Press 2006) at 307-308. The IOM also found strong evidence that exposure to television advertising is associated with adiposity in both children under 12 and teens 12-18 years. The IOM noted that "even a small influence, aggregated over the entire population of American children and youth, would be consequential in impact." *Id.* at 308.

marketing, word of mouth, cross-promotions with popular movies, in-school activities, and many other techniques.[5] The Commission's efforts to date have been to encourage food companies to harness that tremendous marketing power and creative know-how to encourage children to eat nutritious foods. The Commission appreciates, however, that to be successful in this endeavor food companies must be given leeway to shape an approach that will promote children's health, without being overly burdensome on industry.

The focus on industry self-regulation has produced positive results. The FTC's first workshop on this issue was in 2005 – a joint effort with HHS – and resulted in the 2006 report to Congress. The Commission firmly believes that the FTC/HHS report was directly responsible for the 2006 launch of a major initiative by the food industry and that subsequent reports have led to the impressive expansion of that initiative since its launch. The 2006 report commended the early efforts of individual food advertisers to promote healthier choices and the efforts of the Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus (CBBB) to foster responsible advertising. One of the report's key recommendations to food companies was to "review and revise their marketing practices with the goal of improving the overall nutritional profile of the foods marketed to children, for example, by adopting minimum nutritional standards for the foods they market to children, or by otherwise shifting emphasis to lower-calorie, more nutritious products."[6] The agencies emphasized the value of a self-

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[5] FTC, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, Report to Congress (July 2008). The FTC is currently completing a follow-up study of food marketing to children and adolescents, which it plans to submit to Congress later this year.

[6] The joint FTC/HHS workshop was held in July 2005, and a report issued in April 2006. FTC/HHS, *Perspectives on Marketing, Self-Regulation, and Childhood Obesity: A Report of a Joint Workshop* (April 2006), Exec. Summary at iii-iv.

regulatory approach, noting that "effective industry self-regulation can have significant benefits, and can, in many instances, address problems more quickly, creatively, and flexibly than government regulation."[7] The joint report also pointed out another obvious advantage to self-regulation -- that it is "particularly beneficial in instances where it covers marketing activities that the FTC, FDA, and other agencies lack the authority to challenge."[8] The Children's Food and Beverage Advertising Initiative (CFBAI), under the supervision of the CBBB, was launched later that same year.[9]

The Commission has publicly supported the CFBAI's effort to develop a self-regulatory program, from its inception, and has encouraged broad industry participation in the initiative. The Commission has been pleased to see the program grow from its 10 charter companies to its current 17 members, representing 75 percent of total food and beverage advertising to children.[10] Along the way, the FTC has pointed to areas where the program could be strengthened, and the interaction between the CFBAI and the Commission has always been constructive.

Working Group Process

The FTC's participation in the Interagency Working Group has been shaped by the agency's commitment to making industry self-regulation work. Children's health is the ultimate goal, and marketing of more nutritious foods is one effective tool to help achieve that goal;

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[7] *Id.* at 39, quoting former FTC Chairman Deborah Majoras.

[8] *Id.* at 39.

[9] At its launch, the initiative consisted of pledges by ten food, beverage, and restaurant companies to adhere to their own individualized nutrition principles when marketing foods to children.

[10] Council of Better Business Bureaus, *The Children's Food & Beverage Advertising Initiative in Action: A Report on Compliance and Implementation During 2009* (Dec. 2010) at I.

however, we cannot ask more of food marketers than they can reasonably deliver if we expect their continued cooperation in this effort. Our commitment to finding the best balance between what is best for children's health and what is workable for industry has guided this entire process. The Commission has neither the desire nor the authority to promulgate regulations governing the marketing of food to children. The Working Group's proposal is strictly voluntary. The Commission recognizes that some forms of regulatory action could raise First Amendment concerns.

One of the first steps the Working Group took, before commencing work on its initial proposal, was to conduct a thorough review of all of the existing self-regulatory models. This included the pledges of the CFBAI member companies, as well as other nutrition standards for children's food marketing developed by private/public partnerships, most notably the Alliance for a Healthier Generation's guidelines on the sale of competitive foods and beverages in schools. Much more went into the study-phase of the Working Group's process: a review of the available literature on food marketing to children (both the FTC's 2008 study of food marketing activities and expenditures, and other relevant reports by the Institute of Medicine) and a review of current federal nutrition policy and the science behind it (most notably the 2010 Dietary Guidelines for Americans (DGA) and the Dietary Advisory Committee Report on which the 2010 DGA are based). Throughout that process, the Working Group continued to return to what would be reasonably achievable for industry. USDA staff, for instance, generated multiple food analyses to allow the Working Group to assess how different variations of proposed nutrition principles would impact foods currently marketed to children.

The Working Group decided to preview its preliminary efforts at a public workshop[11] and then to more formally solicit stakeholder comment by issuing a draft of the proposed principles in April 2011.[12] The Working Group wanted to ensure that the recommendations set out in its final report to Congress would be strong and also pragmatic. The Working Group did not want to be in a position of making recommendations to Congress without having provided an opportunity for those stakeholders most affected by the recommendations to provide their input. The goal is to strengthen self-regulatory efforts, not stifle them.

The Working Group's draft generated strong reactions from industry and public health advocates alike. The Working Group received 29,000 comments, including more than 28,000 from write-in campaigns supporting the proposal.[13] The 100 or so substantively distinct comments from industry and advocacy groups were divided in support or opposition to the proposal. A common theme of industry comments was that the proposal was simply unworkable and should be withdrawn. Consumer and public health organizations strongly supported the proposal as one that would significantly improve the nutritional profile of foods marketed to children.

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[11] FTC Public Forum, *Sizing Up: Food Marketing and Childhood Obesity* (Dec. 15, 2009), *forum materials and transcript available at* www.ftc.gov/bcp/workshops/sizingup/index.shtml.

[12] Interagency Working Group on Food Marketed to Children: Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts – Request for Comments (April 28, 2011), *available at* www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf. During the 75-day comment period, the Working Group also hosted a public forum to provide additional opportunity for stakeholder input. A transcript of the May 24, 2011 forum is available at www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript.pdf.

[13] All unique comments submitted during the comment period are available at www.ftc.gov/os/comments/foodmarketingstudy/index.shtm.

Perhaps most important, the comment period provided an opportunity for the CFBAI to finalize and submit to the Working Group a uniform set of nutrition principles of its own. The CFBAI proposal is considerably stronger than the current individual pledges of the member companies, and also reasonably achievable within a shorter time frame than the five years initially proposed by the Working Group.[14] The Working Group recognizes that the CFBAI effort represents substantial progress by industry and that its approach warrants careful consideration.

As a result of the many comments we received from various stakeholders and an assessment of the CFBAI proposal, the Working Group is in the midst of making significant revisions to its preliminary proposal. The anticipated revisions go a long way to address industry's concerns and share much in common with the new CFBAI uniform nutrition standards. Although the report is not yet final, the following highlights some of the more significant revisions contemplated for defining the scope of children's marketing to which the nutrition recommendations would apply.

Key Aspects of Recommendations on Scope of Children's Marketing[15]

The FTC's primary role in the Working Group has been to define the scope of children's marketing to which the nutrition recommendations developed by the CDC, FDA, and USDA

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[14] CFBAI proposed limits on calories, saturated fat, trans fat, sodium and total sugars across ten categories of foods and also proposed minimum contributions of nutrients to encourage for each category. The CFBAI members committed to meeting these uniform nutrition principles for all foods marketed to children by their companies before 2014.

[15] The revisions described in this section are recommendations contemplated by the Working Group and have not yet been formally approved by the member agencies. The report will be voted on by the Commission and submitted for final approval by HHS and USDA before it is submitted to Congress.

would apply. Since issuing the preliminary proposal in April, which broadly covered all forms of marketing to children ages 2 to 17 years (as required by the Appropriations Committee), the Commission has taken a fresh look at the marketing recommendations and is contemplating revising them to more narrowly focus on those marketing techniques that our studies suggest are used most extensively to market to children.

The Commission is making a real effort to avoid pulling in marketing activities that are family-oriented or directed to a more general audience and to limit the revised approach to marketing that more exclusively targets the child only. The Commission staff believes that this approach resolves many of the flashpoints that generated strongest industry concern. For instance, FTC staff has determined that, with the exception of certain in-school marketing activities, it is not necessary to encompass adolescents ages 12 to 17 within the scope of covered marketing. In fact, it is often difficult to distinguish marketing designed to appeal to this age group from marketing directed to a general or adult audience. In addition, the FTC staff believes that philanthropic activities, charitable events, community programs, entertainment and sporting events, and theme parks are, for the most part, directed to families or the general community and do not warrant inclusion with more specifically child-directed marketing. Moreover, it would be counterproductive to discourage food company sponsorship of these activities to the extent that many benefit children's health by promoting physical activity. Finally, the Commission staff does not contemplate recommending that food companies change the trade dress elements of their packaging or remove brand equity characters from food products that don't meet nutrition recommendations.[16] These elements of packaging, although appealing to children, are also

[16] The FTC staff is also recommending to the Working Group that in-store displays and packaging of seasonal or holiday confections not fall within the scope of covered media because

elements of marketing to a broader audience and are inextricably tied to the food's brand identity.

The marketing activities we contemplate for inclusion within the scope of children's media are those that are used most extensively to specifically target children ages 2 to 11: traditional media, including television, print, and radio; online, digital, and social marketing; advertising or product placement in movies and video games; and certain specific marketing techniques like cross-promotions, sweepstakes, and premiums. In addition, the Commission staff contemplates covering marketing activities in schools for both children and adolescents.

The Commission staff has also reexamined the approach to the criteria proposed for assessing whether marketing in these categories is directed to children and is recommending revisions to ensure that the criteria are flexible enough to be neither over-inclusive – covering marketing to a general or family audience – nor under-inclusive – leaving out marketing that is clearly targeted to children.[17]

As currently contemplated, the Working Group recommendations on the scope of children's media are substantially similar to the approach used currently by the vast majority of companies participating in the CFBAI self-regulatory program and will cover all the most important aspects of children's marketing without being unduly restrictive.

Conclusion

The Commission thanks this Committee for focusing attention on the challenging

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they are not marketing directed to children, as much as marketing to parents or other adults.

[17] The Commission is also proposing adjusting its proposed audience share criterion for the traditional media marketing category (television, print, and radio) from 30 percent children ages 2 to 11 years, to the same 35 percent audience share used by the CFBAI member companies.

question of how to combat childhood obesity and for giving the Working Group members an opportunity to discuss our shared goal of improving children's health.

Mrs. BONO MACK. Thank you, Mr. Vladeck.

The Chair will recognize herself for the first 5 minutes of questioning, and I will start with you, Mr. Vladeck. It is good to see you again. A different issue that we are working on today.

But before I go to you, I just want to sort of answer something that Mr. Waxman had said. He and I had worked together on tobacco issues. I have been a staunch supporter of the anti-tobacco work both on the Federal level and the State. And I also have been working very hard to address the issue of prescription drug abuse in our adolescents, and I wish that the panel would devote as much attention to that as we are to this.

You spoke about kids having tantrums in the vegetable aisles. When I was a child—I am having flashbacks to my own childhood as I sit here and listen to you. And I remember being forced—I don't know if anybody in the audience was forced to eat cooked liver as a child, but it would smell up the house—clearly, some people were—it would smell up the house for a week. But our mothers thought it was good for us. And you know what? They made us eat it because they thought it was good for us.

But I have been looking at this issue of childhood obesity for years. Dr. Frist and I introduced a bill years ago, the IMPACT Act, to try to address this problem.

But I don't think this is the answer. I don't think we are there yet. And I recognize all of the work you have done, and I am happy to continue to work with you, but I just don't think we are there yet.

And, Mr. Vladeck, you testified that the FTC is currently completing a follow-up study of food marketing to children to its 2008 study, and it will submit it to Congress later this year. Shouldn't the working group report wait at a minimum until the FTC has concluded that study and the study required by the 2009 appropriations language? And wouldn't the working group benefit from the FTC's report?

Mr. VLADECK. I think that that is a possible approach.

We are, of course, dealing with a mandate from Congress that required us to finish our work a year ago; and, as has been pointed out on numerous occasions this morning, we are late. This has been a complicated task, and part of the delay has been occasioned by our effort to engage closely with stakeholders.

This process has been a long one in part because we have held 2 workshops, we have solicited comments. Industry has, to its credit, come forward with a dramatic shift in its own self-regulatory approach that we need to take into account.

I don't know whether at this point it makes sense for us to wait for what will be at least another 6 months or so while we analyze the data that we got from industry. I think my colleagues' testimony this morning makes this clear. I think we are at a point where I wouldn't say that there is clear convergence between the working group and industry, but the gap has been narrowed to a point where I think we should go ahead, try to finish up. These are voluntary guidelines.

Mrs. BONO MACK. Let me jump ahead again why I think we are missing the boat and I think it is a mistake. Because one hand of government doesn't want to talk to the other or wait to work to-

gether collaboratively on this. And I will turn to Dr. Post and Dr. Dietz for their answer to this.

I grew up as a gymnast and I would spend an awful lot of time in the gym as a child. I mean, I am 5'7". It was kind of a dumb sport to do when you are a kid being so tall, but I did it. I grew up—I literally grew up on SpaghettiO's and some other cereal. That is what I would eat every day.

You testified that you do not believe that the lack of exercise is contributing to this problem. I believe that is what I heard Dr. Post say, that you have—is that what you said? I might have misheard you. What is the interplay between exercise and diet? Where does it come in?

Mr. POST. In fact, the 2010 Dietary Guidelines stress that we are, in fact, at energy imbalance. We need to balance our calories with physical exercise.

Mrs. BONO MACK. What does that mean to a mother? You are basically saying that the amount of television and what you eat, that it doesn't matter. That is really what you said. Again, I think you all are trying to throw a panacea out there.

And I will tell you as a mom—this is even far more complicated than that. Mothers are looking for time and answers to, you know, how do we raise our children when we are busy working and how do we do it. Maybe we have to look at the fact that mothers are busy and stressed and it is easier to grab a box from the center aisle than to go to the produce aisles.

But this troubles me, because I am convinced that our children have to get active. And if they were active, they wouldn't be watching the TV and they might not see the ads that you are afraid of. Is that not true?

Mr. POST. We are very supportive in all of our programs at USDA to balance the idea of energy and physical activity or calories in. I think, though, that the comment was made by Dr. Dietz in the connection between advertising——

Mrs. BONO MACK. OK. Can Dr. Dietz then have the last 22 seconds to solve this problem for me—in 22 seconds?

Mr. DIETZ. I think physical activity in children is critically important, and the best data we have suggests that it has declined over time. It is certainly a contributor. But one of the things about obesity is that I don't think any single answer is going to work. I think that we require a multisectoral, a multicomponent approach; and physical activity is one of those approaches.

Mrs. BONO MACK. Thank you. My time has expired. And I appreciate your answer very much.

The Chair will recognize Mr. Butterfield for 5 minutes.

Mr. BUTTERFIELD. I thank the chairman.

Mr. Vladeck, in the Trade Commission's memo accompanying the release of the proposed standards back in April, the Federal Trade Commission indicated that the goal was to steer children away from foods of little or no nutritional value. My question is, what evidence do you have that cereal and foods the FDA has deemed healthy are foods of little or no nutritional value?

Mr. VLADECK. Well, I will ultimately refer that question to my colleagues who work for the nutrition agencies.

The way our approach worked was quite simple. We want to encourage kids to eat healthy foods that make meaningful contributions to diet. Many cereals do that. And we wanted to discourage kids from eating foods that do not make a meaningful contribution to their diet. How the FDA and USDA categorize foods, that is not the FTC's expertise. And I would defer to my colleagues.

Mr. BUTTERFIELD. All right. Dr. Dietz, Dr. Post, do you want to try that one?

Mr. DIETZ. One of the principles that we included was that foods marketed to children should contain a meaningful amount of a food to encourage according to the dietary guidelines, such as fruits, vegetables, whole grains, or dairy. So it was less about restricting advertising and more about encouraging the advertising of foods that would contribute to a healthy diet.

Mr. POST. And to add to that, of course, the idea is that we need to consume less often certain food constituents like sodium and saturated fat, and certainly added sugars. So there was an emphasis, here again, to promote the more healthful choices out there and empower parents with the ability to make those choices for their children.

Mr. BUTTERFIELD. As I recall, Congress directed the working group to include in its study consideration of the role of calories in obesity. But it seems that the working group did not include calories in the standards. That is despite the fact that the working group members have consistently said balancing calories in against calories out is the most effective way for consumers to maintain a healthy weight.

For example, the FDA has said that although there is much discussion about, one, the appropriate makeup of diet in terms of relative proportions of micronutrients and, two, the foods that provide those micronutrients for maintenance of a healthy body weight, it is the consumption and expenditure of calories that is most important. Health and Human Services has said that a calorie is a calorie is a calorie, whether it comes from fat or carbohydrates. Anything eaten in excess can lead to weight gain. You can lose weight by eating less calories and by increasing your physical activity.

Despite Congress' directive to consider calories, and despite your own agency's statements that calories are the key to maintaining a healthy weight, your proposal it seems does not address calories. Help me with this, please, either one of you.

Mr. POST. Yes. I would be happy to. The thresholds for the added sugars and the solid fats are a way to get to the calories issue. By setting thresholds, some level, the tentative or the preliminary proposal, in fact, had a proxy for the calories issue. And by promoting food groups like low-fat and fat-free dairy, more nutrient-dense foods, fruits and vegetables, that is also a way of decreasing calories from added sugars and solid fats. So we dealt with the calories issue by the types of nutrients and food components that are the subject of the proposal.

Mr. DIETZ. Just to add to that, we were compelled by the capacity of certain foods to auto-regulate weight independent of calories. So we knew that low energy density foods, foods that contained fewer calories per gram, such as fruits and vegetables, were more filling than other foods. And in addition, we knew that fiber in-

creased the regulation of satiety. So that if those foods contained a meaningful amount of fruits, vegetables, and whole grains, satiety would be automatically regulated independent of calories.

Mr. BUTTERFIELD. I am going to start this question. I might have to finish it during the second round. Dr. Dietz, industry is concerned about obesity. In fact, broadcasters donate a tremendous amount of time to produce and air public service announcements, including anti-obesity public service announcements to their viewers and listeners. Earlier this year, NAB coordinated a let's move flash workout, featuring Beyonce, in support of First Lady Obama's initiative aimed at curbing childhood obesity. Middle school kids across the country participated in this endeavor, as well as local radio and television stations, to underscore the importance of physical activity as part of a healthy lifestyle for children.

I am going to continue this question, Madam Chairman, in the second round. I yield back.

Mrs. BONO MACK. I appreciate that. The Chair now recognizes Mr. Pitts for 5 minutes.

Mr. PITTS. Thank you, Madam Chair. And I apologize for having stepped out to testify in front of the Rules Committee. In fiscal year 2009, Congress explicitly directed the IWG to complete a study and a report to Congress. However, the guidelines you released in late April did not include a study, and the guidelines you developed are directed to industry, not a report to Congress.

I have a series of questions here that each of you can respond to. Have you calculated the impact of your food marketing restrictions on charitable organizations like food banks, Dr. Dietz?

Mr. DIETZ. No, we did not. That was not part of the scope of the report as we were instructed.

Mr. PITTS. OK. Have you calculated the impact of your food marketing restrictions on jobs in the food industry? Any of you can respond.

Mr. DIETZ. No, we have not. And I know that some numbers have been promoted today that suggest that jobs will be lost. And I think one of the people on the second panel is going to present data which contradicts that assertion.

Mr. PITTS. What about have you calculated the impact of your food marketing restrictions on jobs in the broadcasting industry or cable?

Mr. DIETZ. No, we have not, although we think that food advertising, food marketing to children will continue, and that for example the promotion of healthy products that would replace those that are currently advertised would result in no loss of jobs in the advertising industry.

Mr. VLADECK. Can I add one comment?

Mr. PITTS. Yes, Mr. Vladeck.

Mr. VLADECK. The CFBAI proposal, which sort of moves the discussion in ways that we had not anticipated when we issued our preliminary report, I think reflect industry's view that it can move ahead without sacrificing economically. I assume that the CFBAI proposal is based on industry's clear-eyed assessment of the costs and benefits of making these changes to their products. And so, you know, part of the concerns that you are raising I think go to the economic rationality of our proposal. I think that, you know, there

has been a change in the game. And it is not at all clear to me that those concerns are necessarily going to have traction given where the industry itself has moved to.

Mr. PITTS. Well, what about did you consider the impact of your food marketing restrictions on the price of food?

Mr. VLADECK. Sir, we asked comment broadly in large measure to have a dialogue with stakeholders, including food producers and marketers, about what would be the impact of adoption of these guidelines. So, you know, those are the kinds of issues that we tried to discuss. We did not get in our comments any information of the kind that you have just identified. This was not an issue that was raised by any of the 29,000 commenters that commented on the preliminary draft.

Mr. PITTS. OK. The nutrition standards underlying your proposal are inconsistent with, and stricter than the standards for the standards USDA applies to school lunches or the WIC program.

Does it make sense that the government has two sets of nutrition standards, one for the food a child can be served in school and a second for a food advertisement a child can see on a cartoon network? And why?

Mr. POST. The thread that holds all of the food nutrition programs together in the Federal sector is the Dietary Guidelines for Americans. And that, in fact, is the foundation that sets directional approaches for nutrients and foods: more food groups, less of the nutrients of health concern. And so that is, in fact, the way all of our efforts are joined. When it comes to differences between the IWG's proposal and programs like WIC, we have got to understand that these are programs that focus on a particular need for a particular circumstance or a client that has particular nutritional needs. So the market baskets would be different and the food meal patterns would be different for postpartum moms, for children up to 5 years who are looking for nutritional assistance. And the same thing would apply to the school program, where a complete meal is depended on for giving the nutrients and the food groups that a student needs. So you would see those differences. There really isn't a valid comparison. But the foundation is the same. And that is the dietary guidelines for Americans.

Mr. PITTS. If private industry—my time is almost up—is already doing this, doesn't that mean that government action isn't necessary?

Mr. VLADECK. We were asked by Congress to submit a report, and we will do that. I think that government action here is simply giving our views about what would be the kinds of foods we would like to see marketed to kids. Again, I can't stress enough that these are voluntary guidelines. And our mandate was to help give guidance to industry. And that is what we are trying do.

Mr. PITTS. Thank you. My time has expired.

Mrs. BONO MACK. Thank the gentleman. The Chair recognizes Mr. Engel for 5 minutes.

Mr. ENGEL. Thank you, Madam Chair. Mr. Vladeck, I am glad you reemphasized voluntary guidelines, because this is all that this is. I have heard some comments from my friends on the other side of the aisle that I really just find incredulous. I mean if we want to have the head in the sand approach and pretend that obesity is

not a problem, or know that it is a problem but have this sort of visceral reaction to government doing anything about anything, then I think we are really just frankly kidding ourselves. There can be no substitute for the family. There can be no substitute for parents. Government is not in it to substitute. But I think that government, the panel of professionals and people doing this report can help guide us. You know, I am a father of three. My kids are grown now. Any help that I could get I would take. And what responsible parent wouldn't do it?

So rather than being attacked for government intrusion or other such nonsense, you know, we should be saying thank you, because I think your report helps all of us as parents and all of us as a country. Obesity is a problem that we can't ignore, and we need engagement from all sides. Of course responsible parenting, as well as industry participation, government participation. I mean working together, you know, maybe we can get at this problem. We have directed FDA and FTC and CDC and USDA to come up with these proposals. And I think that the proposal you have all come up with is a reasonable response that all parties should be able to support. It is a voluntary proposal, and it meets the industry more than halfway. And it is a positive step forward as we all work together.

Now, let's look at some statistics. Obesity costs the country $147 billion per year in direct medical costs, which is over 9 percent of all medical spending. And economists have calculated that the total economic cost of the obesity epidemic nears $270 billion per year. Kids would just have one of the testimonies here before, I think it was Dr. Post talked about kids drinking Kool-Aid or whatever it is. They don't eat fruit. They don't drink things. And this is something that we have perpetuated on these kids.

I want to just ask you about industry self-regulation. I am told that the percentage of unhealthy TV food advertisements has decreased significantly since industry tried to self-regulate in 2006. Is that true? Is it not true? How is the industry self-regulation working, in your opinion?

Mr. DIETZ. There was a recent paper which indicated that the products advertised by adherence of CFBAI decreased by about 10 percent, but were replaced by an increase in fast food restaurant advertising. I would describe that as a modest change.

Mr. ENGEL. Well, I think that that shows that we still have a lot of work do, and that if we can use some commonsense approaches, which is what you are doing with these voluntary guidelines, I think it is very important. You know, Mr. Waxman before raised tobacco. I mean I have been in this Congress long enough to remember when the tobacco industry came and sat right in front of us and told us that tobacco was not something that had injury, that tobacco was just fine. And the industry resented it, and resisted for years and years. I mean we now have stamped on cigarettes that tobacco kills, yet people buy tobacco and smoke them. I mean we are not talking about a panel that intrudes into people's lives and tells them what they can or cannot do. We are talking about a report that helps us understand the problem and helps us to take steps as a country to ameliorate the problem.

So I just want to thank you, and unless you have anything else to add, I will yield back my time. Because I think that it is so un-

fair for people to portray this as obtrusive, big government. It is just nonsense. This is something that Congress directed you to do. I think it is a guideline. As a parent, I would have wanted to have this guideline. And I listened to all your testimony, and I just want to thank you for the good work you are doing. I yield back, Mr. Chairman.

Mr. PITTS [presiding]. The Chair thanks the gentleman, and recognizes the gentleman from Illinois, Mr. Shimkus, for 5 minutes for questions.

Mr. SHIMKUS. Thank you, Mr. Chairman. And sorry I missed your opening testimony. I had to go to the Rules Committee on another bill. So obviously, I have had a good opportunity to evaluate your opening statements, along with what was involved with the letter sent by Members to kind of raise issues of concern based upon the Senate language that asked for you all to do that.

I guess the first question is you all were asked, through the language in the bill, to actually do a report back. Is that correct?

Mr. VLADECK. Yes.

Mr. SHIMKUS. So Mr. Vladeck says yes. And what we have seen is guidelines being offered, which for us has a concern that we don't have the full report. We just had a submission, or the proposed guidelines. Now, to my good friend from New York State and the city, our concern is that when these guidelines are not voluntary, they will be in essence the force of law. And if I look at the top 100 most commonly consumed foods, beef burgers, I just had one for lunch—I am not a child any more—beef burger, hamburger, 95 percent lean, one patty cooked and bun doesn't make it. Bottled water, noncarbonated. Bottled water doesn't make it. Egg scrambled. Egg scrambled, made with added fat and salt, doesn't make it. Hot cereal, a leading instant oatmeal, raisin, prepared with water does not make it. Leaf salad, iceberg lettuce chopped with salad dressing, light ranch, doesn't make the list, doesn't make it because of the dressing, the sodium in the dressing. That is our problem with the government. That is the problem with—you know, when I go home, my constituents are saying government is too big, it costs too much, get out of things that it really has no constitutional right to be delving in. The ability of parents to adequately take care of their kids, feed them what the parents would like the kids to be fed, the nutritional issues, to have big government do this, this is really bizarre.

And so I am glad we have had this hearing today. And I guess the question is—I mean we already talked about it, we would like to see the science based before guidelines, a true analysis of this. But let me go to a question for Director Vladeck.

Can you comment on the role taken by FTC during the Interagency Working Group process related to appropriate nutritional levels? What did you all do?

Mr. VLADECK. Well, our expertise is more in the marketing side than the nutrition side.

Mr. SHIMKUS. Exactly.

Mr. VLADECK. Though I think it is important to note, Congressman, that many of the foods that you mentioned as somehow being excluded by the draft guidelines, I don't believe that is correct. I

think that Dr. Post would love a minute to just sort of clear up the record on this issue.

Mr. SHIMKUS. Well, we can have you submit additional comments for the record. Let me go on and continue on this line of questioning to Mr. Vladeck. Did FTC make any judgments or issue specific recommendations on this topic informally or formally during the Interagency Working Group? The question is what has the FTC done on—I mean if you question my analysis of the food groups based upon—I don't want to know what Dr. Post did. I want to know the FTC's involvement in the health analysis of these foods. And is that a role that you have any expertise in?

Mr. VLADECK. This is not our area of expertise, no. We were certainly at the table, but I think it is fair to say the nutrition guidelines were principally the product of the expert agencies, the Food and Drug Administration, the U.S. Department of Agriculture, and the Centers for Disease Control and Prevention.

Mr. SHIMKUS. Yet here is an FTC memo questioning the USDA on their nutritional standards. So you all are questioning the USDA, who should have the expertise on nutritional aspects. Our concern is you are playing the role of food analysis, when you should be in advertising and the like. And I yield back my time.

Mr. PITTS. The Chair thanks the gentleman, and yields to the ranking member emeritus, Mr. Dingell, for 5 minutes for questions.

Mr. DINGELL. You are very kind. Thank you, Mr. Chairman. Like everybody in this room, I am troubled about children's nutrition. But the process by which we arrive at good standards is a matter of great importance to me. I note that in 2009 the working group was, and I quote, directed to conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger. Now, that was not done. I find myself curious, because here you are coming forward with guidelines. Congress has suggested that you should tell us what is going on. You have not done so. We find that this gives us real problems in terms of understanding what is to be done or should be done. And we have to think that you, despite the fact that you are hired full-time to work on these matters, will be having equal difficulty.

Now, according to your testimony, the guidelines you released in April are not based on any new studies conducted by the working group's agencies. Is that correct? Yes or no? Yes or no?

Mr. POST. We did——

Mr. DINGELL. I don't have a lot of time. Yes or no?

Mr. POST. No new study.

Mr. DINGELL. No new studies. The guidelines you developed are directed at industry, and not a report to Congress. Is that correct?

Mr. POST. Excuse me? No.

Mr. DINGELL. Now, you note in your testimony that the working group recommendations, quote, will cover all the most important aspects of children's marketing, without being unduly restrictive. Did the working group weigh any cost-benefits that the recommendations would have on industry? Yes or no? Either Mr. Vladeck or Mr. Dietz, you may proceed.

Mr. VLADECK. Not in the way you are describing it, no.

Mr. DINGELL. OK. Now, does industry agree on this? Yes or no?

Mr. DIETZ. More or less.

Mr. DINGELL. OK. Now, you note in your testimony that FTC has long been an advocate for strong and meaningful self-regulation. I happen to agree with that, and I happen to have been a strong supporter of that. In the instance of food marketing, industry has been self-regulating marketing to children to ensure that foods advertised are healthier since 2006. And this is to Mr. Vladeck. Do you believe that the industry's self-regulation of food marketing to children has helped to ensure the products advertised to children and their parents are healthier? Yes or no?

Mr. VLADECK. Yes.

Mr. DINGELL. OK. Now, as you know, the Children's Food and Beverage Advertising Initiative recently released recommendations to improve nutritional standards of food marketed to children that member companies must meet by December 31, 2013. Do you believe that these recommendations will help to improve the nutritional content of products advertised to children? Yes or no? Again, Mr. Vladeck.

Mr. VLADECK. Yes.

Mr. DINGELL. Have you consulted with industry and do you have their comments or agreement? Yes or no?

Mr. VLADECK. We have had lots of comments from industry, yes.

Mr. DINGELL. Now, do you believe that these recommendations will help encourage development of healthier foods for children? Yes or no?

Mr. VLADECK. Yes.

Mr. DINGELL. Now, will the working group take into consideration the set of nutrition principles set forth in the initiative before finalizing its own guidelines? Yes or no?

Mr. VLADECK. Yes.

Mr. DINGELL. Now, I would like to focus for a moment on breakfast cereal—this is a major product of my home State of Michigan—and the science regarding the relationship between cereal consumption and body weights. Specifically, I note that several significant studies appearing in the Journal of the American Dietetic Association, including a study conducted by the NIH's National Heart, Lung and Blood Institute, established that children who eat cereal frequently are less likely to be overweight than those who eat it less frequently. The result was obtained for all age ranges. But to take an example from one of the studies, kids 7 to 9 who eat cereal eight or more times per 14 days are three times less likely to be overweight than kids who eat cereal zero to three servings per cereal in a 14-day period. In fact, dietary guidelines recommended eating nutrient-dense breakfast, and suggested that not eating breakfast is associated with excess body weight, especially among children and adolescents. Eating breakfast has also been associated with weight loss and weight loss maintenance.

Shouldn't we perhaps be encouraging kids to eat more cereal as a part of a healthy breakfast instead of a less amount of this as the preliminary proposal would do? Yes or no? I will take Mr. Vladeck on that.

Mr. POST. No. We support breakfast cereal.

Mr. DINGELL. Now, like all members of this committee and the witnesses before us, I believe strongly we must address the rising

issue of children obesity in this country. It is costly for health and future success of the country, and it is costly to our health system. So as we work to address this issue, though, we must ensure that the actions and guidelines proposed by the Federal Government do not negatively impact business, industry, and job creation.

One more question, and I know I am beyond my time, Mr. Chairman, but I am curious, how do you assure us that these voluntary guidelines will not become grafted into the law as a statement of government policy or something which will achieve a mandatory impact upon industry?

Mr. VLADECK. We have issued——

Mr. DINGELL. How are we to ensure that some lawsuit or some good lawyer at some future time is not going to say, oh, these guidelines say this, and therefore these people have done a significant hurt, have committed a tort, and this class action is going to be decided against them?

Mr. VLADECK. Sorry, I didn't mean to interrupt.

Mr. DINGELL. Pardon?

Mr. VLADECK. Were you finished? I didn't mean to——

Mr. DINGELL. I am more than finished. I am over my time by a minute and 21 seconds.

Mr. PITTS. You may respond if you wish.

Mr. VLADECK. There is this myth that somehow voluntary guidelines will be the foundation of litigation brought against the food companies. We have not ever seen any evidence of that kind of litigation being brought. We issue voluntary guidelines on a number of topics, including seven reports to Congress on media violence that suggests all sorts of industry self-regulatory proposals. Industry has adopted them to some extent, but not completely. We have never seen litigation on that. The Supreme Court recently relied heavily on our self-regulatory proposals in Brown v. Merchant Education Enterprises, this was the video violence case that the Court resolved last term, cited extensively to our research on this issue and talked about the industry compliance. Some parts of the industry comply, some do not. It has never been the trigger of litigation.

Mr. PITTS. Thank you. The Chair thanks the gentleman, and yields to the gentleman from Kentucky, Mr. Guthrie, for 5 minutes for questions.

Mr. GUTHRIE. Thank you, Mr. Chairman. Some of the concerns that we have when we have these kind of situations, I was at a rock quarry on Monday, and a Federal prosecutor went to a rock quarry because the garbage can was overflowing. And in the whole criteria of safety in the section that the inspector looked at, part of it was are you having workers at high altitude not strapped, and another one is can you close the lid on the garbage can. So that is where you get to that we just got to make sure that we have reasonableness in what is going forward.

And I just took the same sheet, I don't know if you all have that or not, that Mr. Shimkus was showing to Mr. Post. And I kind of came up with a day's meal for my kids, and ask if this would meet the 2021. If I start out with scrambled eggs, wheat toast with jam, and then 2 percent milk. And then for lunch when they went to school I had a turkey sandwich on wheat toast with vanilla yogurt, low fat, and either bottled water or 2 percent milk. And then for

dinner we had a light salad—a salad with light ranch, chicken breast, corn, green beans, I did put in a roll, and bottled water or 2 percent milk.

Would any of that meal fit the guidelines of the 2021 criteria?

Mr. POST. Well, yes, it would. We, in fact, went through considerable effort to conduct a study. We reviewed and incorporated findings from numerous studies. We looked at IOM reports. We looked at the Dietary Guidelines. And then we did testing. We did our homework and did testing of our proposed thresholds. To test the feasibility of the April 28 preliminary proposed criteria, we analyzed foods commonly advertised to kids, to children. And we are concerned that parents continue to depend on the foods that they have learned are the more healthful choices. We found that many products in the various product lines meet the April 28 proposed principles, including tuna, peanut butter, flavored low-fat milk, orange juice, oat cereals, instant oatmeal, popcorn, baked chips, salted peanuts, yes, salted peanuts, whole wheat bread, and even fast-Sfood meals. Water was never excluded. Canned vegetables, we have heard about that as well, that are low in added sodium would certainly meet the criteria, although it is doubtful many are advertised to kids. But we did our homework, and we do have the information to know that there are foods that are eligible for advertising.

Mr. GUTHRIE. I don't know if you all have this list or not. It shows meets 2021 target criteria, the same one Mr. Shimkus had. And everything I just mentioned didn't—it says bottled water doesn't meet the guidelines, less than 50 percent of a food group. Chicken breast, see if I can find it on here. Anyway, none of those, according to this analysis, meets that criteria. And I know you can prepare things differently. If you fry an egg you can do it differently than if you scramble an egg, and you can add sodium if you salt. But it just seems that as I looked at this list, you know, I am concerned about childhood obesity. If anybody want to do something to really open their eyes, tour a dialysis place and see what people are doing when they are older and they are obese and it happens when they get diabetes. It really opens your eyes. But as you start looking through things that according to this analysis, all family cereal, all leading family ready to eat cereal, no, sodium, added sugar; lasagna, no, saturated fat, sodium. I mean just different things that are on this criteria, it just seems like it is not just the M&Ms that Congresswoman Blackburn talked about and getting a couple M&Ms so you eat the healthy stuff. It seemed like a whole list of things that most American parents would say I am giving my kid a turkey sandwich on wheat bread and giving them vanilla low fat yogurt. It is because of the vanilla flavoring I think is why it doesn't meet—but it is low fat—doesn't meet the guidelines. That is when I was looking through that and said this is—we are spending a lot of time on stuff that—go ahead. It is almost like the guy getting cited for his garbage can being full.

Mr. POST. If I can respond, we were focused on foods that are marketed to kids. I think the list you have are foods that are consumed, not necessarily the same foods that we considered. Beer and coffee are on that list. You know, we wouldn't consider that as

foods marketed to children. So it is a matter of looking at what we did, and that is the foods that are commonly advertised.

Mr. GUTHRIE. Even if these aren't marketed to children, somebody is putting these guidelines saying that that is not a recommended 2021 target, meets the guidelines for a healthy meal. I mean whether it is marketed to a child or not. Because I try to find a turkey sandwich when I am traveling around for the purpose of being healthy. And I am about out of time. But as I was saying, as you start going through these guidelines, you say it just seems to be—you know, it is not about certain foods that we would all look at and say, well, maybe that is too much for a kid to be eating, you know, whatever, I am not going to bring all those up. But when you look at this 2021 it doesn't meet the target, it just kind of opens your eyes of—well, I will let you finish. I guess I am about out of time.

Mr. POST. Just as a last response, we are looking to industry in changing the nature of the foods out there, obviously, and we know through the CFBAI effort there is a great effort there. So we are looking forward to the work that that proposes occurring over the next couple of years. So, we know we can get more healthful choices out there.

Mr. PITTS. The Chair thanks the gentleman, and yields to the ranking member of the Health Subcommittee, Mr. Pallone, for 5 minutes for questions.

Mr. PALLONE. Thank you, Mr. Chairman. Gentleman, I am kind of following up on what Mr. Guthrie said. I don't mean to be repetitive, but I wanted to ask. The Grocers Manufacturing Association says that the working group recommended nutrition standards are arbitrary, have no basis in scientific evidence, and conflict with Federal dietary guidance and nutrition policy. And then they go on to say that under the working group's recommendations, and I quote, whole wheat bread, breakfast cereals, reduced fat yogurt, canned vegetables, and bottled water could not be promoted for consumption by children.

I just wanted to start with Dr. Post to comment on that, if you would. Is it really true that your report recommends against marketing to children whole wheat bread or reduced fat yogurt and these other listed foods that they talk about?

Mr. POST. Well, in the work that we did, in the study that we did, and what we reviewed and incorporated, we did look at the numerous studies that are already out there on the issue. We did, in fact, exhaustively go through the Dietary Guidelines advisory committee's comprehensive nutrition research report. We looked at the Dietary Guidelines exhaustively as well. And we considered regulations that are promulgated by FDA and USDA governing nutrient content claims and health claims and food labeling. We looked at relevant IOM reports, and industry groups' reports, and various public and private entities' standards that are out there. We know that there are foods, because we did our homework and we did what we called food runs, we did our analyses to know that foods like whole wheat bread, and orange juice, and oat cereals, and popcorn, and I mentioned salted peanuts, will in fact pass the thresholds that were established for the preliminary recommendations. And we know, too, now with the CFBAI effort, that there are foods

that can in fact be advertised. Although some work is needed, as that organization reported; to continue to reformulate is a necessity. But for the most part, yes, there are foods out there. So the assertion is incorrect. There are foods that can be advertised.

Mr. PALLONE. All right. And Dr. Dietz or Mr. Vladeck, did you want to comment on that at all? No? OK. I mean I think it is important that, you know, the standards that you recommend to Congress have to remain aimed at promoting healthy children, but they have to be achievable, or otherwise the industry is just going to ignore them. And they also have to set clear targets that will lead to improved nutritional quality of the foods that are marketed to children.

You mentioned the IOM. You know, some today are saying that we don't have enough science to justify these guidelines for marketing foods to kids. And the IOM did in fact say there is no clear causal relationship between advertising and body fat levels of kids in their report, I guess in 2006. Now, I know none of you served on that IOM panel, but can someone help me understand why the working group, you know, recommends changes in marketing foods to kids given, you know, that the IOM is saying there is no clear causal relationship? What is your response to that?

Mr. DIETZ. I am not sure whether you were here for my opening comments.

Mr. PALLONE. I wasn't. I had to go to Rules. Sorry.

Mr. DIETZ. The caloric imbalance necessary to reverse obesity is pretty small. It is about 30 calories for young children, 2- to 5-year-olds, and about 150 calories for 6- to 11-year-olds. Our belief is that modest reformulation or modest reductions in the caloric content of foods commonly consumed by children could achieve that deficit. Not a single food, but across the board. And we also know that there is a direct relationship between television viewing and obesity in children that seems to be mediated by the consumption of foods advertised on television. So there seems to be this linkage between television advertising, consumption of foods advertised on television, and obesity.

Despite the conclusions of the IOM panel, it is worth examining a little more carefully what the studies were that they looked at. They reviewed about 65 studies. About 75 percent of those studies, some of which were cross-sectional, so you can't really demonstrate causality from those, but about 75 percent of those studies found an association between food marketing and obesity in children. But the more important studies, in my view, are the intervention studies that have shown that reductions in television time are associated with reductions in weight without a concomitant increase in physical activity, pointing to that connection between television viewing and obesity in children.

Mr. PALLONE. So there may not be a direct or clear causal relationship, but it is still something that, you know——

Mr. DIETZ. Admittedly circumstantial.

Mr. PALLONE. OK. Anyone else want to comment on that? All right. Thank you, Mr. Chairman.

Mr. PITTS. The Chair thanks the gentleman, and recognizes the gentleman from Ohio, Mr. Latta, for 5 minutes for questions.

Mr. LATTA. Thank you, Mr. Chairman. And gentlemen, thanks very much for joining us today. It is a very interesting conversation that we are having here this morning. You know, one of the things that I would like to ask is let's go back in time, if we can.

I know that on page 3 of Mr. Vladeck's testimony you have that the Institute of Medicine has strong evidence that TV ads influence food and beverage purchases and requests for kids under the age of 12. When these studies were being done, did you go back and check what happened with advertising 40 years ago, 50 years ago, 60 years ago, 70 years ago? Because I am just kind of curious. Because I grew up in the late 50s and early 60s when I was a kid. Now, granted we got two channels on a good day when I was a kid, black and white, and some days they came in, some days they didn't come in. But Saturday mornings was my favorite day of the week because that is when all the cartoons were on. Plus that is when all the cereal commercials were on. OK? And I am thinking back through the kids I went to school with that we didn't have an obesity problem. But I tell you what, we ate so much what we would consider junk food today. But it is kind of a difference in time.

And also if you go back to the late 30s and 40s, I am always interested in listening to old recordings of old advertising, and some of the things how they used to advertise to kids at that time. Of course, they were sitting at a radio staring at a radio. Nothing was happening except for a sound coming out. But we have had advertising going on for decades specifically to children, but it seems like only recently that we have had this obesity problem really starting.

And I guess the question I would ask is this, that Mr. Barton, or Chairman Emeritus Barton I think was right on point when he was talking about families and sitting down and eating meals and preparation. And I tell you when I came home as a kid from school, if my sister and I got home and we said, gee, is there something to eat, my mom would actually make oatmeal. We would eat cabbage hearts, carrots, apples, and all these other things. And also we had this great fear. When I was a kid, if our parents ever saw us in the house, I don't care if you were at your friend's house, if you were sitting, that must mean you had time to do more work, I don't care if it was school work or housework or yard work. So we took off. But, you know, are there studies out there that go back and look at what was advertised 40, 50, 60 years ago and how that affected kids when you did the study?

Mr. VLADECK. You know, we are about the same age. And I remember Saturday mornings fondly as well. Of course, in those days there wasn't very much fast food. There wasn't much prepared food. Most of the meals, my mom worked, but she cooked dinner from scratch every night. I don't know whether they are the kinds of long-term studies that you are describing. We will take a look, and we are happy to get back to you on that. Maybe one of my colleagues does, but I am not aware of the kind of analytic work that you——

Mr. LATTA. If there are studies from back then, I would be very interested to see if somebody went back and looked at that, especially with obesity rates.

Mr. POST. Just to add to that to bring on the issue of complexity, we know the food environment is so much more complex, and the Dietary Guidelines for Americans has a whole chapter now that recognizes how complex the food environment has become, that it is not, you know, simply a household influence anymore; there are so many other influences.

Mr. LATTA. Also, if I may, and I just throw this out because I know Mr. Dietz' testimony on page 6 when he is going through about of the more than $200 billion for children and youth collectively spent annually, ages 8–12, I didn't have any money when I was a kid unless I shoveled somebody's driveway or mowed. So the money I got came from my parents somehow. So it is really a question I think also today is that where these kids are getting the money, who is buying the TVs, who is buying the computers? It is the parents. And unfortunately, in a lot of cases, as we all know, the parents plop their kids in front of the TV set, put a snack in front of them, and voila, you now have instant food, you have an instant baby-sitter. So I think a lot of it falls back on where the parents are. And I know I think Mr. Dietz made the comment in regards to that, you know, kids nag their parents. And I told both my girls a long time ago that I want them to always remember there is a difference here, that I was their dad, not their best friend, and they had to figure out there a was a big difference between the two. But I really would be interested if we could find out if studies have been conducted in the past, especially in the 40s—40 or 50 years ago, in the infancy of television, when those commercials were still really out there, but the obesity from then to today, I would like to really get that analysis.

And I see my time is up, Mr. Chairman, and I appreciate the time. Thank you very much for being here.

Mr. PITTS. The Chair thanks the gentleman, recognizes the gentlelady from California, Mrs. Capps, for 5 minutes for questions.

Mrs. CAPPS. Thank you, Mr. Chairman. And I am really pleased that we are able to have today these two subcommittees coming together to discuss what is such an important topic. And I appreciate the testimony of the three presenters so far. I am pleased that we are here today to discuss the partnership that has in the past and I hope will continue to exist, between private industry and public health professionals to address the marketing of less healthy food to children, that being our goal. But I worry that we are losing sight of the reason we are having this discussion at all.

Your testimony, Dr. Dietz, clearly makes that point. About one-third of our Nation's kids are overweight or obese, affecting not only their physical and emotional health, but also the fiscal health of their families and of our Nation. Specifically, Dr. Dietz, you note that the direct costs of childhood obesity are at least $3 billion a year. And this health condition, that is an epidemic really, and the high costs often continue into adulthood. In light of these numbers, it is clear to me that the obesity epidemic necessitates an equally strong response. As a former school nurse as my background, protecting the health and well-being of our children is one of my greatest concerns. However, the potential benefits of these voluntary guidelines on our national health care expenditures is also an im-

portant factor that I believe these guidelines could themselves address.

So Dr. Dietz, would you take a minute or two to explain more to us on the record about the costs of the obesity epidemic to our health care system?

Mr. DIETZ. As you point out, the costs in childhood are about $3 billion a year. This was a recent study published in about 2009 by Leo Trasande. That is trivial compared to the costs of obesity in adults, which somebody else mentioned earlier is about $147 billion.

Mrs. CAPPS. And isn't it true that obesity in adults almost always starts at some point in childhood?

Mr. DIETZ. The majority of obesity in adults, at least historically, has started in adulthood. The childhood obesity has contributed a minor portion of that obesity. But what is a concern about childhood obesity that persists into adulthood is that it accounts for a disproportionate share of severe obesity in adulthood, and therefore may contribute disproportionately to the costs of obesity in adulthood.

Mrs. CAPPS. So in terms of other costs?

Mr. DIETZ. Well, the costs that have been estimated in the paper that we published that cited the $147 billion, that was the costs associated with obesity, which also accounted for the costs of cardiovascular disease, diabetes, and the hospitalizations and medications associated with all the diseases associated with obesity.

Mrs. CAPPS. Right. So Medicare, Medicaid, private insurers are shelling out more money.

Mr. DIETZ. Well, a big concern is about half those costs are borne by Medicare and Medicaid.

Mrs. CAPPS. And this is not to mention the additional indirect costs from decreased productivity and absenteeism from school. So there are some ripple effects as well into the rest of society. Like most chronic health conditions, I am convinced that primary prevention, doing all we can to stop obesity before it ever starts, is key to addressing these concerns.

I want now to turn to Mr. Vladeck. As you may know, a different take on this topic, in 2003 the IOM issued a report on the marketing of alcohol to kids. A similar kind of questioning came from my colleague Mr. Pallone. But with respect to the comparison with alcohol, IOM concluded, like in the case we are discussing today, that there was no clear causal link between marketing alcohol and the use of it by kids, but still recommended limitations on alcohol marketing to kids.

There are of course differences between alcohol and food. But a few years later, in 2008, at the close of the Bush administration, the FTC issued a report. Mr. Vladeck, the industry was engaged in self-regulation at that time. They said the IOM report was not based on strong science. What did the FTC do in that 2008 report?

Mr. VLADECK. We encouraged self-regulation. And these are difficult areas for us. We do not have, particularly in the food area, rulemaking authority that would permit us to regulate in these areas. And there are, as you know, there are First Amendment issues that would arise if we tried to regulate aggressive marketing. We have, through enforcement efforts, such as our recent

case against Phusion, taken action against marketers who are marketing to children. One of the counts in the Phusion complaint was a count alleging that Phusion, which is the seller of FourLoko, which is an alcohol product, used images plainly of kids, people under the legal age, in order to promote alcohol.

Mrs. CAPPS. Right. I know I am going over time now, but I would—saying that there are differences between alcohol and food, there also is a close parallel for how the agencies provided a framework when voluntary industry-based efforts were not adequately addressing a vital public health problem. There isn't anything extreme in this document on marketing to kids. It may not be perfect, but I believe it is clearly the next sensible step to take.

And in closing, Mr. Chairman, I would like to submit testimony submitted by Mars for the record. I believe this document may have identified areas that I hope we can use to form a common ground. I yield back.

Mr. PITTS. The Chair thanks the gentlelady, and the gentlelady's unanimous consent request to include in the hearing record a statement of Mars. I also have four other items, a letter to HHS, FTC, Department of Agriculture, and CDCP from Members of Congress, led by Eric Paulsen of Minnesota from October 11, 2001; statement from the American Bakers Association; testimony from the President and CEO of American Frozen Food Institute; and a statement of the American Frozen Food Institute to the FTC. Without objection, both sides have seen these, without objection these will be included in the record.

[The information follows:]

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STATEMENT FOR THE HEARING RECORD

FOOD MARKETING: CAN "VOLUNTARY" GOVERNMENT RESTRICTIONS IMPROVE CHILDREN'S HEALTH?

Submitted by

MARS, INCORPORATED

Before the

ENERGY AND COMMERCE SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE AND THE SUBCOMMITTEE ON HEALTH

U.S. HOUSE OF REPRESENTATIVES

October 12, 2011

Mars, Incorporated (Mars)[1] appreciates the opportunity to submit this statement for the hearing record regarding the voluntary child marketing restrictions recommended by the Interagency Working Group on Food Marketed to Children (IWG). Mars strives to be a leader and constructive participant in the area of health and nutrition and child advertising restrictions. To that end, in 2007 Mars was one of the first food companies to adopt a Marketing Code that formalizes our commitment to refrain from advertising food products to children under 12.

Over the past several months, we have witnessed a great deal of controversy over the proposed IWG guidelines on limiting advertising to children. The guidelines were designed to provoke industry to accelerate development of a stronger self-regulatory program that will enable greater accountability and transparency. Mars views this as overall positive. However, we are not without concern. First, we believe the tone of the debate, particularly over whether the guidelines should be withdrawn, undermines an opportunity to forge improved multi-stakeholder

[1] Based in McLean, Virginia, Mars employs more than 65,000 associates worldwide and has global net sales of more than $30 billion across six business segments including Petcare, Chocolate, Wrigley, Food, Drinks and Symbioscience.

collaboration. Second, we have concerns about the creation of any restrictive model based on nutrition profiles and the potential use of such profiles in a regulatory context.

While we don't fully agree with all of the IWG recommendations and do not support government regulation of advertising, we have not advocated for the withdrawal of the guidelines. Instead, as stated above, we view them as a provocative set of guidelines that should be used to accelerate additional action by the industry, working with other stakeholders such as NGOs, broadcasters, retailers and consumers.

As discussed in more detail below, Mars believes that, consistent with available science, the core area of focus for all stakeholders should be a drive toward broader industry participation in, compliance with, and enforcement of voluntary marketing and advertising standards for children under the age of 12 years. Our stance has been to not market to this group, and Mars would like to continue to work in close collaboration with the industry and other key stakeholders to play a constructive role in strengthening protocols in regard to the marketing and advertising of foods to children under age 12. Two areas of opportunities we see for next steps are further defining and broadening the definition of marketing and establishing enforcement mechanisms that bring even greater credibility and accountability.

To that end, we have provided below a brief summary of Mars' Marketing Code and our recommendations for the continued development of a strong, enforceable industry self-regulatory mechanism guiding the advertising and marketing of foods to children under 12.

I. Mars' Marketing Code

Like others in our industry, Mars is concerned about the growing body of scientific evidence demonstrating that children under the age of 12 may not understand the nature and purpose of food marketing directed toward them. That's why, as early as 2007, Mars established a Marketing Code that includes a commitment to refrain from advertising our food products to children under the age of 12.

In line with our commitment, we do not purchase advertising time or space where the composition of the under-12 audience, at the time of the media buy, is expected to exceed 25%, nor do we advertise, sponsor, or undertake product placement in films or media programming where the intended audience is primarily children under 12.

Our global marketing commitments apply to marketing communications for all food, chocolate, confections, and gum products produced and licensed by Mars and Wrigley on a worldwide

basis[2] including media advertising (e.g. broadcast, print, and digital, including websites), advertorials, sponsorship, sweepstakes, contests, and similar promotions. This blanket prohibition on marketing to children under 12 enables us to better enforce our Code and helps ensure transparency for consumers and other stakeholders. We have developed a strong internal training and enforcement mechanism within our company to ensure the highest level of compliance with our Code.

We aim to focus our marketing communications in all media to individuals who make household purchasing decisions (gatekeepers), both in terms of ad content and media purchasing. Our marketing communications aim is to allow gatekeepers to make informed choices about which products to serve to the children in their care. Mars actively participates in the external monitoring of its voluntary commitments to ensure compliance with regional, national, or global industry pledge commitments.

II. Mars Recommends Building on Existing Industry Self-Regulatory Programs to Develop a Voluntary, Strong, and Enforceable Program Restricting the Advertising and Marketing of Foods to Children Under 12

While Mars does not support all aspects of the IWG's recommended guidelines including their expansion to packaging and restrictions on marketing to youth ages 12-17, we believe that advocating for the complete withdrawal of the proposed guidelines is unproductive and misses a key opportunity for industry to develop stronger industry self-regulatory mechanisms, in consultation with other key stakeholders. Self-regulation of industry advertising and marketing to children has worked to improve the types of foods that are marketed to children. But this does not mean that it couldn't work better.

For instance, Mars proposes that industry join together and build on the success of its existing self-regulatory program, the Council of Better Business Bureaus' (CBBB) Children's Food and Beverage Advertising Initiative (CFBAI), of which Mars is a member. While this self-regulatory effort has yielded very positive results, it could be made more effective by expanding the initiative to include more company participants, strengthening CFBAI's Core Principles, and establishing an industry-only dispute settlement/enforcement mechanism beyond the current CBBB monitoring program.

CFBAI already incorporates a solid monitoring mechanism that has established some accountability and improved consistency among various company marketing commitments. However, we believe this structure should be strengthened to provide companies with the

[2] Following its acquisition by Mars in 2008, Wrigley adopted the Mars Marketing Code. Wrigley implementation of the Code was completed across geographies in 2010, with the exceptions of China, which will fully implement the

opportunity to hold each other accountable to their respective marketing pledges. Similarly, while CFBAI has taken great strides to harmonize the marketing definitions used by the various member companies in developing their own marketing codes, we believe the uniform standards that have been incorporated into the CFBAI Core Principles to date should be strengthened and that all marketing definitions and other standards by which company members abide in practice should be incorporated into CFBAI's Core Principles going forward. We believe these steps will strengthen our self-regulatory program and further demonstrate an industry commitment to responsible advertising.

There may be other industry coalition options outside CFBAI that may also be worth exploring to provide opportunities for more food companies, including small businesses, to demonstrate leadership on the advertising and marketing of products to children under 12. As we build on our previous self-regulatory efforts, we should also bear in mind the importance of aligning industry standards in the U.S. with similar standards being developed in the European Union and elsewhere.

IV. Conclusion

In conclusion, Mars continues to support strong and effective self-regulation of the advertising and marketing of foods to children under 12. We share the concerns of the IWG that industry continue to strengthen our voluntary child marketing principles and seek additional measures of accountability. Mars appreciates the opportunity to submit this statement for the hearing record and looks forward to moving the debate forward in a constructive way through continued active engagement with key stakeholders from all relevant disciplines (including scientific, regulatory, public health, consumer advocacy groups, other governments, and NGOs). We hope that the Committee will consider Mars a resource as it considers the most effective ways to improve the marketing and advertising of foods to children.

Brad Figel
Vice President
North America Public Affairs
Mars Incorporated

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Code by the end of 2012, and India, which will fully implement by the end of 2013.

Congress of the United States
Washington, DC 20515

October 11, 2011

The Honorable Kathleen Sebelius
Secretary
Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

The Honorable Tom Vilsack
Secretary
Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dr. Thomas Frieden, MD, MPH
Director
Centers for Disease Control and Prevention
1600 Clifton Road
Atlanta, GA 30333

Dear Secretary Sebelius, Secretary Vilsack, Chairman Leibowitz and Director Frieden:

We are writing to express our deep concern about the recent proposal by Federal Trade Commission, the Food & Drug Administration, the Department of Agriculture, and the Centers for Disease Control that would ban the advertising of nearly all foods to children and adolescents.

This ban is far-reaching, affecting not only advertisements that primarily reach children, but also many that reach adults. Indeed, the ban would even prohibit the use of iconic brand logos on the packaging adults see and purchase at the grocery store if those logos contain animated characters. This would destroy equity that companies have accrued in their brands.

We believe the guidelines, as currently drafted, are also too prohibitive. Many foods that qualify under the Food and Drug Administration's definition of "healthy" would be precluded by the guidelines. Even foods that are approved for consumption as part of the Supplemental Nutrition Program for Women, Infants and Children (WIC) would not meet the guidelines.

As you are aware, in an Executive Order dated January 18, 2011, President Obama mandated that federal agencies must regulate in a manner that preserves and promotes "economic growth, innovation, competitiveness, and job creation" and that regulations "must be based on the best available science." It is difficult to see how the proposed regulations satisfy these mandates.

This policy would have an enormous impact on the food manufacturing industry which employs 1.5 million Americans. According to a study conducted by IHS Global insights, if this rule goes into effect we would see a potential reduction of 20% in food and beverage advertising expenditures which could affect over 74,000 jobs in just one year.

PRINTED ON RECYCLED PAPER

Because of the devastating impacts of this rule, we ask that the Commission and the Interagency Working Group immediately withdraw this proposal.

Sincerely,

Erik Paulsen

Mike Ross

Tim Huelskamp

Bill Posey

Peter Roskam

Patrick T. McHenry

Marsha Blackburn

Kevin Yoder

Paul Broun

Bill Johnson

Thomas Rooney

Joseph R. Pitts

John Carter

Tom Graves

Ron J. Kobble

Todd R Platts

Scott Garrett

MO-6

Joe Wilson

Howard Coble

Rick Crawford

Blake Farenthold

John Fleming

Jeb Hensarling

Lamar Smith

Bill Flores

Pete Sessions TX-23

Louie Gohmert

Jeff Duncan

Jeff Roberts

Tom Graves

Sam Johnson

Steve Womack

STATEMENT OF THE AMERICAN BAKERS ASSOCIATION

PREPARED FOR THE SUBCOMMITTEE ON COMMERCE, MANUFACTURING AND TRADE AND THE SUBCOMMITTEE ON HEALTH OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE

October 12, 2011

"Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health"

American Bakers Association

The Voice of the Baking Industry Since 1897

1300 I Street, NW Suite 700 West
Washington, D.C. 20005
(202) 789-0300
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I. INTRODUCTION

The American Bakers Association (ABA) and members of the grain chain coalition including the American Institute of Baking, Grain Foods Foundation, Grains for Health Foundation, Independent Bakers Association, National Pasta Association, North American Millers' Association and Wheat Foods Council thank the House Subcommittee on Commerce, Manufacturing and Trade and the Subcommittee on Health of the House Committee on Energy and Commerce for holding this critically important hearing on food marketing to address whether 'voluntary' government restrictions improve children's health.

Our organizations appreciate the opportunity to address the IWG's proposed nutrition principles for food marketed to children and commend the group for its efforts and commitment. However, the proposal is misguided and will not be effective in achieving this goal.

II. WHY THE INTERAGENCY WORKING GROUP PROPOSAL WILL NOT WORK

We have long advocated a consistent, science-based approach to setting government nutrition guidelines. Fortunately, there is an established approach that accomplishes this important task: the Dietary Guidelines for Americans. Reviewed and updated every five years by leading experts, the Dietary Guidelines provide solid, science-based nutrition advice for all Americans, including children. Government initiatives involving nutrition should be based on these Dietary Guidelines to ensure policy and public health messaging consistency.

The nutrition principles outlined in the IWG proposal, differ significantly from the recent Dietary Guidelines, establishing an entirely new, non-science-based regime. The proposal would effectively:

- Ban advertising of numerous foods that FDA defines elsewhere as "healthy"
- Disallow foods that FDA explicitly authorizes for use in health claims
- Disallow foods USDA promotes for consumption as part of the Dietary Guidelines & for the WIC Program (Women, Infant, and Children).
- Disallow enriched products fortified with folic acid that the CDC recently touted as one of its great public health achievements in the last decade as it lowered neural tube defects 36 percent and resulted in a savings of $4.7 billion in direct costs (Morbidity and Mortality Weekly, CDC Report "10 Great Public Health Achievements – 2001-2010; May 20, 2011).

The extremely restrictive nature of the proposed criteria would preclude advertising of nearly all baked goods to children. In fact, they eliminate the ability to promote/advertise very basic and important grain food staples in children's diets including: nutritious, fiber rich whole wheat breads, whole grain cereals and enriched grain products that offer iron and four B vitamins including folic acid, such as bread, pasta and rice.

It is critical for government to focus on strategies that work. There is no evidence linking advertising of particular foods to obesity. A 2005 report from the IOM commissioned by Congress concluded that there is not sufficient evidence "to arrive at any finding about a causal relationship from television advertising to obesity among children". Further, the IWG has produced no peer-reviewed studies which draw such a connection.

Extensive work is already being done by the baking industry to encourage demand for healthy foods among children, and adults alike. Our members have invested heavily in developing new, healthy grain foods. The expanding number and variety of innovative, nutritional, affordable and tasty whole grain and enriched products available on supermarket shelves is clear evidence.

Additionally, the baking industry worked with Congress to include funding in the 2008 Farm Bill for a Grain Purchase Program that expanded the availability of whole grain food offerings in 2009 as part of the School Breakfast and Lunch programs.

The wheat chain is reaching out to consumers in a variety of ways to educate them about nutritious grain foods and the role they play in a balanced, healthy lifestyle.

Additionally, a proven alternative approach, the Children's Food and Beverage Advertising Initiative (CFBAI) with the Better Business Bureau, comprises 90% of the advertising of food in programming for individuals under the age of 12. Setting science-based nutrition standards, the initiative provides a transparent and accountable advertising self-regulation mechanism aimed at shifting the mix of advertising, messaging and products directed to children, to encourage healthier dietary choices and lifestyles. Unfortunately, the IWG proposal ignores the progress industry has made and fails to provide any evidence that the IWG standards would produce additional public health benefits.

III. CONCLUSION

In conclusion, the proposed IWG principles will further confuse the public by imposing a new set of nutrition standards that are inconsistent with other government mandates. This proposal will not achieve the intended goal of encouraging children to eat more healthfully, as they are not science based, and instead will stifle existing, successful industry initiatives to self-regulate in the marketing arena. We believe that this proposal cannot be fixed and urge that it be withdrawn.

In 2009, Congress passed legislation that created the Interagency Working Group with the direction to conduct a study on the impact of food marketed to children, as well as teens, and then report to Congress on the findings. Unfortunately, instead of completing that study, the IWG developed the misguided proposal discussed by the Subcommittee today. We recommend a completion of the study of benefits and costs of this proposal as Congress intended and as the President has pledged in two recent executive orders.

ABA, AIB, GFF, GFH, IBA, NPA, NAMA and WFC and our members applaud the House Subcommittee on Commerce, Manufacturing and Trade and the Subcommittee on Health for holding this hearing regarding food marketing to address whether 'voluntary' government restrictions improve children's health.

As further background, we have attached the grain chain coalition response to the IWG proposal submitted to Federal Trade Commission on July 14, 2011.

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex W)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

July 14, 2011

RE: Interagency Working Group on Food Marketed to Children: Proposed Nutrition Principles:
FTC Project No. P094513

Re: Interagency Working Group on Food Marketed to Children: General Comments and Proposed Marketing Definitions: FTC Project No. P094513

To Whom It May Concern:

On behalf of the partners in the grains industry: **American Bakers Association, American Institute of Baking, Grain Foods Foundation, Grains for Health Foundation, Independent Bakers Association, National Pasta Association, North American Millers' Association, USA Rice Federation, and Wheat Foods Council,** we thank you for the opportunity to submit comments regarding the Interagency Working Group's (IWG) preliminary proposed nutrition principles to guide industry self-regulatory efforts regarding food marketed to children.

We commend the IWG for its commitment to encourage children to choose foods that contribute to their overall healthy diet. As providers of grain products, both whole and enriched, to American consumers including children, we have a similar commitment to providing our customers with a wide variety of healthy grain foods. We are also committed to nutrition education and, individually and collectively, continue to implement programs to assist children and adults in making healthy eating choices.

However, while we appreciate the intent of these proposed principles, we believe they will not be effective in achieving the goal of improving children's diets. We urge the IWG to withdraw the proposal for the following reasons.

The proposed principles are not consistent with the 2010 Dietary Guidelines for Americans (DG) or other federal nutrition programs such as the School Meal requirements; Women, Infants and Children Program (WIC); and Supplemental Nutrition Assistance Program (SNAP).

Our organizations have long advocated a consistent, science-based approach to setting government nutrition guidelines. Fortunately, there is an established approach that accomplishes this important task: the Dietary Guidelines for Americans. The role of the Dietary

Guidelines as the foundation for all federal nutrition policy is specifically stated in the US Code at Title 7, Chapter 84, Subchapter III, Section 5341:

At least every five years the Secretaries shall publish a report entitled "Dietary Guidelines for Americans". Each such report shall contain nutritional and dietary information and guidelines for the general public, and ***shall be promoted by each Federal agency in carrying out any Federal food, nutrition, or health program.***

The Guidelines provide solid, science-based nutrition advice for all Americans, including children. Government initiatives involving nutrition should be based on these Guidelines to ensure policy and public health messaging consistency. The nutrition principles outlined in the IWG proposal differ significantly from the very recent Dietary Guidelines, establishing an entirely new, non-science-based regime. The proposal would:

- Ban advertising of numerous foods that FDA defines elsewhere as "healthy."
- Disallow foods that FDA explicitly authorizes for use in health claims.
- Disallow foods USDA promotes for consumption as part of the DGs and for its WIC Program. WIC-allowed foods that could not be marketed under this proposal include whole grain breads, cereals and tortillas.
- Disallow advertising of nearly all baked goods because of the proposal's whole grain contribution requirement, as well as the extremely restrictive final sodium target of 140 mg/RACC for individual foods. In fact, it eliminates the ability to promote/advertise very basic and important grain food staples in children's diets including: nutritious, fiber rich whole wheat breads, whole grain cereals, and enriched grain products such as bread, pasta and rice that offer iron and four B vitamins including folic acid. We would note that the CDC recently touted folic acid fortification as one of the great public health achievements in the last decade due to its lowering of neural tube defects.

We are concerned that the proposal may reflect a desire to decrease consumption of enriched grains which would be in direct contradiction with the 2010 Dietary Guidelines' recommendation that Americans eat six servings of grain foods daily, at least half of those whole grains and the rest enriched grains. A decrease in consumption of healthy enriched grain foods ignores the nutritional merits of these products and could lead to serious health consequences for all, and most particularly for the youngest among us – our infants.

Since the 1940s, enriched grains have made significant contributions to the health of all Americans including eradication of the crippling diseases Pellagra and Beriberi. Furthermore, enriched grains are the primary source of folic acid in Americans' diets.

In March 1996, the FDA mandated that enriched cereal-grain products be fortified with 140 µg of folic acid per 100g of flour. Since this fortification, there has been a 25-35 percent decrease in neural tube birth defects in the US – an amazing success story. Folic acid has also been linked to decreased risk of coronary heart disease, hypertension,

Alzheimer's and some cancers. Additionally, folic acid has lowered stroke mortality in the US and Canada where fortification is mandated. Fortification of whole grain products with folic acid is prohibited by law, with the exception of whole grain cereals.

We realize that most consumers, including children, fall far short of the recommendation to make half their grain servings whole. Nonetheless, given the importance of enriched grains in the diet, and in particular in the diets of women of child bearing age, it is critical to maintain consistency with the Dietary Guidelines' recommendation to include servings of both enriched and whole grains in meals.

The proposal also fails to follow the Guidelines' recommendations regarding four nutrients that are to be encouraged in the diets of all Americans: potassium, vitamin D, calcium and fiber. The IWG mentions food group contributions in Nutrition Principle A, but fails to make specific recommendations following the Dietary Guidelines for these beneficial nutrients. All four of these nutrients can be found in bread and other grain products, which, as discussed above, are actually prohibited from being marketed to children by the proposal.

In fact, according to an analysis by General Mills using NPD Group data of the top 100 most commonly consumed foods under the IWG standards, 88 of those foods would be banned (see attachment).

<u>The proposed rules are overly complicated and unworkable.</u>

The proposal is based on a pair of nutrition principles by which companies and advertisers are to determine what products may be advertised to children. The IWG has included in its proposal some 17 questions dealing with various aspects of these nutrition principles. In question 13, the IWG itself acknowledges that it has had to create an "exemption" intended to "resolve any inherent inconsistencies" between Nutrition Principles A and B. The IWG further states that it "recognizes that the calculations involved" would "make it difficult for any third party to verify whether a product meets Principle B." The IWG then asks for input on "reconciling" the provisions of the two nutrition principles. We are troubled that the IWG would publish for comment a proposal that by its own admission is unworkable and contains inconsistencies.

We would also note that, regarding Nutrition Principle A and its two options, we have serious issues with both approaches. Option 1, which requires individual foods to contain at least 50% by weight of one or a combination of more than one from a list of food categories, fails to take into account foods with high moisture content, such as bread, and puts them at a disadvantage compared to drier foods like crackers or breakfast cereals. Some whole grain foods would not qualify at all, such as whole grain raisin bread. Healthy, convenience foods like ready-to-eat brown rice may not qualify as well because of high moisture content in the "as consumed" form. In the case of

cookies or muffins, with grain often 20-25% of total weight, manufacturers would have no incentive to produce a "better" version since these products would never qualify.

Option 2 is based on proposed amounts for each food category "representing one-quarter of the daily amount for that food category as drawn from current dietary recommendations for a 2,000 calorie diet per Reference Amount Customarily Consumed (RACC) and per labeled serving." According to the proposal, for whole grains, the required amount is 0.75 ounce equivalent of 100% whole grain. This requirement takes an imprecise measurement of an amount of **finished grain food** and tries to use it to measure the whole grain content of that food. The result is a very high level that is not compatible with the DG, which directs consumers to look for foods where "a considerable proportion of the grain ingredients is whole grains." The DG goes on to cite as an example, "...foods with at least 8 grams of whole grains per ounce-equivalent."

We would further note that the proposal fails to take into account that there are currently six different definitions in use among various federal agencies for what constitutes "whole grain." Which definition is the appropriate one for manufacturers to follow in judging whether a whole grain food may be marketed to children? Food and nutrition policy would benefit from a harmonized definition of whole grain.

<u>The proposed sodium limits are overly ambitious and unrealistic.</u>

We support a realistic approach to reducing sodium in the diet through an incremental and gradual reduction of sodium in foods. This gives consumers, including children, time to adjust to taste changes while providing manufacturers time to develop products that deliver necessary functionality as well as palatability. For children, the issue of taste is essential and is a key factor in the successful introduction of such healthy foods as whole grains, fruits and vegetables.

In the IWG proposal, final sodium targets are to be reached by 2021, a timeline that totally ignores the recommendations for sodium intake in the most recent Dietary Guidelines, as well as the release of new Dietary Guidelines in 2015 and 2020. We believe the proposal's failure to address the current recommendations and these future publication dates, especially given that the Dietary Guidelines are identified by statute as the basis for all government nutrition policy, is a serious shortfall. The proposal's sodium timeline also ignores the reality of the business world where manufacturers require sufficient time to develop and test new products before bringing them to market.

In addition, the proposal sets out interim target sodium limits **per serving** for individual foods and for main dishes and meals, with the final target sodium value **per RACC** for individual foods and **per serving** for main dishes and meals. The Dietary Guidelines provide sodium targets **per day**, a much more realistic and sensible approach. Attempting to get food manufacturers to lower sodium levels per dish is both unrealistic

and unworkable. The diets of both children and adults are not static but vary from meal-to-meal and from day-to-day. Thus, a higher sodium dish at one eating occasion may be compensated for by consumption of lower sodium foods at subsequent meals or over the course of a week's time. The approach in the proposal appears to be dietary micro-management and is totally out of sync with the approach taken by other federal agencies.

The proposal would require substantial reformulation of foods, increasing manufacturers' costs and potentially costing consumers more money in the checkout line.

Sensory factors such as taste and texture are critical components of any successful food product. This is especially true when it comes to children. While we strongly support encouraging children to eat more healthfully, we also recognize that if the food doesn't taste good and children won't eat it, we are not improving children's nutritional status.

The nutrition requirements described in the proposal would likely require reformulations of a number of products by manufacturers, resulting in increased costs that could lead to significant job losses at a time when our country continues to face severe economic challenges. Such reformulations, which would entail additional research, consumer testing, marketing, packaging and labeling costs, could also result in higher finished product costs. Many consumers already cite high prices as a reason for not purchasing foods with healthier profiles. It does not make sense for our government to further contribute to this situation through imposition of a new set of nutrition principles such as those proposed here.

Instead, we encourage you to look at the extensive work currently being undertaken by the baking industry and others in the food arena to encourage demand for healthy foods among children and adults alike. A number of our organizations have invested heavily in developing new, healthy grain foods as clearly evidenced by the expanding number and variety of innovative, nutritional, affordable and tasty enriched and whole grain products available on supermarket shelves.

The baking industry, joined by millers and wheat growers, also worked with Congress to establish funding in the 2008 Farm Bill for a Grain Purchase Program that expanded the availability of whole grain foods offered in 2009 to schools as part of the school lunch and breakfast programs.

The entire grain chain is reaching out to consumers in a variety of ways to educate them about nutritious grain foods and the role they play in a balanced, healthy diet.

The principles will not be effective in changing consumer behavior.

We believe it is critical that our government focus on strategies that work. There is no evidence linking advertising of particular foods to obesity. A newly-released study from the Montreal Economic Institute, Montreal, Canada (attached), states that "an extensive review of the relevant scientific literature shows that the total consumption of 'undesirable' products cannot be reduced by limiting or banning their advertisement since consumers do not simply allow their choices to be dictated by ads."

There is no need for the proposed principles as industry has recognized the issue, has already taken initiatives to address it, and will continue to seek measures that are clinically effective and scientifically supported, in cooperation with directions set by USDA and other federal guidelines.

The proposed principles are not necessary because the food industry is already moving forward on its own initiative to self-regulate. In 2006, the Council of Better Business Bureaus (CBBB) and 10 leading food and beverage companies launched the Children's Food and Beverage Advertising Initiative. The program provides companies that advertise foods and beverages to children with a transparent and accountable advertising self-regulation mechanism aimed at shifting the mix of advertising messaging and products directed to children under 12 to encourage healthier dietary choices and lifestyles. Today, 17 companies participate in the program representing over 90 percent of all child-directed advertising.

The principles raise serious antitrust implications.

Implementation of the proposed principles potentially could render industry members vulnerable to antitrust risk. Given the nature of the proposal and its effects on industry, food companies might not implement the principles without seriously considering whether their competitors will also do so. Further, the ambiguities regarding the definitions of marketing and other aspects of the proposed principles may prompt members of the food industry to discuss their meaning and practical application collectively, through trade associations or other industry discussions. And different companies may reformulate similar types of products in order to be able to advertise them under the principles, and may need to charge higher prices to cover the costs of reformulation. Though these are logical and likely legitimate activities that would be the natural result of the industry pressures imposed by the proposed principles, an antitrust plaintiff could possibly allege that such activities are illegal collusion or other agreements in restraint of trade in violation of Section 1 of the Sherman Act. By making the described activities vulnerable to challenge, the proposed principles could put food companies in a difficult position from an antitrust perspective, and could potentially undermine companies' efforts to shift their product portfolios to more healthful options.

The principles restrict speech protected by the First Amendment.

While we support programs to encourage healthy dietary choices by children as well as adults, we believe that the proposed principles not only would not produce effective dietary change, but they also would impermissibly restrict commercial speech that is protected by the First Amendment. In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980), the Supreme Court articulated a four-part test for determining whether a government restriction on commercial speech is permissible under the First Amendment. The Court inquires whether: 1) the commercial speech concerns a lawful activity and is not misleading; 2) the government interest asserted to justify the regulation is substantial; 3) the regulation directly advances that government interest; and 4) the regulation is no more extensive than necessary to serve that interest. As currently proposed, the principles clearly fail the *Central Hudson* test. Specifically, the principles fail both the third and fourth prongs of the test, and are therefore unconstitutional.

Although the principles were designed to support the governmental interest of prevention of childhood obesity, the principles do not directly advance this interest. As discussed above, there is no evidence linking advertising of particular foods to obesity. Moreover, even if evidence did link advertising to obesity, regulating marketing to children would not be sufficient to directly advance the government interest. As First Lady Michelle Obama's Let's Move initiative recognizes, combating childhood obesity requires a multifaceted approach on many levels, including broader access to healthy food and exercise. Thus, in addition to the First Amendment problems presented by the proposed marketing restrictions, the principles undermine broader approaches to the problem of childhood obesity by implying that marketing restrictions will solve the problem.

Even assuming that the proposed principles could materially advance the government's interest in reducing childhood obesity, they are far more extensive than necessary to serve that interest. As described in a May 11, 2010, Press Release from the White House, the White House Task Force on Childhood Obesity action plan presents "a series of 70 specific recommendations, many of which can be implemented right away," that are designed to solve the problem of childhood obesity. These recommendations—which include providing good prenatal care for parents and providing healthy foods in schools—describe a wide variety of potential means to battle the problem of childhood obesity other than the restriction of advertising. The government has not shown that it has made sufficient efforts to implement any of these recently recommended alternatives before proposing the marketing restrictions in the principles. We encourage progress on many of the other fronts articulated in the Task Force report.

Furthermore, the principles unduly impact the First Amendment right of commercial advertisers to communicate with adults. As proposed, the principles restrict advertising when the percentage of children in the audience is estimated at no more than 20 or 30%, meaning that manufacturers would be prevented from communicating truthful information concerning lawful products to audiences that are made up of 70 or 80%

adults. Also, the proposed principles would prohibit numerous communications even when they are seen exclusively by adults. For example, under the proposal's approach to "programming blocks" and "dayparts," an advertisement could be shown in a program that has a solely adult audience yet be considered as targeted to kids if the prior or subsequent programming is directed to children or teens. Thus, even if the proposed principles survive scrutiny under other aspects of commercial speech protection, they fail the fourth prong of the *Central Hudson* test.

The unconstitutionality of the proposed principles is also made clear by the Supreme Court's recent decision in *Brown v. Entertainment Merchants Association*, 564 U. S. ____ (2011). Expressing strong support for First Amendment free speech rights even when children and adolescents are the audience, the Court found that the state had impermissibly singled out video game purveyors for disparate treatment without sufficient evidentiary basis showing that the content of the banned videos actually harmed children. Against this recent articulation of First Amendment protections, it is difficult to conclude that the proposed principles could withstand constitutional scrutiny.

As discussed in greater detail in the attached White Paper by Martin H. Redish entitled "Childhood Obesity, Advertising and the First Amendment," the proposed principles will have an unconstitutional "chilling effect" on free speech despite their superficially "voluntary" nature. The principles would impose costly and impossible choices on those subject to the principles. Companies will be forced to choose between, on the one hand, abandoning marketing efforts important to their commercial success and, on the other hand, facing a parade of completely untenable consequences, such as: (i) risking enforcement actions; (ii) receiving criticism from the agencies that hold great power over nearly every aspect of food companies' businesses; (iii) opening themselves up to class action lawsuits; and (iv) causing damage to the reputations of food companies who choose to continue to market products that do not comport with the principles. This sort of choice is inherently coercive and belies the purported voluntary status of the principles.

Conclusion

In conclusion, the proposed voluntary guidelines will further confuse the public by imposing a new set of nutrition standards that are inconsistent with other government mandates and most importantly, fail to follow federal statute mandating the Dietary Guidelines for Americans as the blueprint for all federal nutrition policy.

They will not achieve the intended goal of encouraging children to eat more healthfully as they are not science-based and instead, will conflict with and stifle existing, successful industry initiatives to self-regulate in the marketing arena. Furthermore, while the stated goal is to improve the diets of children, the principles do just the opposite by disallowing the marketing of such healthy foods as fiber-rich whole wheat breads, whole

grain cereals, enriched bread, pasta and rice that offer iron and four B vitamins including folic acid.

We are also concerned about the additional costs on food manufacturers should the proposed principles be adopted. Imposing significant product reformulations based on unrealistic and unworkable timelines would be counterproductive at a time when our country is still trying to work its way out of a crippling recession and many Americans remain out of work.

We urge the IWG to withdraw the current proposal and suggest that a much more productive and commonsense approach is called for based on:

- Adhering to the principles of the 2010 Dietary Guidelines.
- Working with manufacturers to develop positive health messages to include in advertising to children since we know positive messages resonate more strongly with consumers.
- Recognizing industry initiatives such as the CFBAI, and other companies/industries taking proactive steps in marketing healthier foods to children and building on those successful models.

Again, we appreciate the opportunity to provide our views. If you have questions, feel free to contact one of the organizations below.

Sincerely,

American Bakers Association, Robb MacKie, President/CEO
American Institute of Baking, James Munyon, President
Grain Foods Foundation, Judi Adams, MS, RD, President/CEO
Grains for Health Foundation, Len Marquart, President
Independent Bakers Association, Nick Pyle, President
National Pasta Association, Carol Freysinger, Executive Director
North American Millers' Association, Mary Waters, President
USA Rice Federation, Elizabeth C. Ward, President/CEO
Wheat Foods Council, Judi Adams, President

American Bakers Association (ABA) is the Washington D.C.- based voice of the wholesale baking industry. Since 1897, ABA has represented the interests of bakers before the U.S. Congress, federal agencies, and international regulatory authorities. ABA advocates on behalf of more than 700 baking facilities and baking company suppliers. ABA members produce bread, rolls, crackers, bagels, sweet goods, tortillas and many other wholesome, nutritious, baked products for America's families. The baking industry generates more than $70 billion in economic activity annually and employs close to half a million highly skilled people. RMackie@americanbakers.org

American Institute of Baking International (AIB) is a corporation founded by the North American wholesale and retail baking industries in 1919 as a technology transfer center for bakers and food processors. The original mission of the organization was to "put science to work for the baker," which is still central to all of the programs, products, and services provided by AIB to baking and general food production industries worldwide. JMunyon@AIBonline.org

Grain Foods Foundation (GFF), a joint venture of members of the milling, baking and allied industries formed in 2004, is dedicated to advancing the public's understanding of the beneficial role grain-based foods play in the human diet. Directed by a board of trustees, funding for the Foundation is provided through voluntary donations from private grain-based food companies and is supplemented by industry associations. Judi.Adams@grainsfoundation.org

Grains for Health Foundation (GFH) was founded in 2009 to increase the availability of affordable grain-based foods with health benefits to improve public health. Grains for Health forges partnerships with food and health leaders to develop evidence-based strategies that facilitate the development, delivery, and consumption of grain-based foods that promote public health, lower the incidence of diet related chronic disease, and curb health care costs. LMarquart@umn.edu

Independent Bakers Association (IBA) The Independent Bakers Association is a Washington, D.C. based national trade association of over 400 mostly family owned wholesale bakeries and allied industry trades. The Association was founded in 1968 to protect the interests of independent wholesale bakers.
NPyle@attglobal.net

National Pasta Association (NPA) was founded in 1904 and is an organization of pasta manufacturers, millers and suppliers to the US pasta industry which serves as a cohesive industry advocate, a promoter of pasta and a center of knowledge for its members.
CFreysinger@kellencompany.com

North American Millers' Association (NAMA) is the trade association representing 45 companies that operate 170 wheat, rye, oat and corn mills in 38 states and Canada. Their collective production capacity exceeds 160 million pounds of product each day, more than 95 percent of the total industry production.
MWaters@Namamillers.org

USA Rice Federation is the global advocate for all segments of the U.S. rice industry with a mission to promote and protect the interests of producers, millers, merchants and allied businesses. Over 20 billion pounds of long, medium, and short grain, and organic and specialty rices are grown and harvested each year by farmers in Arkansas, California, Louisiana, Texas, Mississippi and Missouri.
BWard@USARice.com

Wheat Foods Council (WFC) is a nonprofit organization formed in 1972 to help increase public
awareness of grains, both whole and enriched, complex carbohydrates, and fiber as essential components of a healthful diet. The Council is supported voluntarily by wheat producers, millers, bakers, and related industries.
JAdams@wheatfoods.org

Testimony of Kraig R. Naasz
President & CEO
American Frozen Food Institute

Before the House Energy and Commerce Committee
Subcommittee on Commerce, Manufacturing, and Trade and the Subcommittee on Health

October 12, 2011

I am pleased to submit this testimony on behalf of the American Frozen Food Institute (AFFI) before the House Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade and Subcommittee on Health. We appreciate the subcommittees' interest in exploring how proposed federal food marketing restrictions could impact childhood nutrition and potentially limit commercial free speech.

AFFI serves the frozen food industry by advocating its interests in Washington, D.C., and communicating the value of frozen food products to the public. AFFI is the sole association that represents all sectors of the frozen food industry, with more than 500 member companies that produce and distribute frozen foods throughout the United States and globally. Our members are responsible for approximately 90 percent of the frozen food produced annually in the U.S., valued at more than $60 billion.

AFFI previously testified before the federal Interagency Working Group (IWG) on the group's proposed "voluntary" principles to limit the marketing of food products to children aged 2-17. A copy of that testimony is enclosed. However, we would like to take this opportunity to share additional thoughts with the subcommittees regarding the IWG's proposed restrictions.

Recently, the leaders of the IWG communicated to Energy and Commerce Committee Chairman Upton to express their intent to cooperate with industry on the proposed marketing restrictions, a commitment welcomed by food makers. Unfortunately, the IWG continues to disregard explicit congressional direction contained in a fiscal year 2009 appropriations law requiring the IWG to first study this issue before issuing any proposed marketing restrictions.

Indeed, the IWG has moved forward with a proposal that includes sweeping restrictions that would curtail the marketing of thousands of healthy food products and radically change the way consumers receive food information. In the absence of the congressionally mandated study, the IWG's proposed restrictions lack any sort of foundation to justify their imposition.

The ramifications of the IWG's proposal for food makers are epic in proportion. Facing so-called voluntary marketing restrictions, food makers will be forced to reformulate their products at significant cost, with reformulation not an option in many cases. In addition, food producers would be barred from promoting their products in any venue where children or adolescents could be present or watching, like a child accompanying a parent in a grocery store.

For food makers and retailers alike, refusal to abide by the restrictions could lead to serious consequences, including potentially (and unfairly) being labeled by the government as bad actors. Ultimately, businesses not adhering to the restrictions could be forced to defend themselves against shareholder-sponsored resolutions, consumer advocacy boycotts, civil lawsuits and a constant barrage of public criticism from advocacy groups.

The burdens and consequences of the proposed marketing restrictions are simply too severe to bear without being rooted in careful study and research, as directed by Congress.

The IWG, without substantiation, asserts that advertising is a significant cause of childhood obesity, and that restricting food marketing to children will reduce childhood obesity rates. This is an entirely too narrow contention that ignores the reality that obesity is a complex problem not directly attributable to, or caused by, any one factor.

Also lost on the IWG are efforts by the food industry to self-regulate. The Better Business Bureau's five-year old Children's Food and Beverage Advertising Initiative includes 17 of the largest U.S. food and beverage makers. Each has committed to advertising only healthy and better-for-you products in marketing directed at children under the age of 12. The adoption of these standards in 2006 has seen the number of advertisements aired with children's programming reduced by 50 percent.

In addition, the IWG's proposed restrictions completely ignore voluntary industry efforts to strengthen the nutritional value of more than 20,000 food products. Food makers have made sweeping cuts to sodium, sugar and fat, while at the same time making greater use of fruits and vegetables, whole grains and all-natural ingredients in packaged foods.

At the end of the day — despite not producing evidence demonstrating a link between food marketing and obesity rates and ignoring the industry's efforts to self-regulate — the IWG continues to press forward with its proposed restrictions.

There is no disagreement about America's obesity crisis, in children and adults, or the need to see it addressed. By changing recipes and reducing fat, calories, sodium and sugar, food producers have demonstrated an impressive commitment to confronting America's obesity crisis.

In summary, AFFI respectfully urges that the IWG withdraw its proposal and complete a study of the benefits and costs of such restrictions, as Congress originally directed.

Thank you for this opportunity to offer testimony. AFFI looks forward to working with the subcommittees to strengthen the nutritional health of America's children.

July 14, 2011

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex W)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Interagency Working Group on Food Marketed to Children: Proposed Nutrition Principles, General Comments, and Proposed Marketing Definitions; FTC Project No. P094513

To Whom It May Concern:

The American Frozen Food Institute (AFFI) appreciates the opportunity to submit these comments to the Interagency Working Group on Food Marketed to Children (IWG) on its *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts* (proposed principles). As the voice of the U.S. frozen food industry, AFFI is the sole national trade association that promotes and represents the interests of all segments of the U.S. frozen food industry. AFFI's more than 500 member companies manufacture and distribute frozen foods throughout the United States and globally. Our members are responsible for approximately 90 percent of the frozen food produced annually in the U.S., valued at more than $60 billion. Although AFFI's membership comprises many of the largest food companies in the world, the Institute prides itself on also representing the interests of small and mid-sized frozen food companies.

AFFI is a strong supporter of healthy eating initiatives with the goal of improving nutrition and reducing obesity. We share the IWG's desire to improve children's and adolescents' diets and improve their access to nutritious foods. However, we are very concerned by the proposed principles' infringement upon free speech rights protected by the First Amendment. Beyond the First Amendment issues, we also have concerns about the IWG's proposed nutrition principles and marketing definitions for food marketed to children and adolescents. We question both the wisdom of the specific proposed nutrition principles and the approach to and implications of the proposed marketing definitions and resulting restrictions.

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Specifically, our comments highlight the following:

- Although termed as "voluntary," the principles would, in effect, suppress free speech in violation of the First Amendment.
- The proposed nutrition principles are inconsistent with federal nutrition policy, would prohibit marketing for many beneficial foods, like frozen vegetables, and establish an unrealistic timeline for implementation.
- Because the marketing definitions are overly broad, they would effectively ban marketing to many adults and would prohibit corporate sponsorships of activities that encourage healthy eating and physical activity.
- The IWG failed to conduct a "study," as required by Congress, and would effectively preempt ongoing self-regulatory efforts, which have already demonstrated benefits, if it implements the proposed principles.

AFFI urges the IWG to withdraw the proposed principles and carry out the study required by Congress, taking into account the significant results demonstrated by the food industry's voluntary efforts over the past several years to help address the obesity epidemic in the U.S. and provide more healthy options for parents and children to chose from.

I. The IWG's Proposal Violates Constitutional Protections for Free Speech.

The proposed principles would unconstitutionally infringe on free speech rights protected by the First Amendment. The Supreme Court has established strong, well-defined protections for commercial speech. Government regulation that suppresses advertising is prohibited unless the restrictions *directly* advance a substantial governmental interest and the measure is drawn to achieve that interest. Yet, the proposed principles attempt to *indirectly* address the government's claimed interest in reducing childhood obesity, are overly broad, unnecessarily restrictive, and would infringe on a significant volume of advertising to a sizeable segment of the population.

Courts apply the four-part *Central Hudson* test to assess restrictions on commercial speech. After first assessing whether the expression is protected by the First Amendment, courts consider whether the asserted governmental interest is substantial, the regulation directly advances the governmental interest asserted, and the restriction is not more extensive than necessary to serve that interest. 1/ A restriction on speech is unconstitutional if it fails any one of these requirements. The proposed principles would fail both the third and fourth prongs of that analysis.

The proposed principles fail the third *Central Hudson* prong because there is no basis to conclude that they would directly advance the government's interest in

1/ *Central Hudson Gas & Elec. Corp. v. Pub. Serv Comm'n*, 447 U.S. 557 (1980).

preventing and reducing childhood obesity. The IWG, without substantiation, asserts its belief that advertising is a significant cause of childhood obesity and that restricting marketing of foods to children would reduce childhood obesity rates. But obesity is a complex problem that is not directly attributable to or caused by any one factor. At its most basic form, obesity is a result of consuming more calories than are burned for a sustained period of time.

The IWG's proposal does not address numerous other issues that materially affect the net caloric balance, such as physical activity, portion size, the overall nutrition profile of a child's diet, individualized factors (such as metabolic rate and family history), and general lifestyle choices. Nor does the IWG establish that foods selected by children because of targeted marketing—as opposed to meals offered at schools and daycare or food bought or prepared by parents or guardians—make up a significant portion of a child's diet or materially affect a child's net caloric intake. Critically, the foods identified by the IWG as contributing to childhood obesity would still be available to children under the proposed rules, only their manufacturers would not be permitted to talk about them. In actuality, decreasing obesity will depend on a number of factors, such as behaviors and lifestyle modifications, including increased physical activity and consuming fewer calories. The IWG cannot show that its proposed restrictions would help remedy the problem or that only allowing marketing of foods that meet its restrictive nutrition requirements will affect childhood obesity rates. Therefore, the proposed principles would fail because there is no evidence that they would significantly advance the government's interest of addressing childhood obesity.

Even assuming that the IWG's proposal would actually affect childhood obesity, the principles would fail to pass constitutional muster under the fourth *Central Hudson* prong because they restrict far more speech than is necessary. There are much less controlling means to advance the goal of reducing childhood obesity, such as the self-regulatory efforts currently being undertaken by the food industry, increased efforts to provide physical activity in schools, and increased access to healthy foods by lower income populations. Rather than considering less severe approaches, the IWG's proposal would restrict advertisers from communicating with significant numbers of adults.

The proposed principles would consider programming to be "marketing to children" even when adults constitute up to 70 or 80 percent of the audience. In fact, certain marketing communications that are seen only by adults may even be prohibited by the proposed principles. A speech restriction that sweeps up four extra persons for every one targeted person is a clear example of an overly broad restriction on speech that would not withstand judicial scrutiny. In his whitepaper on childhood obesity, advertising, and the First Amendment, Professor Martin Redish succinctly summarized the problem with the proposed principles, stating "The regulations thus would employ a hatchet when at most a scalpel would be needed." 2/

2/ Martin H. Redish, *Childhood Obesity, Advertising, and the First Amendment*, at 10 (June 8, 2011) (white paper prepared at the request of General Mills, Inc.).

Two frequently asserted defenses are that the proposal is subject to a different standard because it involves the protection of children and that it is not subject to judicial review because it is voluntary. Neither of these points is tenable. A desire to "protect" children through these restrictions does not cure their constitutional flaws. The Supreme Court very recently reaffirmed that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." 3/ The government's power to protect children "does not include a free-floating power to restrict the ideas to which children may be exposed." 4/

Furthermore, the proposed principles are not truly voluntary. Food companies would have no choice but to adhere to the principles, lest they face *de facto* penalties such as enforcement actions, government investigations, and class action lawsuits. Manufacturers would also be bound, as media outlets would likely decline to run advertisements if they do not adhere to the principles. 5/ Therefore, even though they are promoted as being "voluntary," the proposed principles would be subject to judicial review because their inherently coercive nature would affect First Amendment freedoms. 6/

Moreover, we believe that a reviewing court would be particularly skeptical of the IWG's proposed principles in the current environment. The Supreme Court is strongly protective of the First Amendment and is particularly inclined to review cases of government overreaching. For example, the Court recently struck down restrictions on children's access to violent video games and on marketers' use of physician's prescription histories. 7/ In the later case, Justice Kennedy wrote:

3/ *Brown v. Entm't Merchants Ass'n*, No. 08-1448 at 6-7 (June 27, 2011) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-213 (1975) (citation omitted)).

4/ *Id.* at 7.

5/ In fact, in its report to the President, the White House Task Force on Childhood Obesity recommended that the media and entertainment industry "develop uniform guidelines to ensure that a higher proportion of advertisements shown on their networks and platforms are for healthy foods and beverages." *Solving the Problem of Childhood Obesity within a Generation* at 32.

6/ *See, e.g.*, *Bantam Books v. Sullivan*, 372 U.S. 58, 66-67 (1963) (holding that the government's practice of notifying publishers that certain books were obscene constituted a violation of the First Amendment, even though the government's actions were limited to informal sanctions, because its aim was to "achieve the suppression of publications deemed 'objectionable'"); *Rattner v. Netburn*, 930 F.2d 204, 209 (2d Cir. 1991) ("[W]here comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim [for violation of First Amendment rights] can be stated.") (quoting *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983).

7/ *Brown v. Entm't Merchants Ass'n* No. 08-1448 (June 27, 2011); *Sorrell v. IMS Health Inc.*, No. 10-779 (June 23, 2011).

> In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime. Likewise the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers. 8/

He added that the "fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech. 9/ Given the Court's strong reaffirmation of the substantial protection that advertising enjoys under the First Amendment and the limited additional protections permitted for speech aimed at children, the Court is unlikely to look favorably upon the IWG's proposal.

II. The Proposed Nutrition Principles are Flawed.

AFFI and its members have three primary concerns with the proposed nutrition principles. First, the proposal does not align with current federal nutrition policy, including federal regulations. Second, the proposed principles would prohibit marketing for many beneficial foods that public policy encourages children and adolescents to consume, like frozen vegetables. Finally, the IWG establishes an unrealistic timeline and fails to consider the costs and challenges of reformulation.

A. The Proposal Is Inconsistent with Federal Nutrition Programs and Regulations.

The IWG's proposed nutrition principles do not align with existing federal food and nutrition programs. Although the IWG states that the proposed principles "should not be interpreted as a change in federal dietary guidance or nutrition policy or as a revision to any regulation defining health claims or nutrient content claims," their implementation would mark a significant departure from established nutrition policy. 10/ Underlying this inconsistency is the failure of the proposed principles to adhere to the *2010 Dietary Guidelines for Americans* ("Dietary Guidelines" or "DGA"). This is particularly concerning given that the Dietary Guidelines are intended to form the basis of federal nutrition policy and all federal dietary guidance for the public is required to be consistent with the Dietary Guidelines.

The Dietary Guidelines focus on the overall composition of the diet, with less consideration given to the individual foods that may be consumed. Their recommendations encompass two overarching concepts: (1) Maintenance of calorie balance over time to achieve and sustain a healthy weight; and (2) Consumption of

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8/ *Sorrell v. IMS Health Inc.*, No. 10-779 at 22 (June 23, 2011) (emphasis added).

9/ *Id.* (quoting *Thompson v. W. States Med. Ctr*, 535 U. S. 357, 374 (2002).

10/ Interagency Working Group on Food Marketed to Children, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts*, at 6.

nutrient-dense foods and beverages. By focusing on specific foods and imposing detailed nutrient requirements, the IWG's proposed principles do not consider the diet holistically as recommended by the Dietary Guidelines.

The IWG's principles are also inconsistent with the Dietary Guidelines because they apply to children of all ages, whereas the Dietary Guidelines set specific recommendations for sub-populations (ages 1–3, 4–8, 9–13, and 14–18). The proposed sodium restrictions do not comport with the Guidelines because they establish a single, restrictive limit on sodium consumption for all age groups, which is not scientifically supported. The IWG proposal also sets sodium restrictions per food item, main dish or meal, whereas the DGA focus on daily intake as being the most important. Notably, no description of the methods or data used to derive these individual food limits is provided. The Dietary Guidelines set different sodium recommendations by age group. Moreover, the Dietary Guidelines recommend the most restrictive sodium limit, 1500 mg per day, only for certain sub-populations such as individuals over age 50, African Americans, or people with hypertension, diabetes, or chronic kidney disease. This most restrictive limit is recommended for only one subset of children, those ages 1–3. The Dietary Guidelines establish higher sodium levels for children and adolescents above 3 years old, but the proposed principles deviate from the DGA in this regard.

The nutrition guidelines outlined in the IWG proposal imply a one-size-fits-all approach for children ages 2–17 years. The Institute of Medicine recommends providing young children with a variety of healthy foods and age-appropriate portion sizes in meals, snacks and beverages. Some of the proposals provisions would, in effect, limit certain nutrients that are especially vital during certain periods of childhood development. The restrictions on protein rich foods, for example, do not take into consideration the essential fatty acids required for proper neurological growth and development. Furthermore, the one-size-fits-all approach of the nutrient guidelines, fails to take into consideration the changing energy and nutrient needs across the age spectrum of 2–17 years.

Additionally, the IWG's limits are more restrictive than the regulatory definition of "healthy" established by the Food and Drug Administration (FDA). 11/ FDA restricts the "healthy" claim to foods with 480 mg or less of sodium, which significantly exceeds the IWG's proposed levels. Therefore, the proposed principles would ban advertising for numerous foods that federal nutrition regulations define as "healthy." The proposed principles also would prohibit advertising for products FDA has explicitly authorized for promotion using various health claims.

The restrictions on added sugars pose another incongruity with FDA's labeling requirements. FDA has not defined "added sugars," and only requires that "total sugars" be declared on the Nutrition Facts Panel. The restriction on advertising foods based on their added sugar content would cause confusion for advertising outlets, which have no readily established means of verifying whether a food is

11/ 21 C.F.R. § 101.65(d)(2).

acceptable to be marketed to children or adolescents. Furthermore, as recently recognized by the Institute of Medicine, "[a]n analytical test that can accurately determine added sugar content is unavailable, leaving the sharing of proprietary product formulations as the only apparent option for monitoring product compliance with established criteria." 12/

Similar concerns arise because of the focus on "naturally occurring nutrients." It is impossible to distinguish which nutrients are naturally occurring from the Nutrition Facts Panel, which makes restrictions on this basis impossible to monitor unless companies are required to provide complex proprietary data about each food they intend to advertise. Also, the proposed principles are not clear as to how the exclusion on "naturally occurring" nutrients will function.

Furthermore, the proposed principles fail to align with several other important components of federal nutrition policy, including the National School Lunch and Breakfast programs and the Women, Infants, and Children (WIC) nutrition program. It is especially ironic that many foods currently served and made available to children in schools and that are currently permissible for inclusion in WIC food packages, which are accepted by the U.S. Department of Agriculture (USDA) as nutritious, could not be marketed to children or adolescents under the IWG's proposal due to its constraining nutrient restrictions.

The nutrition standards outlined in the IWG proposal are also not consistent with the Healthier US School Challenge nutrition guidelines nor the Alliance for a Healthier Generation; both voluntary programs supported by the U.S. Department of Agriculture and First Lady Michelle Obama. These programs provide guidance and incentivize schools to provide healthful meals and a supportive environment that promotes physical activity. Several AFFI members currently support these programs.

Considered as a whole, the IWG's proposed principles are inconsistent with established federal nutrition policy and would prevent the marketing of foods long recognized as nutritious and healthy to children and adolescents. It is essential for the government to establish consistent federal nutrition standards because conflicting federal guidance will cause confusion among the food industry and consumers. Congress did not intend for the IWG to undertake a wholesale reinvention of nutrition policy, and therefore the proposed principles should be withdrawn.

B. Marketing for Many "Good For You" Foods, Like Frozen Vegetables, Would be Prohibited by the Proposed Principles.

The proposed principles would effectively prohibit the marketing to children and adolescents of many foods for which consumption should be encouraged. This

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12/ Institute of Medicine, *Examination of Front-of-Package Nutrition Rating Systems and Symbols: Phase I Report*, October 2010.

result is not supported by nutrition science and directly contradicts the IWG's stated goal of promoting healthy diets. We are especially troubled that the proposed principles would prevent the advertising of certain wholesome, healthy, and nutritious frozen foods to children. In particular, we are concerned about the proposal's impact on the advertising of frozen vegetables.

Frozen vegetables are a vitally important food option for children, and restrictions on the promotion of these vegetables would be detrimental to efforts aimed at improving childhood nutrition. Like fresh vegetables, frozen vegetables deliver key nutrients and contribute to an overall healthy diet. In fact, according to FDA, the nutrient profiles of select raw fruits and vegetables and frozen, single-ingredient versions of the same fruits and vegetables are relatively equivalent. Recent data have shown that the nutrient content level for certain nutrients is actually higher in the frozen version of certain vegetables because they are packed at the peak of freshness. Notably, the 2010 Dietary Guidelines urge the consumption of more vegetables and explicitly reference frozen vegetables as being just as healthy as their fresh counterparts.

However, under the IWG proposed principles, companies may not be able to advertise certain frozen vegetables to children because they may not meet the stringent and unrealistic sodium limitations endorsed by the IWG. In fact, the IWG acknowledges that its sodium level recommendations, along with many other requirements it proposes, cannot be met by numerous products in the marketplace if fully implemented. This is not just a matter of reformulation, because such drastic reductions in sodium can affect acceptability and consumption by children.

It is entirely counterintuitive to prevent advertising of frozen vegetables to children under a scheme that purports to improve childhood nutrition, when the prohibited advertising promotes products the federal government acknowledges are beneficial to childhood nutrition. This is not responsible public policy. Moreover, children are more likely to eat new foods in the presence of familiar ones. Combination vegetable dishes, therefore, may provide a vehicle for the introduction of a greater variety of vegetables and other foods to children. Yet the IWG's proposed principles would prohibit the marketing to children of frozen foods that would make the vegetables more palatable to children and increase their acceptability. Frozen vegetables prepared in a light herb sauce, for example, offer the same nutrients as raw broccoli and may be consumed by kids who would not otherwise eat such vegetables. It defies common sense for the IWG to restrict advertising for foods that can help children transition to acceptance of more healthy choices.

C. The Proposed Principles are Unrealistic to Implement.

AFFI is also concerned that many companies would not be able to reformulate their foods to meet the proposed principles, or could not do so within the IWG's timeframe. In recent years, many of our members have made significant strides in reformulating their products to reduce the levels of undesirable nutrients like *trans* fats and sodium. However, the development, testing, and implementation of

further changes may not be immediately feasible. Making such changes requires significant time and resources. It is unrealistic to expect that companies will be able to affect further modifications to their products in the time accorded by the IWG's proposal.

Furthermore, the IWG does not seem to consider the costs and technical challenges of reformulation. For example, sodium reduction is extremely challenging and complicated. Sodium affects many aspects of foods, including food safety, palatability, and functionality, such as shelf life. Consumers may not choose foods with drastic reductions in sodium levels due to undesirable impacts on taste and appearance. Implementation of such changes also may have the unintended consequence of decreasing the affordability of these products for consumers. Notably, and unfortunately, the expected costs of the IWG's proposal are unknown because the proposal is termed "voluntary" and therefore is immune from a cost-benefit review by the Office of Management and Budget.

III. The Proposed Definitions of Marketing Are Unreasonably Broad.

The definitions of "marketing to children" are overly expansive and would sweep within their coverage a substantial amount of marketing that is primarily directed toward adults. This results in unnecessarily broad restrictions, such as prohibitions on advertising during a television program with 70 to 80 percent adults in the audience. The proposal would capture many types of programming that are intended primarily for adults, such as professional sports broadcasts. Furthermore, the definitions cover a wide range of activities that extend far beyond traditional advertising vehicles like television and radio advertising. The proposals would also affect support of children's charities, athletic activities, and funding for philanthropic healthy-behavior initiatives.

The excessive scope of the proposal is clearly illustrated by the consequences that would result for the Frozen Food Foundation's annual 5K Run Run/Walk. In response to First Lady Michelle Obama's *Let's Move!* initiative, the scope of the race has been expanded in recent years to include children, teens and families. The Fun Run promotes healthy eating and physical activity, two pillars of the *Let's Move!* campaign. The race also provides a safe, family-oriented environment that allows kids to engage in healthy behaviors.

However, events such as these are costly to stage, and require significant underwriting from member companies in the form of event sponsorship. The sponsoring companies produce healthy, nutritious frozen products, but may also have some foods in their product lines that would not meet the IWG's proposed principles.

As part of its sponsorship, one company's brand mascot, a vegetable, is present at the event and interacts with children by playing games and taking photos. The mascot communicates the positive message that vegetables are "cool."

Were the IWG's proposal to be implemented, the Frozen Food Foundation would no longer be in a position to hold this event due to the prohibition on our sponsors' involvement. This result is counterproductive. The Frozen Food Foundation's 5K encourages positive behavior by exposing children to positive activities, role models, and messages about the benefits of healthy eating and physical activity in a supervised, safe environment. The IWG should consider whether it is sound public policy to cause such collateral effects.

Additionally, the definitions established in the child marketing study conducted by the Federal Trade Commission (FTC) in 2006 are complicated and difficult to apply, making feasible implementation of the IWG's proposal an impossibility. Rather than engage in a complex assessment of each potential advertisement being considered, food companies are more likely to shy away from any marketing that could approach the boundaries of being considered child or adolescent marketing. Companies are rightfully concerned about the risks of enforcement actions, litigation, or negative publicity from behaviors that are too close to the line.

IV. The IWG Should Withdraw the Proposed Principles.

The IWG should withdraw its proposed principles and instead focus on ways to effect change through more cooperative efforts. In addition to the unconstitutionality of the proposal, another underlying need for withdrawal is the IWG's failure to address its Congressional mandate. Congress directed the IWG to "conduct a study and develop recommendations for standards for the marketing of food." 13/ In developing its recommendations, the IWG is directed to consider "the positive and negative contributions of nutrients, ingredients, and food . . . in the diets of such children" and "evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children." The IWG has yet to conduct a study and its proposed standards have not adequately considered these issues, which is reflected by the proposed principles' reliance on outdated assumptions and data. Before attempting to establish standards, the IWG should have conducted a comprehensive study of the issue as directed by Congress.

Furthermore, rather than continuing to develop its overly restrictive proposed principles, the IWG could work to support more cooperative approaches that have a greater chance of effectively changing the nutrition profiles of foods marketed to children and adolescents. Self-regulatory efforts are already effecting great change in this regard, but would be effectively preempted by the IWG's proposal. For example, the Council of Better Business Bureaus' Children's Food and Beverage Advertising Initiative (CFBAI) has resulted in an improved nutritional profile of

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13/ Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84.

foods shown in child-directed advertising, which are lower in calories, fats, sugars, and sodium and contain more positive nutrients than just a few years ago. 14/

Given the release of the 2010 Dietary Guidelines, the CFBAI and its participants today announced the development of new category-specific uniform nutrition criteria to replace existing company-specific nutrition standards, which help companies meet the new objectives of the Dietary Guidelines. CFBAI and its participants have committed to put the new criteria into effect no later than December 31, 2013.

CFBAI's success and continued development is attributable to incentives for reformulation and innovation, which have been supported by a lively debate about this issue in the public arena. Consumers are now demanding more nutritious foods and are choosing not to purchase foods with less positive nutrition profiles. This encourages a healthy level of competition within the food industry, with companies competing to be the best on the basis of nutrition.

The incentive to reformulate products as a point of differentiation from competitors would be eliminated if the IWG's principles were implemented, because the proposed principles would only permit advertising for the "best" foods. Companies will only have an incentive to reformulate products if doing so is feasible and realistic. However, because there would effectively be no means of informing consumers of product improvements (unless they meet the proposed principles' restrictive standards), manufacturers would have no reason to produce incrementally "better for you" versions of a product.

V. Conclusion.

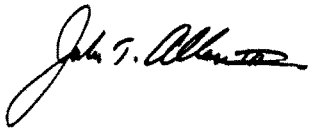
As discussed above, the courts are unlikely to look favorably upon the IWG's prohibition of free speech. Justice Stevens once noted that bans on commercial speech "not only hinder consumer choice, but also impede debate over central issues of public policy." 15/ We agree that obesity is a serious problem that must be addressed, but the IWG's approach would foreclose public discourse about the issue by prohibiting a large amount of marketing behavior. In contrast, the self-regulatory efforts that are currently in place allow the debate to continue while encouraging competition on the basis of nutrition. Notably, in its recent decision striking down California's restrictions on the sale of violent video games to minors, the Supreme Court lauded the video game industry's voluntary self-regulatory efforts. 16/

14/ *The Children's Food & Beverage Advertising Initiative in Action: A Report on Compliance and Implementation During 2009* (December 2010).

15/ *44 Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996).

16/ *Brown v Entm't Merchants Ass'n*, No. 08-1448 at 15-16 (June 27, 2011) ("This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home.").

In closing, we reiterate our concerns that the proposed principles would not remedy the problem of childhood obesity but rather would serve only to restrict free speech and limit the nutrition information available to consumers when making purchasing decisions. AFFI and its members firmly believe the federal government should not attempt to define "good" and "bad" food, nor regulate marketing based on the category in which it believes a particular product falls. We respectfully request, therefore, that the IWG withdraw the proposed principles, carry out the study required by Congress, taking into consideration the results of the industry's latest efforts, and report to Congress on these results.
Respectfully submitted,



John T. Allan, III., MS
Director of Regulatory and International Affairs

Mr. PITTS. And now the Chair recognizes the gentleman from Mississippi, Mr. Harper, for 5 minutes.

Mr. HARPER. Thank you, Mr. Chairman, and thank each of you for being here. And as I look at this, and Dr. Dietz, your opening statement and remarks, and looking at your report, you know, you have a statement here that says not only does obesity increase the likelihood of a child developing those serious physical issues, you also said but it also may lead to severe psychological and social problems, such as absenteeism from school, discrimination, victimization, and poor self-esteem. So I just wonder what you are doing here for the skinny kids like me. You know, I was 6–5 and 160 pounds. Now, I got a little, you know, I added a little. By the time I got married I was 165. So you know, I did beef up some during that time. But you know, when you are a skinny kid, particularly going into young adulthood, and you have to have a suit—back in that day you had two choices. You could get navy blue, or really dark navy blue. I mean that was pretty much your choice. So as you look at this, you know, every child is different. But it appears that your report is focusing more on obesity. And I understand the physical reasons for that. But tell me exactly what was the charge or the task that was given the IWG? What was the verbiage for that?

Mr. DIETZ. I will just jump to the directive. The working group is directed to conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years or younger or when such food represents a significant component of the diets of children. In developing such standards, the working group is directed to consider positive and negative contributions of nutrients, ingredients, and food, including calories, portion size, saturated fat, trans fat, sodium, added sugars, and the presence of nutrients, fruits, vegetables, and whole grains, to the diets of children; and secondly, evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children.

Do you want——

Mr. HARPER. Sure. That is fine. Now, you know, one of the things, one of the proposals, and I want to make sure I have got this right, one of the proposals is it would eliminate sports figures and also animals from boxes. That is correct on what the recommendation is?

Mr. VLADECK. In our proposed draft there is a discussion about that. As I tried to signal in my written testimony, and in my oral statement today, my sense is that we are moving away from that.

Mr. HARPER. OK. And would it be your personal recommendation that you move away from that?

Mr. VLADECK. Yes.

Mr. HARPER. And what about you, Dr. Post?

Mr. POST. We are in agreement, yes.

Mr. HARPER. OK. Dr. Dietz? OK. Well, that is—you know, as we look at the correlation you were talking about, Mr. Vladeck, about television and obesity, each of you have heard this, you know, is it because—is the obesity connection for television because of the

advertising or the sheer number of hours that a child will sit in front of the television to watch?

Mr. DIETZ. Well, certainly inactivity is a contributor. And as time has gone on, we have been more and more concerned about screen time, because it is not limited to television time. The data we have, though, is about television time, and the advertising on television, and the connection that that has to the consumption of foods advertised on television while watching television.

Mr. HARPER. So if it is related to the advertising of the food product, then you are saying that the child, who is a child, is the one who sets the standard for what the parent will buy at the store and not the parent?

Mr. DIETZ. Well, not always, but children have a huge influence on parental decision-making. And that is derived from the advertising that directs children to want products.

Mr. HARPER. We have all seen or experienced certainly, in aisle 6 the child pitches a fit, and it is easier to give in and put it in the basket than it is to be the parent and maybe not shop in the store with the child. So what is the average number of hours that your study shows that the typical child will spend watching television?

Mr. DIETZ. We have not done a recent study of that. My recollection is that on average it is 3 hours. It is variable by age. But I think on average—and there are significant ethnic disparities. African American children tend to watch more television.

Mr. HARPER. OK. Anybody else have different figures besides the 3 hours that you have heard or are familiar with? OK. And during that let's say a typical 3-hour period that a child is watching TV, they are inactive, obviously during that time.

Mr. DIETZ. Yes.

Mr. HARPER. During that 3-hour period, how many advertisements would typically be about a food item?

Mr. DIETZ. I think the majority of ads, and I can't remember, FTC has those numbers, I want to say 11. But I think—a Saturday morning is quite different than weekday.

Mr. VLADECK. I think the average is somewhat lower than that, outside of the cartoon hours on Saturday morning.

Mr. HARPER. And I know my time is up, but it sure seems like we are trying to do these—and I know we have many things, many regulations that are well intended, and we certainly want people and kids to be healthy, but it seems to me that we are trying to do what the parent is supposed to be doing here, to have the responsibility for that self-discipline of the family and to do those things that need to be done. So we are in a situation where this doesn't mean that—we all want to see an end to childhood obesity, but this seems to be a farfetched approach, when what we should be doing is expecting the parents to do their job.

With that, I yield back.

Mr. PITTS. The Chair thanks the gentleman, and yields to the gentleman from New York, Mr. Towns, 5 minutes for questions.

Mr. TOWNS. Thank you very much, Mr. Chairman. You know, I want to follow up on Mrs. Capps' question. Is it true that the IWG agencies do not have regulatory authority over food advertising to children?

Mr. VLADECK. I think it would be very difficult for the Federal Trade Commission to issue regulations that had any binding effect in terms of marketing food to children. Our rulemaking authority is very limited in this area. We have enforcement authority, but it wouldn't extend to the kinds of issues that we are talking about today.

Mr. TOWNS. Could you give me an example of your enforcement authority? Just a classic one, you know.

Mr. VLADECK. Our authority is deception. It rests on a company committing a deceptive act or an unfair act. But here the only example I could come up with would be if, you know, if a company were making completely unsubstantiated claims about the beneficial health effects, selling, you know, lard covered in fat and making claims that this is going to improve your heart health or something like that. But our authority here, our regulatory authority and our enforcement authority is pretty limited. And even if it were not, regulating in this kind of area might raise First Amendment issues. And so one of the points that we tried to make repeatedly is there is nothing that isn't voluntary about the proposal. If industry decides not to adhere to it, then we spent a lot of time and we haven't accomplished very much.

But it is up to the industry ultimately to decide whether it is going to abide by these standards.

Mr. TOWNS. Why do the companies feel that it is not truly voluntary? Why do they feel that way?

Mr. VLADECK. I don't know. If you look at—we have been doing this sort of work for quite some time. For example, we have, I think, submitted several reports to Congress making recommendations about media violence. The fact of the matter is, is that the industry, I think, has welcomed our role here. But some of the industry complies, some of it doesn't. We have never brought a case because not abiding by these standards doesn't fit the deception theories that we can rely on.

The Supreme Court discussed our voluntary approach at length in a recent Supreme Court case, involving violent video games sold to children. So there is a long track record of the FTC engaged in this kind of voluntary self-regulatory guidance without any coercion from our part, without any enforcement from our part, without any collateral litigation being brought by third parties. So I am mystified by that claim.

Mr. TOWNS. They are saying that these rules and regulations will bring about a job loss. I mean, what are your views on that?

Mr. VLADECK. Well, there is one study which we find perplexing because it assumes that as a result of our voluntary standards, industry will stop advertising to children altogether and the loss to the economy will be $2 billion, which greatly exceeds the amount of advertising directly to children that we found in our most recent study. And that study goes on to conclude that there will be substantial job loss.

We have had our economists look at the study. There are no citations in the study. So we don't know where these figures come from. But the figures don't match the industry's own data about how much it spends in advertising to children. So we do not understand that study and we certainly don't agree that a voluntary self-

regulatory proposal is going to have that kind of a consequence on the economy.

Mr. TOWNS. Thank you very much, Mr. Chairman. I yield back.

Mr. PITTS. The Chair thanks the gentleman and recognizes the gentleman from Texas, Mr. Olson, for 5 minutes for questions.

Mr. OLSON. I thank the Chair. I would like to welcome the witnesses again and thank you for your time and expertise today. And my first question is going to be for you, Dr. Post.

As I mentioned in my opening statement, hundreds of jobs in the district I represent and thousands in my home State of Texas involve the manufacture, sale, distribution, marketing of snack products, including wholesome and nutritious products. These products qualify as healthy under FDA regulations and are eligible under the Healthier U.S. School Challenge, a Federal nutrition program. I am referring to products like Sun Chips, Baked Lays Potato Crisps and Baked! Cheetos snacks, and yet the IWG draft proposal would deem them unacceptable. And to make things more confusing, my staff has told me that classic hummus, right here, as sold under the Sabra label, is not restricted but green olive hummus sold under the same label is restricted. Why is green olive hummus a threat to children's health and not classic hummus? Help me understand why there is such a disconnect between these Federal agencies?

Mr. POST. Well, as I had mentioned earlier, we did in fact do analyses of food composition, the products that are commonly out there in the world of advertising. And our findings are products like the whole wheat bread and the other products, even the baked chips that you had there, would, in fact, be allowable under our structure. Some products, because of higher sodium contents, would fail. I mean, I imagine olives as a source of an ingredient in a food would be a problem. We were interested in following the Dietary Guidelines and, in that regard, we were looking for reductions in sodium, saturated fat, and certainly sugars as well. So, in some cases, the threshold couldn't be achieved. But there are certainly a lot of products that would be viable out there for marketing.

Mr. OLSON. Also with all due respect, we are talking about a lot of marketing. And look at the packages, exactly the same exact three words here, Greek olive hummus and classic hummus. Again, I appreciate what you are talking about—some of the sodium and what all this might add. But the fact here is we are talking about advertising. Those two products look the same to a kid, to an adult. And I think we have got to be careful here because again we can't—the responsibility ultimately rests with parents. And that to me in my mind is not some sort of danger to children's health. I mean, no child is going to look at that different packaging and say, "Mom, I want that one because it is classic" or "Mom, I want that one because it has olives."

A question for you, Dr. Vladeck. I am troubled by your testimony today. In response to a question from my colleague, Mr. Shimkus from Illinois, regarding the FTC's role in recommending specific nutritional standards in the IWG process, you said that the Commission should and did defer to USDA's judgment given the subject matter and expertise on nutritional standards. Yet in a July 15, 2010, memo written at your request by attorneys in the Division

of Advertising Practices at FTC—Mr. Chairman, I ask unanimous consent to put this memo in the record.

Mr. PITTS. So ordered.

[The information follows:]

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection

MEMORANDUM

TO: David Vladeck, Director, Bureau of Consumer Protection

FROM: Michelle Rusk, Attorney
Carol Jennings, Attorney
Division of Advertising Practices

DATE: July 15, 2010

RE: Interagency Working Group on Food Marketed to Children: USDA Alternative Approach for Nutritional Standards

At your request, we have reviewed the USDA's July 8, 2010 draft proposal for nutrition standards for foods marketed to children. At the outset, we note that USDA's general proposal to set nutritional standards for those specific categories of foods most heavily marketed to children is a workable approach that could reduce marketing of many of the least nutritious foods – particularly sweetened beverages and sweet snacks. To the extent this approach is more palatable to industry, and more likely to be voluntarily implemented, it might have a greater impact on the marketplace. Below is a brief summary of our analysis and the main concerns that we have about the USDA proposal in the context of current industry self-regulatory initiatives.

USDA's approach is a significant departure from the proposed recommendations set out in the Interagency Working Group's draft Federal Register Notice forwarded to the Commission last February. The Working Group's recommendations were designed to encourage the industry to market only the healthiest, most nutritious foods to children and therefore set rigorous standards for all foods in all categories. The Working Group has recommended that the industry only market to children foods that both provide a meaningful contribution to the diet in the form of whole grain, fruit, vegetable, low-fat dairy or lean protein sources and, in addition, meet certain strict limits on saturated fat, trans fat, added sugar, and sodium. Based on food runs conducted by USDA, it appears that a substantial majority of the foods currently marketed to children would not qualify under the Working Group's proposal unless the industry reformulated. Although the proposal admittedly sets the bar high for the industry, the Working Group was guided by existing federal nutrition policy and a goal of sending a strong signal to industry that only those foods likely to improve children's diets and health should be marketed directly to children. The proposal was intended to provide a set of goals that would push industry to adopt more meaningful and uniform nutrition standards than those in existing self-regulatory pledges.

The USDA proposal was developed by the staff of USDA's Center for Nutrition Policy and Promotion as an alternative to the tentative proposed recommendations that were presented

by the Interagency Working Group on Food Marketed to Children at the FTC's December 15 Workshop. As a general matter, the USDA proposal represents a less restrictive set of standards that, if implemented by industry, would serve to reduce the marketing of the least nutritious foods within five general categories of foods most heavily marketed to children.[1]

The staff has two key concerns about the USDA alternative proposal. First, the staff is concerned that the standards do not set a level playing field for all foods and, in fact, seem to be significantly more lenient for some food categories than others. Obviously, certain categories of foods would not be covered at all under the USDA proposal, and thus would not be subject to any nutritional goals.[2] In addition, there are major differences in the standards applied from one food group to another. Thus, for example, pizza or chicken nuggets sold by fast food restaurants would be subject to a different set of criteria than those same items sold in a grocery store. In the case of fast food, the chicken nuggets could be advertised, regardless of sodium and saturated fat content, as long as they were depicted as part of a meal with fat-free milk and apple slices. In the grocery store context, chicken nuggets would fall in the snack food/prepared meal category, and would need to meet limits on saturated fat and sodium. In some ways, therefore the standards for fast food are less restrictive than for other categories. In other respects, however, they are more restrictive. For example, rather than applying a standard to the overall nutritional quality of fast food kids' meals, the USDA proposal specifies exactly what must be depicted in advertising, requiring that 2 of the 3 meal components depicted in any kids' meal ad must be healthy offerings such as apples or fat-free milk.

The problem of disparate treatment is most evident in the comparison of the sweet snack and savory snack categories. Foods in the sweet snacks and candy category must provide a meaningful contribution of a food group, such as fruit, dairy, or whole grain and must also meet standards for added sugars and saturated fat. Foods in the savory snack and prepared meals category, in contrast, do not need to contribute to a food group. These products only need to meet limits for saturated fat and sodium. In other words, a fruit roll-up snack would need to be 50% by weight real fruit, but a bag of pretzels would not need to contain whole grain or make any other meaningful contribution to the diet. The standards are thus more lenient for savory snacks than for sweet snacks. The breakfast cereal category is also more restrictive than other categories like savory snacks, requiring limits on both sugar and sodium and a meaningful contribution of whole grain or fiber.

The staff's second concern about the USDA proposal is that it is more permissive in several respects than many of the current food and beverage company self-regulatory pledges. The proposal therefore does not achieve the basic goal of advancing more meaningful self-regulation. The USDA proposals for both saturated fat and sodium thresholds are more than

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[1]The staff recommends that, if the Interagency Working Group chooses to go with a category-specific approach to nutrition standards, it would be better to define the foods groups based on standard industry classifications, like those applied in the FTC's food marketing studies. This would provide greater clarity for both industry and government about what specific foods would be included in the identified groups.

[2]Based on data from the FTC's Food Marketing Study, the five USDA food categories appear to reach 90% or more of the foods most heavily marketed to children

double the self-regulatory thresholds already implemented by several major food companies. USDA suggests a threshold of 4.5 grams of saturated fat, based on its definition of "lean" foods. This threshold is several times more than the Working Group proposal of less than 1 gram/15% of calories, which is based on the federal labeling regulations for "low saturated fat" and "healthy" claims. More importantly, it is also more than double that of many industry self-regulatory pledges, which apply a standard of 2 grams of saturated fat or even less.[3] The 4.5 g saturated fat standard would allow the marketing of foods to children that most parents would not consider to be healthier choices and that many companies already refrain from marketing. USDA's food run tables, for example, indicate that even Breyer's full fat vanilla ice cream would meet USDA's proposal for saturated fat.

Similarly, USDA's proposed sodium threshold of 480 mg, based on the current threshold for "healthy" is substantially higher than the Working Group's interim goal of 200 mg and ultimate goal of 140 mg (or "low" sodium). It is also more than double that set for industry pledges from larger companies[4] including many food categories of the Smart Choices Program. This is of particular concern in light of the recent Institute of Medicine report recommending that FDA should invoke its food safety powers to restrict sodium content of processed foods and that Americans should lower their daily intake goals from 2300 mg to 1500 mg. It also seems contrary to similar recommendations of the just released Report of the Dietary Guidelines Advisory Committee (DGAC) to reduce sodium intake by choosing or preparing foods with little or no sodium.[5] Importantly, the DGAC specifically highlighted the association between sodium intake and blood pressure in children.[6]

Finally, the USDA proposal drops the Working Group's proposal to set a limit for trans fat. The Working Group proposal, like most industry self-regulatory pledges, set a standard of 0

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[3]For example, Kellogg Company and General Mills both apply a standard of 2 g saturated fat; Nestlé USA applies a standard ranging from 1.5 g to 2 g, depending on the category; Pepsico, Inc. applies a 1 g standard; Campbell Soup Company applies a 1 g standard for its soup; and the Smart Choices Program, which was discontinued last year after concerns were raised by both FDA and USDA, applied a standard that was 2 g or even lower to categories like cheese, dairy, meat and poultry, snack foods and sweets.

[4] General Mills and Kellogg both apply a 230 mg sodium standard to cereals. Dannon also applies the 230 mg standard. Kraft applies a 290 mg for cookie and cracker products, 360 mg for cereal. The Smart Choices general benchmark for sodium was 480 mg, but was set at 240 mg for several food categories, including breads, cereals, cheese, snacks, and desserts.

[5]*See* IOM, Food and Nutrition Board, *Strategies to Reduce Sodium Intake in the United States* (April 2010); *Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans* (May 2010) at B2-10.

[6]*Id.* at D6-2 to D6-10. There are other issues that staff believes the full Working Group should discuss in considering the USDA proposal. As just one example, the fact that the same thresholds apply to snacks and to packaged meals means that limits on things like sodium may be too lenient for a snack product and, at the same time, too restrictive for a main dish or meal product.

g trans fat.[7] This is, again, consistent with current federal dietary guidance to keep trans fat intake as low as possible. The staff does not see a justification for eliminating this standard and is concerned that doing so might have the unintended consequence of encouraging food companies to substitute trans fat for saturated fat in reformulating products.

The staff would be happy to meet with USDA to discuss some of these issues further, and, for example, to provide information on the standards used by the industry pledge programs to see how they compare with the USDA proposal. In addition, the staff recommends that the Working Group convene as soon as possible to attempt to reconcile the two proposals and issue its proposed recommendations for comment.

APPROVED.

Heather Hippsley
Assistant Director

Mary K. Engle
Associate Director

[7]Burger King, Campbell Soup Company, Conagra, Dannon, General Mills, Kellogg, and Pepsico, all apply a standard of 0 g trans fat for their children's marketing pledges. Other companies, like Kraft, set a limit for the amount of saturated fat and trans fat combined.

Mr. OLSON. Thank you, sir. Employees at the FTC expressed strong disagreement with the nutritional standards recommended by the USDA. In the memo, attorneys at your Commission delve into inherently scientific questions about nutrition, such as proper thresholds for sodium intake and the associated risks related to blood pressure in children. Commission employees also expressed concern with the saturated and trans fat levels recommended by USDA. This memo seems to contradict your assertion to Mr. Shimkus just a few minutes ago that FTC did not involve itself in nutritional aspects of the working group process. I find your juxtaposition of this letter and your statements troubling.

Can you explain your assertion and the seemingly contradictory fact? I have got a copy of the memo if you need it, sir.

Mr. VLADECK. I am aware of this memo. I think the thrust of this memo is that we were worried and these were—there were many drafts—as you know, this process is—we are in our second year of this process and we are not done. But what we were concerned about was one of the interim update USDA proposals may have cut back on industry's own self-regulatory efforts. If you look at page 3, what we were concerned about is that there was a USDA proposal that might actually be weaker than some of the industry self-regulatory guidelines. And that was a cause of concern to us. I would note that this is an internal FTC memo. I am not sure that this was shared with anyone other than within the FTC. And this is simply a memo to me suggesting that there may be concerns about the IWG process if we are going to undercut industry's own self-regulatory efforts.

Mr. OLSON. I appreciate that, sir. Again in your testimony to Mr. Shimkus, you said you defer to USDA's judgment about the——

Mr. VLADECK. I said USDA, FTC and CDC, yes, sir.

Mr. OLSON. Yes, sir. Again, I don't believe this is a proper role for the FTC. I ran out of time. I thank you. Thank you, Mr. Chairman. I yield back.

Mr. PITTS. The Chair thanks the gentleman. I recognize—just a minute. Do you have a problem with this? All right. We will reconsider a unanimous consent request if you want to take some more time to look at that. All right. Do you want to yield to Mr. Terry for 15 seconds? All right. We will recognize the gentleman from Nebraska.

Mr. TERRY. Thank you, Mr. Chairman. All I want to do is ask unanimous consent that I may place a statement into the record.

Mr. PITTS. Without objection. He wants a unanimous consent request for a statement in the record. So ordered.

[The prepared statement of Mr. Terry follows:]

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Congress of the United States
House of Representatives

HOUSE COMMITTEE ON
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CONSUMER PROTECTION
ENVIRONMENT AND HAZARDOUS
MATERIALS
COMMUNICATIONS, TECHNOLOGY
AND THE INTERNET
REPUBLICAN DEPUTY WHIP
REPUBLICAN POLICY COMMITTEE
REPUBLICAN STEERING COMMITTEE

Wednesday, October 12, 2011

Congressman Lee Terry's Opening Statement at today's
Subcommittee on Commerce, Manufacturing, and Trade/Subcommittee on Health
Joint Hearing "Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health?"

In just two short years, the Obama Administration gained controlling interests in our nation's health care system, automobile industry, and Wall Street. Now it wants to control what parents feed their children.

The IWG has proposed marketing guidelines that only allow certain foods to be marketed in a way that could be appealing to children.

These food marketing guidelines are yet another example of the Obama Administration having a good intention: *curbing childhood obesity*, followed by a poorly-considered plan. Well, *something* isn't always better than *nothing*. The IWG's proposals will not curb childhood obesity. It is a mere assumption that limiting children's exposure to food advertisements combats obesity. There isn't a single scientific study to back it up.

Though adopted IWG guidelines wouldn't work *as intended*, they would have several negative and unconsidered consequences.

These guidelines would result in thousands of jobs destroyed in the midst of an economic crisis. That is what cutting a company's marketing business in half does. It cuts into sales, production, and product storage and transportation activity. Unfortunately, the IWG didn't acknowledge this because a cost-benefit analysis wasn't part of their planning stage.

The IWG guidelines would deal a major blow to our First Amendment and its guarantee of free speech. It would set a dangerous precedent for the marketing world. What would be next? Would the EPA ban all truck advertising for trucks that don't get 50 mpg? Would low-top shoes be denied commercials because they don't offer as much heel protection as high tops?

The IWG guidelines would challenge the role of parents in our modern society. I thought that parents decided what their kids ate, not corporations - "parenting" is supposedly done by parents, right? Enforcing the IWG proposals would diminish the role of parents and prop up the role of government as "the big decider" in homes. We simply don't want to do that. We don't want to threaten the American family.

The IWG should completely withdraw their proposed marketing restrictions, and should instead complete a study and report to Congress – as Congress originally intended in the FY 2009 Omnibus Appropriations Act.

If future food marketing proposals are made, the agencies involved should base their studies and report on peer-reviewed science and include a careful consideration of benefits and costs.

We cannot risk the negative consequences of adopting misguided guidelines. We cannot risk demoting parents' authority when it comes to family food decisions. Most importantly, we cannot risk having a nanny state telling us what we can and cannot feed our children.

Mr. PITTS. The Chair recognizes the gentleman from Louisiana, Dr. Cassidy, for 5 minutes.

Mr. CASSIDY. Gentlemen, I am a physician. I am totally aware of this issue and very much concerned. And thank you for your input. My questions are not to challenge. My questions are to understand. Dr. Post, what a great name for a guy from USDA talking about childhood nutrition. I see that the State of New York and other States had a proposal that would not allow sugar sweetened beverages to be purchased in the SNAP program. USDA would not allow this restriction saying there was no proof that decreasing sugar consumption would decrease the health in SNAP beneficiaries. Man, that just seems very kind of counter to the whole thrust of this discussion. Any comments on that?

Mr. POST. That is an issue that is obviously very deeply being dealt with in the Food and Nutrition Service, our sister agency. And I haven't been part of the discussion regarding the SNAP program.

Mr. CASSIDY. I see that there is a correlation, at least in some studies, between SNAP participation and obesity. And, in fact, I am wondering if there was a regression analysis, some sort of statistical analysis that said, oK, what is the relative role of participation in SNAP versus the relative role of Tony the Tiger. And so I say that because I have read that there is a boom and bust type cycle with SNAP programs, that people get their SNAP benefits once monthly, they purchase a lot of goods and then they get them again the next month. You cannot purchase vegetables and fruit to keep them for the whole month. We are effectively saying go out and buy high caloric stuff at stores. Do we really know that we have met the enemy and the enemy is SNAP?

Mr. POST. A response to that is that we aren't aware of any evidence, convincing evidence, that establishes SNAP participation or participation in other food nutrition assistance programs as the cause of overweight or obesity.

Mr. CASSIDY. Do you mean there is stronger evidence that kids watching commercials on Saturday morning are more likely to be obese than the SNAP program, which encourages the consumption—because I have seen evidence that people on SNAP don't buy more fruits and vegetables, but they do buy more calorie dense foods.

Mr. POST. Well, with regard to the evidence on nutrition assistance programs, including SNAP, the evidence that exists is in fact mixed and that while some studies have shown an association between participation and certain of these programs and higher weights for some groups of participants, others have found no association. So none have, in fact, shown a causal relationship.

Mr. CASSIDY. And so you are saying that, you are emphasizing causal relationship. Again, have we seen a causal relationship between advertising to children and not just an association but causal association between advertising to children and increased obesity?

Mr. POST. Well, I will defer to the CDC, but I will say that there is certainly a contributing factor there. Perhaps not a causal relationship, but certainly a contributing factor.

Mr. CASSIDY. The difference between a causal and just being associated.

Dr. DIETZ.

Mr. DIETZ. Now, the whole debate about causality of obesity is complicated. And I tend to focus more on what can be done about obesity than emphasizing another longitudinal study trying to control for all of the factors which affect it. What we do know about obesity is that one of the most powerful interventions is reductions in television time.

Mr. CASSIDY. Now, you say that, but I was wondering we don't necessarily know that reductions in TV are not associated. Is that a secular thing or does it actually influence other things?

Mr. DIETZ. Sir, these are randomized clinical trials.

Mr. CASSIDY. So if you have somebody who is watching more TV, is she or he more likely to be in an area which is a food desert, an area in which the built environment is less conducive to getting out and walking or in families which have more children and perhaps mom is using TV to baby sit?

Mr. DIETZ. Now, those are sound questions. I don't think we know the relationship of television viewing to food deserts, for example. We do know that there is a relationship between television viewing and neighborhood safety, that parents——

Mr. CASSIDY. Now, that in itself—because my wife will not let my children bicycle on our busy street. So clearly built environment figures. Do we really not—as I was listening, I kept on thinking, man, I bet you TV watching correlates with lack of an appropriate environment for a child to exercise without mama's supervision.

Mr. DIETZ. There have been some studies that confirm that. I don't think it accounts for all the television viewing that is going on.

Mr. CASSIDY. I accept that, but on the other hand we are making the case for these rules based upon something which may have an alternative explanation. Is that a fair statement?

Mr. DIETZ. First, these are not rules. They are voluntary proposals.

Mr. CASSIDY. I am sorry. You are right. I apologize.

Mr. DIETZ. And you are right. I think we still need more data on factors that affect obesity and most importantly on how to resolve it.

Mr. CASSIDY. Again, gentlemen, I am not saying all of this to challenge, but rather to understand better.

Thank you for your participation. I yield back.

Mr. PITTS. The Chair thanks the gentleman and recognizes the vice chairman of the health subcommittee, Dr. Burgess, for 5 minutes of questions.

Mr. BURGESS. Thank you, Mr. Chairman. Can we just continue on that concept for a moment, both Dr. Post and Dr. Dietz? It does seem like the focus now is regulating the end product. Have we sufficiently studied the issue of lack of access to healthy foods? And I know in part of the district that I represent, I am dealing with the problem of food deserts. And it seems like that is a more appropriate place to start, the access to healthy foods rather than some of the voluntary guidelines that are being talked about this morning. Do you have any thoughts on that?

Mr. DIETZ. It is true that food deserts are a significant problem that impair the intake of the healthful diet. We were not asked to

look at the impact of food deserts on food intake. We were asked to look at the effect of food marketing.

Mr. BURGESS. Not meaning to interrupt, but you still in your testimony you talk about the disproportionate impact on minorities and lower socioeconomic status. And certainly in the areas that I am thinking about at home, I mean, your only option for nutrition is a convenience store. And not being derogatory to convenience stores—I use them all the time myself. But if that is your only option, it is tough to get a head of lettuce when all you have got is a Twinkie display. Do you know what I mean?

Mr. DIETZ. No question about it.

Mr. BURGESS. Again, I would just ask the question. Would we be better focusing our efforts in a time of limited budgets, should we try to fix that problem first before we go into this direction?

Mr. DIETZ. Well, I think those efforts are underway. As I said earlier, I think we need a multi-component, multi-sectoral approach. As I am sure you are aware, there is the Healthy Food Financing Initiative which has allocated substantial sums of money for the development of grocery stores and other retail changes in food deserts or areas with limited access to food. I think that is an important step forward. Unfortunately, we don't know what the impact of that intervention will be on obesity rates.

Mr. BURGESS. I guess, Dr. Dietz, let me stay with you. I mean, you referenced a moment ago in your discussion with Dr. Cassidy that the causality of childhood obesity is complicated and multi-factorial and multi-faceted and I may have some words there to your discussion. But nevertheless, it is a complicated issue. So do you have available and can you provide us—has the CDC compiled a compendium of articles and data and data collections on the scientific basis for the conclusion that banning food advertising will promote public health? What is the precise scientific basis for the conclusions of the working group that banning food advertising will promote public health?

Mr. DIETZ. We are not talking about banning food advertising. We are talking about modifying food advertising directed at children.

Mr. BURGESS. Beauty is in the eye of the beholder. Some people would say your modification results in a ban. But oK. Fair enough. But you were really not even asked to provide guidelines, but you kind of did, didn't you?

Mr. DIETZ. Well, we were very careful not to call them guidelines. What we called them were principles.

Mr. BURGESS. Look, we don't call income relating means testing, but everybody knows that it is. So were these guidelines or not?

Mr. DIETZ. No. I think they were principles.

Mr. BURGESS. Very well. On the principles then that you developed, can you provide us with the precise scientific basis for the conclusions detailing those principles?

Mr. DIETZ. Yes. I think Rob reviewed the data sets that we analyzed.

Mr. BURGESS. And I apologize for not being here. But perhaps if the CDC has that available. I know you guys compile a lot of data. Maybe you would be able to do that for us.

Mr. DIETZ. We have referenced those studies in our testimony. I think all three of us have done so. But if you would like additional information, we would be happy to provide it.

Mr. BURGESS. I think that would be helpful to the overall direction of where this committee is going. And again, just like Dr. Cassidy, I am not trying to be confrontational. We appreciate all of you making time to be available to us here on the committee this morning. But at the same time, these are issues that have significant impact and import. And I appreciate the fact that there is work being done on providing for areas of food deserts, but I have got to tell you I am not seeing the results. I am not seeing the activity. So if the CDC is doing that, I am grateful and I welcome your participation. But in some parts of the world it is not happening. And the difficulty is these are parts of the world that are otherwise affluent. The surrounding communities you would drive through and say, "Nothing to see here, let us keep moving." But the reality is you have got pockets of poverty within these relative areas of affluence that are significant and of course they have been hurt harder by the recession than the surrounding communities.

Mr. Chairman, I thank you for your indulgence. I will yield back the balance of my time.

Mr. PITTS. The Chair thanks the gentleman and recognizes the gentleman from Illinois, Mr. Kinzinger, for 5 minutes for questions.

Mr. KINZINGER. Thank you, Mr. Chairman. I guess this will go to all three, but Director Vladeck first and Dr. Post second. In a fiscal climate where every dollar is precious, we do have to be focused on protecting jobs and we have to be focused on our economy. That is where the real concern is right now. But it appears that the IWG has completely disregarded any attempt to find out an economic impact that any kind of a ban or suggestion or whatever would have on this. The reality is the food and beverage industry employs 1.4 million workers, 12 percent of our manufacturing workforce, and it is one of the biggest sources of manufacturing jobs.

Now, you said you didn't consider the economic impact or benefits when creating these guidelines. Is that true, there were no economic benefits taken into account?

Mr. VLADECK. We did solicit questions in our comments. And we expected if there were economic objections to get them in our comments. That was not the focus.

Mr. KINZINGER. You got zero comments of anybody that was concerned about the economic impact?

Mr. VLADECK. No. I am not saying that. We did get submitted a study which we gave to our economists to take a look at. The study purported to be based on advertising expenses for ads geared at children. And the economic analysis posited that if our voluntary guidelines, principles were adopted by industry, it would essentially end all advertising to children, costing about $2 billion in expenditures a year.

Mr. KINZINGER. And specifically, what about jobs? What about jobs——

Mr. VLADECK. I think it concluded ultimately that there would be a loss of 74,000 jobs. Our concern is—we have many concerns, one of which is there is no underlying data, there are no citations

to any of the assertions made in the study. But more problematic, it assumes that advertising to kids will stop and it uses a figure for advertising expenditures that greatly exceed what industry tells us it is spending.

Mr. KINZINGER. Your study says 74,000 jobs it costs but you don't have the basis of probably not actually the case?

Mr. VLADECK. It is not our study.

Mr. KINZINGER. The study that you have seen that we are talking about.

Mr. VLADECK. I mentioned the comments. I was explaining that in connection with the comments this study was submitted. But more importantly, as I tried to make clear before, industry itself has proposed quite substantial changes in its own self-regulatory proposal, bringing it very close to where we are likely to end up. Industry is not proposing making these changes if it thinks it is going to cost it money, revenue or jobs. And so I understand your concern about——

Mr. KINZINGER. Yes, it is a big concern. I mean, you have a lot of people that want jobs out there. And when you talk about killing jobs from the government perspective, that is not a good way to get on the right train of creating jobs.

Mr. VLADECK. We agree.

Mr. KINZINGER. I appreciate that.

Mr. VLADECK. But voluntary standards don't kill jobs.

Mr. KINZINGER. Let me ask another one. You contend that these restrictions are voluntary, but some of the most distinguished scholars of the Constitution argue that these would violate the First Amendment, these voluntary proposals. Do you believe the food and beverage industries will treat these restrictions or principles, or mild hints or general reminders, do you believe they will consider them rules, they will count them as rules? I mean, do you think that they will? Either of you.

Mr. VLADECK. I don't. They are not enforceable in any respect.

Mr. KINZINGER. But if they are not rules and they are not enforceable, then why even go through the trouble of creating them in the first place?

Mr. VLADECK. Well, because Congress told us to issue——

Mr. KINZINGER. Well, we also wanted a report, right, that we are still waiting on?

Mr. VLADECK. That is correct.

Mr. KINZINGER. Do you expect that any time within the next few whatever that we are going to see the report that we actually requested?

Mr. VLADECK. We are hoping to get you a report by the end of this year.

Mr. KINZINGER. So we are able to get some of these guidelines out, but the report we will hold off—we are hoping we will have by the end of the year?

Mr. VLADECK. The report will constitute our—what we are calling principles, guidelines.

Mr. KINZINGER. Gentle suggestions may be the new word. All right. Thank you. And I yield back.

Mr. PITTS. The gentleman yields back. The Chair thanks the gentleman and recognizes the gentleman from Kansas, Mr. Pompeo, for 5 minutes for questions.

Mr. POMPEO. Thank you, Mr. Chairman. Thank you all for your time today. It has been a long morning for you all. It started with Mr. Waxman saying he was mystified by the fact that we are holding this hearing. That is maybe one of the first things I have agreed with Mr. Waxman on in my 9 months in Congress. I am mystified, too. I am mystified that the Federal Government believes that it can identify a problem, childhood obesity. And I think everyone here has agreed that there is a challenge, there are health risks, but think that the Federal Government has got a solution and that we can get so detailed and we can spend hours talking about these things and that the Federal Government can solve this problem with a set of principles out in the air. I am deeply troubled by that fact. I know you would use the defense of Congress made me do it, but I will tell you that was a previous Congress. And I hope this one will reconsider that.

Having said that, Mr. Vladeck, I wanted to talk to you about your notion of voluntary. You continue to say that the industry came up with a set of principles that are very close to where you are going to be. Don't you think that is at least in part because they are afraid of you?

Mr. VLADECK. I assume it is because they think it is the right thing to do.

Mr. POMPEO. Right, right. Because they are afraid that the Federal Government is going to come put a more onerous set of restrictions and it is often the case the industry will respond by trying to move close enough that they can convince regulators like you that they have been good citizens. So it may well not be the profit motive that drove them but the fear of regulation that drove them to do it.

Mr. VLADECK. I would disagree. We have voluntary standards, for example, for media violence, violent video games, movies. Industry has adhered to some and has not adhered at all to others. We have no enforcement role in that space. The voluntary principles that we articulated were done pursuant to a congressional mandate just like the congressional mandate here. No one has suggested they have a coercive effect. I think one of the things that we need to look at——

Mr. POMPEO. Until just this moment I suppose. I just suggested that. So one person——

Mr. VLADECK. I apologize. I didn't mean to put it that way. I was talking about the media. I understand that you suggested it. But two other quick points. One is this is an area in which we have very limited regulatory authority. So the idea that we could turn around tomorrow and take these principles and codify them in a binding—you know, in a binding regulation, there is no basis for that concern even though—you know, I know Kathleen Sullivan, I know Marty Redish, the First Amendment scholars. I have litigated in this area extensively. I have argued commercial speech cases before the Supreme Court. I know this area of law. It takes a law, a statute, a regulation or some other practice that is the

force of law to create a restraint or to create coercion. And it is not there.

Mr. POMPEO. I appreciate that. Would you commit today to filing a friend of the court brief in defense of the industry if someone should choose to sue on this matter, saying that the principles we put forth provide no basis for it on behalf of the FTC?

Mr. VLADECK. I don't have that discretion on my own.

Mr. POMPEO. Would you recommend to the FTC that they would do that?

Mr. VLADECK. I will commit to putting something if we can persuade our colleague agencies to say that in the final report that this is not intended to create binding legal standards and should not be the basis of something along those lines, which should signal quite clearly our view that industry has no legal obligation to follow.

Mr. POMPEO. I appreciate that. Yes, thank you. This is a question for all three of you and then I will be complete. Have we seen any examples in other countries where this type of principle or guideline has been effective at changing behavior and improving health conditions in children?

Mr. DIETZ. I am sorry. I don't have any of that data at my finger tips.

Mr. POST. And we are aware that other countries have these kinds of voluntary standards, organizations in other countries do. Whether they are successful on their own, no. This is a complex issue. So it is part of the puzzle.

Mr. POMPEO. Great. Thank you. I yield back the balance of my time, Mr. Chairman.

Mr. PITTS. The Chair thanks the gentleman and recognizes the gentleman from Pennsylvania, Dr. Murphy, 5 minutes for questions.

Mr. MURPHY. Morning, gentlemen. I am all the way over here. Good to be with you. Just a little background. I am also a psychologist. I have dealt a lot with obese kids over the years and I maintain a faculty appointment with the University of Pittsburgh School of Medicine in pediatrics. So I appreciate your concerns about youth here.

I am thinking as I am hearing all of this, I don't know how we survive because a typical menu some of you may have had may have been similar to mine. I can still recall that we would have meatloaf, fish sticks, canned vegetables, canned fruit cocktails, fried chicken, Campbell's tomato soup and that wonderful thing that cures all ills, that Velveeta sandwich on white bread. I don't know how we survived. And yet the CDC has this great map on your Website which shows obesity rates changing over time. It seems to me there are some big differences here. I just want to make sure as you prepare some reports on this that you are looking at the full breadth of what I think is making a huge difference here. I am also noting as these guidelines on marketing come by, I am looking at this Website here that has some things in there which sounds like it may be one of those things I just want to make sure we are not going after in terms of attacks.

You know what Tagalongs are? Does anyone know what those are? Tagalongs? They are Girl Scout cookies. My favorite. Now, the

serving size unfortunately is 2 and I think most kids would say I would rather have 8 or 10 or 12. And I am concerned. I want to make sure we are not going to attack those poor Girl Scouts on the box cover there as well. Because the issue here—I want to make sure we are broadening this.

And, Dr. Dietz, I think you brought it up about the television time. I think you would agree it is not television. It is what they are doing instead of television, that years ago it was not just what we ate but what we did when we were not eating. Perhaps some of you also grew up in an area where your parents told you in the morning get out of the house, play all day; if you come in here, I am going to put a vacuum cleaner in your hand, you are going to wash windows, you are going to do something else. Kids were very active and now they are not.

What I am concerned about here in guidelines coming forth—and I am doing this more as recommendations than I want your comments. Are any of your familiar with the Naperville School District? Their program is pretty exemplary and one which I hope at some time we can even bring someone in to talk about that from the school district. They actually spend less per student in expenses than some other school districts in Illinois, but they require an hour of vigorous activity, elevated heart rate every day. And in turn, these students actually exceed many other countries and many other Asian countries on transit international mathematics and science studies, reading tests, et cetera, and obesity rates where as nationwide is—we are approaching about 30 percent, nationwide obesity rate? They are, like, 3 percent. How much is it in children?

Mr. DIETZ. 17 percent.

Mr. MURPHY. 17 percent in children. But they have—97 percent of eighth graders turn out very bright and a very small percent of them have obesity rates. So as you are talking about these guidelines and as we are looking at marketing, I would like to know what your thoughts are in terms of—the big culprit here is also immobility, lack of activity, dealing with thumb movements on gaming or dealing with clicking things on the Internet. It is not activity. But I would like you to comment on marketing of those issues too as a key ingredient of burning off calories and getting healthy nutrition. Could each one of you going through that, starting with you, Dr. Dietz?

Mr. DIETZ. I couldn't agree with you more about the importance of activity and equally importantly the contributions of inactivity. And certainly physical activity is a strategy to be encouraged not only because it helps weight control but also because it reduces the co-morbidities associated with obesity. And I have known about Naperville for a long time. And it is a model. I have worried that it is confounded by income and socioeconomic status and perhaps other factors. I would love to know whether kids walk to school in Naperville because they don't in most parts of the country. And we have certainly eliminated physical activity as part of a child's daily behavior in life.

Mr. MURPHY. I have got a few seconds, but I want to hear from each person. Next. Dr. Post.

Mr. POST. I think this comes back to this being a very complex issue. We are totally supportive of ensuring that we empower people with information: kids in schools, where we learn, where we play, where we get fitness, certainly in health care settings. So I think we can look at all of the solutions being part of a multi-sectoral effort. And certainly advertising is one way we can deal with this, certainly also enhancing school meals. And there are a lot of other opportunities that are working——

Mr. MURPHY. Dr. Vladeck.

Mr. VLADECK. We agree, this is a complex issue and physical activity is one important step in the right direction.

Mr. MURPHY. Well, I would venture to say I think it is of critical importance. It is not something that should be a postscript to this, but one I think that is absolutely essential. And I think we are going down the wrong road of going after advertising with regard to food if we are not doing other things. One of the companies in my district is Dick's Sporting Goods. I venture to say they do more to reduce childhood obesity than some of these other things to deal with some advertising of some foods that we will be doing. So I hope that is something that you all include in your report right up front. It is extremely important. And this is something that I hope this committee takes into account in the future too, Mr. Chairman.

With that, I yield back.

Mr. PITTS. The Chair thanks the gentleman. The ranking member has a unanimous consent request.

Mr. PALLONE. Thank you, Mr. Chairman. I ask unanimous consent to enter into the record an open letter on the First Amendment and the Interagency Working Group principles. This is from various constitutional law professors from around the country, and I believe you have it.

Mr. PITTS. We have it. Without objection, so ordered.

Mr. PALLONE. Thank you.

[The information follows:]

September 6, 2011

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Open Letter on the First Amendment and
the Interagency Working Group Principles

The undersigned professors of law write to convey our conclusion that the draft nutrition principles issued this spring by the federal Interagency Working Group on Food Marketed to Children (IWG) embody a constitutionally permissible set of government recommendations. Despite a number of comments submitted to the IWG claiming the contrary, the nutrition principles, in their current form, do not violate the First Amendment.

Simply put, voluntary principles that food and beverage businesses are free to ignore do not "abridg[e] the freedom of speech."[1] The draft nutrition principles pose no threat to any rights guaranteed by the First Amendment.

The Free Speech Clause applies only to government mandates restricting or compelling private speech.[2] The draft nutrition principles, which are designed "to guide industry self-regulatory efforts,"[3] do not restrain or compel anyone's speech. They are not, in fact, government regulation at all. Instead, they are the speech of the government itself.

The Supreme Court has made clear that "the Government's own speech . . . is exempt from First Amendment scrutiny."[4] The principles were issued in response to a congressional request for a "report" containing "findings and recommendations."[5] The agencies have now issued their draft report, and the principles constitute their draft recommendations.

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[1] U.S. Const. amend. I
[2] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010).
[3] Interagency Working Group, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts*, Request for Comments, http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf.
[4] *See Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005); *Donaggio v. Arlington Cty., Va.*, 880 F.Supp. 446, 453-54 (E.D.Va. 1995).
[5] Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84.

The report and recommended nutrition principles contain no mandates. None of the four agencies will seek to "enforce" the principles, which lack any legally binding effect under agency statutes or the Administrative Procedure Act. Accordingly, no federal agency can impose legal repercussions on a company for following the IWG principles in only a piecemeal fashion, for ignoring them entirely, or—for that matter—mounting a wide-ranging public relations campaign disparaging them, as the food and beverage industry has done.

Nonetheless, attorneys retained by industry have invoked a variety of First Amendment arguments, a tactic with the potential effect of diverting policymakers' attention from the substance of the draft nutrition principles. Nothing in the cases cited by these commenters bears on the IWG principles. The doctrines of "informal censorship," "unconstitutional conditions," and "de facto coercion" are completely inapt. The government is neither explicitly nor implicitly forcing industry to espouse any messages or to silence its expression. The IWG is not requiring loyalty oaths,[6] threatening criminal prosecution,[7] or confiscating real estate.[8] It is not establishing or invoking a legal regime. It is simply following a congressional mandate to issue a report with recommendations based on the agencies' expert analysis of the relevant facts.

The IWG is better characterized as a routine governmental advisory body than an oppressive censorship panel. The situation here is akin to the Environmental Protection Agency promoting the Energy Star guidelines for energy efficiency[9] or the Department of Agriculture announcing the new MyPlate recommendations.[10] The IWG is making suggestions regarding the content of food marketed to children in the same way the National Institutes of Health has called for a reduction in youth exposure to smoking in movies;[11] the Surgeon General has attempted to promote breastfeeding by encouraging hospitals to refuse infant formula advertisements; [12] and Congress has called on the entertainment industry to reduce the exposure of underage audiences to "programs with unsuitable alcohol content."[13]

The conclusion is straightforward. The principles proposed by the IWG do not violate the First Amendment.

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[6] *Speiser v. Randall*, 357 U.S. 513 (1958); *but see Rust v. Sullivan*, 500 U.S. 173 (1991)
[7] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), *but see Meese v. Keene*, 481 U.S. 465 (1987).
[8] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *but see City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009).
[9] http://www.energystar.gov.
[10] http://www.choosemyplate.gov.
[11] National Institutes of Health, Healthy People 2020 objectives, http://healthypeople.gov/2020/topicsobjectives2020/pdfs/tobaccouse.pdf, TU-18.
[12] The Surgeon General's Call to Action to Promote Breastfeeding (2011) at 43, http://www.surgeongeneral.gov/topics/breastfeeding/calltoactiontosupportbreastfeeding pdf.
[13] The Sober Truth on Preventing Underage Drinking (STOP) Act, 42 USC § 290bb-25b, 120 Stat. 2890, Public Law 109-422 (2006).

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Mr. PITTS. That concludes the questioning for our first panel. And the Chair thanks the witnesses for your testimony, for your responses. And we will dismiss the first panel and call the second panel to the witness table. While the staff is setting up the table, we will suspend for 5 minutes.

[Recess.]

Mr. PITTS. The subcommittees will come to order. And I will introduce the second panel at this time. Our second panel consists of seven witnesses. Our first witness is Jim Baughman, Senior Marketing Counsel for the Campbell Soup Company. Next is Dan Jaffe, Executive Vice President for the Association of National Advertisers. Our third witness is Elaine Kolish, Vice President and Director of the Children's Food and Beverage Advertising Initiative. Our fourth witness is Beth Johnson, Principal and Founder of Food Directions. Next we will hear from Margo Wootan, the Director of Nutrition Policy at the Center for Science in the Public Interest. We also have Dale Kunkel, a Professor of Communication from the University of Arizona. And finally Dr. John Irons, Research and Policy Director at the Economic Policy Institute.

Thank you all for coming. We have your prepared statements. They will be entered into the written record. We ask that you summarize in 5 minutes your opening statement.

Mr. Baughman, you are recognized to summarize your testimony.

STATEMENTS OF JIM BAUGHMAN, SENIOR MARKETING COUNSEL, CAMPBELL SOUP COMPANY; DANIEL L. JAFFE, EXECUTIVE VICE PRESIDENT, ASSOCIATION OF NATIONAL ADVERTISERS; ELAINE D. KOLISH, VICE PRESIDENT AND DIRECTOR, CHILDREN'S FOOD AND BEVERAGE ADVERTISING INITIATIVE, COUNCIL OF BETTER BUSINESS BUREAUS; BETH JOHNSON, PRINCIPAL, FOOD DIRECTIONS LLC, ON BEHALF OF GROCERY MANUFACTURERS ASSOCIATION; MARGO G. WOOTAN, DIRECTOR, NUTRITION POLICY, CENTER FOR SCIENCE IN THE PUBLIC INTEREST; DALE KUNKEL, PROFESSOR OF COMMUNICATION, DEPARTMENT OF COMMUNICATION, UNIVERSITY OF ARIZONA; AND JOHN S. IRONS, RESEARCH AND POLICY DIRECTOR, ECONOMIC POLICY INSTITUTE

STATEMENT OF JIM BAUGHMAN

Mr. BAUGHMAN. Good morning and thank you, Mr. Chairman, Mr. Pallone. My name is Jim Baughman. I am Senior Marketing Counsel for Campbell Soup Company, and I very much appreciate the opportunity to speak with you today about just some of the concerns we have with the Interagency Working Group's proposal to define marketing to children and to adolescents and then to lay out the nutrition criteria for products that are promoted in ways that meet those definitions.

Our biggest concern is that the proposal loses sight of what we believe is the national priority on which we should be focusing childhood obesity. Cracking obesity is the key to diet-related conditions such as heart disease and diabetes. As the only corporation in America having an executive devoted to childhood hunger and obesity, we are fully committed to that priority. By taking their eye

off obesity, the agencies have proposed criteria that, for example, not only fail to address calories, but would discourage the promotion of soup, a food associated with managing weight.

But why are the agencies discouraging people from eating a food that isn't related to obesity? The essential reason is that the agencies have been focused on idealized foods, rather than on foods parents will actually include in the family meal plan. Moms look for foods that kids will eat and parents will enjoy too. And, yes, there are men and women in every food company who roll up their sleeves and figure out how to make actual foods that taste really good, have a pleasing texture—that is not just a kid's concern—that won't spoil as soon as you get them home, won't cost an arm and a leg and will provide good nutrition.

The problem is that the IWG nutrition criteria are simply not realistic when it comes to making great tasting food. For example, while calling for more whole grain content than can readily be put in baked products for kids, they call for reducing the very things that help kids find whole grain products good to eat, a little salt and sugar to help with texture and to reduce that little bit of a bitter taste that kids can find objectionable.

It is all in the power of definition. Advocacy organizations have been telling you and anyone who will listen that practically all we make and sell are unhealthy foods. But healthy and unhealthy have to be defined. When Campbell calls something healthy, we follow the FDA and the USDA requirements for using that term. For example, we only market healthy soups and healthy canned pasta to kids. The IWG proposal uses definitions that are, in fact, inconsistent with the government standards. For example, when it comes to sodium, they impose a requirement that foods contain about one-fourth the level that is in the healthy definition, an amount in foods that are already not enjoyed by everyone. To produce foods to definitions that are even less tolerant of salt and sugar and fat would discourage people from eating the healthy foods they are now enjoying and it would discourage food makers from even trying.

We are told that we should not complain about the agency's proposal because it is voluntary and just a suggestion. That is not how it feels from here. These four agencies are the agencies that regulate our business, that have the power to shut us down, that look hard at everything we do and say. They are not advisers to the food industry. What they say in their official capacities matters. If adopted, these so-called voluntary principles will certainly evolve in that dimension. Even now, Senator Tom Harkin has introduced legislation laying the groundwork to make them binding in S. 174.

We are all impatient to see some results in our national struggle with childhood obesity. And in that impatience, it is important to not put obstacles in the path of helping real people and real families eat better. Creating nutrition standards and marketing definitions that would put what we decide to call healthy food out of the reach of most people's taste buds and wallets will not help us eat better and manage our weight as a nation. It is a different kind of leadership we need from our government, leadership in partnering with stakeholders to educate the Nation in how to eat and live in a way that will better promote our health and leader-

ship in promoting scientific research to better understand what practical tools may help reverse the incidence of childhood obesity.

Thank you.

[The prepared statement of Mr. Baughman follows:]

Statement of Jim Baughman, Esq.
Senior Marketing Counsel, Campbell Soup Company
Before the House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing and Trade
Subcommittee on Health

on

Food Marketing: Can "Voluntary" Restrictions Improve Children's Health?

October 12, 2011

Summary Page

Campbell Soup Company respectfully recommends that the Interagency Working Group on Food Marketed to Children should withdraw the IWG Proposal and recommend support for the work of the Children's Food and Beverage Advertising Initiative (CFBAI) as a practicable means to improve the nutrition of foods we encourage children to eat through marketing that is primarily directed to them. The Working Group should also recommend that no special program is needed to address marketing directed primarily to adolescents because their perceptual acuity and their interests, as well as their use of media, are often indistinguishable from those of adults. Specifically:

1. The nutritional criteria in the IWG Proposal ("Nutrition Criteria") are unrealistic, counterproductive, contrary to established nutrition policy as set forth in the Dietary Guidelines for Americans 2010 ("Dietary Guidelines"), and entirely fail to address obesity;

2. The definition of "marketing to children and adolescents" ("Marketing Definition") is inappropriately broad; and

3. Dictating "voluntary" standards to industry will be less effective than genuine self-regulation, which is the only practicable way to achieve meaningful changes in foods marketed to children.

Statement of Jim Baughman, Esq.
Senior Marketing Counsel, Campbell Soup Company
Before the House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing and Trade
Subcommittee on Health

on

Food Marketing: Can "Voluntary" Restrictions Improve Children's Health?

October 12, 2011

Thank you for this opportunity to comment on the principles proposed by the Interagency Working Group ("Working Group") on Food Marketed to Children ("IWG Proposal").

Campbell Soup Company[1] ("Campbell") strongly agrees with the Working Group, the Institutes of Medicine, the Dietary Guidelines Committee, and Congress that the diet of American children must be improved to address the prevalence of obesity. Addressing childhood obesity should be a national priority. As the only corporation in America having an executive devoted to childhood obesity and hunger, we are fully committed to that priority.

Indeed, obesity is a significant contributing factor for a number of health conditions associated with the diet. If obesity can be controlled, the incidence of high blood

[1] Campbell Soup Company is a global manufacturer and marketer of high-quality foods and simple meals, including soups and sauces, baked snacks, and healthy beverages. Our products are sold in more than 120 countries. In total in the U.S., Campbell sells almost 2 billion cans of soup every year, accounting for more than 60 percent of the U.S. wet soup market. Each year, nearly 100 million U.S. households, or more than 80 percent of all U.S. households, purchase our soups. Campbell offers more than 90 soups at sodium levels consistent with regulatory standards for representations that the soups are "healthy," including our iconic *Campbell's* condensed Tomato soup, our line of *Campbell's* Healthy Kids soups, our *Campbell's V8* soups, and our *Campbell's Healthy Request* soups. Our Pepperidge Farm subsidiary is a leading provider of premium quality fresh bakery products, cookies, crackers, and frozen foods, ranked by consumers as one of the most well-loved and respected brands. Among our most popular products are *Goldfish* snack crackers, which have grown to be the number three selling cracker in the United States.

pressure and diabetes, for example, will necessarily be reduced.[2] That is why a reduction in caloric intake, combined with increased physical activity, is the most important thing that can be done to improve the nation's health.

We must, however, act on this concern while remembering that if people don't enjoy what they eat, they will reject it and eat something they like better. This is why pushing healthy foods to the point where they don't taste good or have an objectionable texture (or price) won't help anyone eat better. Food makers can only market and sell what regular people can afford and would like to eat. And, we food makers do not want to make it more difficult for parents when they try to get their children to eat their vegetables and whole grains. Insisting on marketing standards that would force food makers to reformulate to recipes that people tell them don't taste good is not a constructive approach to reversing obesity trends.

Campbell currently advertises three kinds of food with messages primarily directed to children 6 through 11 years old.[3] Those foods are (1) healthy soups,[4] (2) healthy main dishes,[5] and (3) wholesome baked snacks made with either whole grains or enriched flour that are a popular alternative to snacks with higher sugar or fat.[6] The crux of our concern

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[2] Faulkner B. Journal of the American Society of Hypertension 2008 2(4): 267-274. Reilly JJ, Kelly J. Long-term impact of overweight and obesity in childhood and adolescence on morbidity and premature mortality in adulthood. Systematic review. 2010 Int J Obes doi:10.1038/ijo.2010.222.

[3] We do not direct advertising messages for any of our products primarily to adolescents.

[4] These include Tomato soup and soups sold under our "*Healthy Kids*" banner.

[5] Namely, products sold under the *SpaghettiOs* brand.

[6] Namely, certain of the products sold under the *Goldfish* brand. The *Goldfish* brand products to be advertised to children under the recently announced CFBAI uniform nutrition criteria will be limited to 1.5 grams of saturated fat, 290 mg of sodium and 10 grams of total sugar in a portion not to exceed 150 calories, as well as providing ½ serving of whole grains and/or 10% of the DV of certain nutrients due to baking the products with enriched flour.

is that, under the IWG Proposal, we could not market any of these foods that parents feel good about feeding their children (as well as most of the products we make) in media enjoyed disproportionately by children or adolescents. We are also concerned that the IWG Proposal would prevent us from offering our products to shoppers in packaging with attractive graphics suggesting that children (or anyone else) might enjoy eating them. For these and other reasons, stated below, we respectfully request that the Working Group withdraw the IWG Proposal.

Specifically, in our opinion:

(i) the nutritional criteria in the IWG Proposal ("Nutrition Criteria") are unrealistic, counterproductive, contrary to established nutrition policy as set forth in the Dietary Guidelines for Americans 2010 ("Dietary Guidelines"), and entirely fail to address obesity;

(ii) the definition of "marketing to children and adolescents" ("Marketing Definition") is inappropriately broad; and

(iii) dictating "voluntary" standards to industry will be less effective than genuine self-regulation, which is the only practicable way to achieve meaningful changes in foods marketed to children.

Campbell is proud of the role it plays in encouraging healthy lifestyle choices through its communications to children. We encourage physical activity by marketing exercise to kids and their families through such features as Team Xtreme at goldfishfun.com and

support of initiatives such as Together Counts.[7] Although we direct no advertising or marketing to children under 6, we do market healthy foods to children ages 6 through 11. Such advertising is consistent with our pledge as a member of the Children's Food and Beverage Advertising Initiative ("CFBAI"). Indeed, the recently announced CFBAI uniform nutrition criteria, which we helped develop, far better address the public interest than the Nutrition Criteria.

We recommend that the Working Group withdraw the IWG Proposal and encourage support for the work of CFBAI. Indeed, the IWG Proposal explicitly acknowledges that the CFBAI has "already begun to have a positive impact on the nutritional quality of foods marketed to children."[8]

I. The Nutrition Criteria are Unrealistic, Counterproductive, Contrary to Established Nutrition Policy, and Fail to Address Obesity

A. A single set of nutritional criteria does not reflect the critical differences among types of foods and can result in unattainable nutrient levels for specific foods, especially for sodium.

Different types of foods require different ingredients to make them "work" and to make them safe. Baked products require ingredients, including salt and shortening (fat), to

[7] A social media campaign supported by the Healthy Weight Commitment Foundation.
[8] IWG Proposal, p. 4.

provide the expected texture and to prevent spoilage. Canned or jarred tomato-based products need just a bit of sugar to balance a sour taste that results from season-to-season variations in the natural acidity of tomatoes. Prepared soups require ingredients like salt to deliver an expected flavor profile. Moreover, because soup must necessarily contain a significant amount of water, it is challenging for soups to satisfy the "positive" nutritional requirements set forth in Principle A. All of these foods have unique characteristics that require varying levels of specific ingredients, including ingredients contributing amounts of so-called "negative" nutrients such as saturated fat and sodium. Food scientists leverage the interaction of ingredients to create good tasting foods in a form people enjoy. Adding whole grains to a food, for example, makes it difficult to reduce sugars or sodium at the same time because they help the dough to be worked, the product to bake up with a good texture, and the whole grain taste to appeal to most children (and many adults). Consequently, applying the same nutritional criteria to all food types makes those criteria inappropriate for all foods.

The sodium limits in the Nutrition Criteria are particularly unrealistic. In fact, none of the products we currently market to children and few of the products we make anywhere in the world satisfy the sodium levels mandated by the Nutrition Criteria. The ingredient sources of sodium in food, the most important of which is ordinary salt, have important functions that cannot be performed satisfactorily by ingredients that are not sources of sodium. Reducing sodium in foods is extraordinarily difficult because of the many roles that sodium plays. Among the functional roles played by sodium are: (1) providing texture, including as part of leavening and the conditioning of dough, (2) controlling

water activity as a form of preservation, (3) acting as an anti-microbial agent, (4) making foods taste good by imparting the cleanest salty taste compared with other salts and bringing out other desirable flavors in a food. (5) blocking the bitterness of other ingredients and modulating our perception of sour and sweet flavors, and (6) supporting an umami taste. As a consequence, there are many foods for which low sodium alternatives are either impossible (due to concerns about safety) or which would not be commercially viable (because most consumers would reject their taste).

To be clear, food makers cannot commercialize foods that don't meet the taste expectations of consumers. If we were, for example, to radically reduce the sodium in our Healthy Kids line of soups from 480 mg to 210 mg or 140 mg, they would not be enjoyed by either the children or the adults in the household who are also eating them.[9] Soups at such a low sodium level – even with the benefit of the most current technology – are, unfortunately, unpalatable for most consumers. They would, consequently, not be repurchased and consumers would turn to higher sodium soups instead (or add their own salt at the table, if other soups were not available). This would be a self-defeating exercise. Similarly, should crackers intended for children have to be baked with so little salt that they have only 85 mg per serving, rather than having sodium levels of less than 300 mg, they would no longer be palatable for children and other salty snacks would be chosen for them, again making the Nutrition Criteria counterproductive.

[9] It is, in fact, difficult to produce an affordable store-bought soup at a sodium level as low as 480 mg of sodium per serving unless it is marketed as a "healthy" product, which appears to help consumers accept a different flavor profile.

FDA recognized the limitations of radical sodium reduction when it decided to not lower a "healthy" level for sodium in individual foods to 360 mg per serving from 480 mg per serving. FDA's rationale was that manufacturers would not provide the public with products having significantly reduced sodium levels because those products could not meet a theoretically superior, but unattainable target:

> Comments from both industry and consumer advocates support the conclusion that implementing the second-tier sodium requirements would risk substantially eliminating existing "healthy" products from the marketplace because of unattainable nutrient requirements or undesirable and, thus, unmarketable flavor profiles. As a result of these comments, FDA has concluded that it can best serve the public health by continuing to permit products that meet the first-tier sodium level [*i.e.*, 480 mg for individual foods and 600 mg for main dishes] to be labeled as "healthy," and thereby ensure the continued availability of foods that consumers can rely on to help them follow dietary guidelines not only for controlling sodium but also for limiting total fat, saturated fat, and cholesterol and consuming adequate amounts of important nutrients such as fiber, protein, and key vitamins and minerals.[10]

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[10] Food Labeling: Nutrient Content Claims, Definition of Sodium Levels for the Term "Healthy," 70 F.R. 56828 (Sept. 29, 2005) (to be codified at 21 C.F.R. pt. 101).

Prescribing unattainable nutrition standards will discourage food makers from making improvements that are, in fact, achievable, and may drive existing "healthy" products from the marketplace.

B. The IWG Proposal would preclude advertising healthy foods to children or adolescents or suggesting that they are fun to eat.

Under the Nutrition Criteria, *Campbell's* Healthy Kids soups could not be advertised to children or adolescents because they meet neither the sodium standard nor the positive food group standard, even though they are considered "healthy" under current regulations. In fact, even *Campbell's* Low Sodium soups could not be advertised to children or adolescents. *Campbell's* Low Sodium Chicken with Egg Noodles soup, for example, exceeds the saturated fat limit by 0.5 grams because a bit more fat is needed to provide flavor to low sodium soups and, as a soup, it lacks a positive food group at the levels demanded by the Nutrition Criteria. *SpaghettiOs* canned pastas are "healthy" main dishes under current regulations, but do not meet the sodium limit under the Nutrition Criteria. While our new *Pepperidge Farm Goldfish* sandwich breads do meet the 2016 sodium standard, they do not meet the 2021 sodium requirement and, being made with enriched flour rather than whole wheat flour, one of the breads would not meet the positive nutrition standard, even though it contains fewer calories than many sandwich breads and provides a good source of Vitamin D, Calcium, Thiamin, Niacin, and Folic Acid, as well as 8% of the DV for both Iron and Riboflavin. Even our 50% juice *V8 V-Fusion* Light vegetable and fruit juice drinks, which provide a combined serving of fruit and vegetables, with no added sugar and 50 calories, could not be advertised to

children or adolescents[11] because they do not comply with Option 1 of Principle A, and under Option 2 would be penalized because their juice content is half vegetable juice. Of considerable concern to us is the fact that *V8 V-Fusion* juices, including *V8 V-Fusion* Light juice drinks, are packaged in containers with bright, bold, and colorful graphics that, under Marketing Definition, could be construed as "marketing to children" (even though the products are not actually marketed to children).

V8 V-Fusion juice is a good example of a product that has been packaged to encourage vegetable consumption by making it a fun and enjoyable product to consume. It's an attractive package that is attention getting and encourages shoppers to try the product. Depriving food makers of the ability to use colorful and attractive packaging is unwarranted and unnecessary. Making our food supply dress more demurely will not improve the public health.

Industry should not be condemned for having responded to the public interest by marketing its healthier food choices to children. Indeed, by proposing unattainable Nutrition Criteria, the Working Group undermines the recommendation of the Institute of Medicine that "Food and beverage companies should use their creativity, resources, and full range of marketing practices to promote and support more healthful diets for children and youth."[12] ***Industry is not able to shift its resources to promote healthier eating among the nation's children if the Working Group adopts standards for marketing***

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[11] *V8 V-Fusion* juices are not currently advertised to either children or adolescents.

[12] Institute of Medicine of National Academies, Food Marketing to Children and Youth: Threat or Opportunity? Committee on Food Marketing and the Diets of Children and Youth, Food and Nutrition Board, Board on Children, Youth, and Families (2006), p 7-9.

foods to children and adolescents that are so stringent that they effectively ban advertising those foods that are more healthful.

C. The Nutrition Criteria would discourage the promotion of foods that may provide helpful strategies for children in losing or maintaining weight.

Any food can be part of a healthy diet, if it is eaten in moderation. However, there are some foods and some eating habits that may help us to eat more moderately. Given the critical importance of seriously addressing obesity, we must not discourage people from adopting eating strategies that may be helpful to them.

1. *Soup may be a useful tool to help children manage their weight.*

The Nutrition Criteria would discourage children from eating soup – a popular form of food associated with weight loss and weight maintenance, as well as a food containing a substantial amount of water and, consequently, a food that is very low in calorie density. The Dietary Guidelines advises: "Strong evidence shows that eating patterns that are low in calorie density improve weight loss and weight maintenance... ."[13]

An analysis of NHANES data (2003 – 2008) shows that the diets of children and adolescents whose eating patterns are lower in calorie density contain soup much more often than those of children and adolescents with eating patterns that are higher in calorie

[13] U.S. Depts. Of Health and Human Services and Agriculture, Dietary Guidelines for Americans (2010), p. 16.

density.[14] Among children ages 2–17 in the quartile having the least calorie dense total diet (including both foods and beverages) 17.1% (+/- 1.2) had soup during the day, while 12.4% (+/- 1.0) had soup in the second quartile, 9.0% (+/-1.0) in the third quartile, and only 6.3% (+/- 0.8) of those children in the quartile having the most calorie dense diet had eaten soup. Indeed, the calorie density of diets (total calorie intake/total gram weight of foods and beverages consumed) varied significantly, with the mean calorie density of the least calorie dense quartile of diets among 6–11 year olds being 0.711 (median 0.741) and the highest being 1.533 (median 1.459). Thus, from evaluating the calorie density of children's eating patterns, it is clear that soup plays more of a role in eating patterns that are lower in calorie density than in those that are higher in calorie density.

Moreover, the Dietary Guidelines, in advising on additional principles or behaviors that might be helpful in promoting calorie balance and weight management, indicate that there is evidence that "soup, particularly broth or water-based soups, may lead to decreased calorie intake and body weight over time."[15] Nonetheless, the Nutrition Criteria discourage people from including soup in the family diet.

Soup can be time consuming and inconvenient to make at home from scratch. That is why the overwhelming behavior of families that include soup in their diet is to purchase and eat store-bought soups.[16] Discouraging the purchase and use of store-bought soups while ostensibly helping children combat overweight and obesity may, in fact, accelerate

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[14] D. Keast, Food & Nutrition Database Research, Inc. analysis of NHANES data 2003-2004, 2005-2006, 2007-2008, calculating dietary calorie density and soup intake using SUDAAN 10.0.1 statistical package, 2011.
[15] Dietary Guidelines for Americans (2010), p. 19.
[16] The NPD Group/National Eating Trends – U.S., Years ending February 2001-2011.

the growth in the incidence of overweight and obesity among the American public by increasing the calorie density of the diets of families complying with the dietary guidance implicit in the Nutrition Criteria.

2. *Healthy snacking, especially for children, may help to control hunger and provides essential nutrients.*

Snacking is, of course, an almost universal behavior; and, people snack for different reasons, spreading out the consumption of food during the day.[17]

Researchers don't understand very well how snacking relates to weight. Looking at "snacking" as different from simply having a beverage, an analysis of snacking and the weight and abdominal obesity status of adolescents in NHANES data found that snackers were less likely to be overweight or obese. The report of this research points out that "Research has shown that a higher eating frequency can assist with weight management... ."[18]

One strategy to prevent overeating is to control hunger. Although there is not enough data for a public health recommendation in the Dietary Guidelines, a healthier snack may take the edge off hunger, helping to moderate the amount of food eaten at the next meal.

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[17] According to an analysis of NHANES 2005-2006 data on food intakes of people 12-19 years old, snacks provide 23% of total daily caloric intake. U.S. Dept. of Agriculture, Agricultural Research Service, Food Surveys Research Group, Dietary Data Brief No. 2, "Snacking Patterns of U S. Adolescents, What We Eat in America, NHANES 2005-2006" (2010), p. 2.

[18] D.R. Keast et al., *Snacking is associated with reduced risk of overweight and reduced abdominal obesity in adolescents: National Health and Nutrition Examination Survey (NHANES) 1999-2004*, Am J Clin Nutr 2010; 92:428-35, p. 433.

Indeed, standard pediatric advice is that children should have two healthy snacks per day, given that their smaller stomachs make it more difficult to obtain proper nutrition and sufficient calories with just three meals per day. Control over one's appetite is essential to success in limiting food intake, so cautious use of a range of healthier snacks, such as the *Goldfish* crackers we currently advertise to children, may help limit caloric intake.[19]

But, all snacks are not created equal. A recent study showed that a simple dietary strategy of decreasing food item size without altering the portion size offered reduced energy intake.[20] *Goldfish* crackers and grahams, for example, are therefore ideal offerings for children. Given the significant percentage of caloric intake attributable to snacking, it is important to encourage consumption of healthier snacks that are relatively nutrient dense for the calories consumed, as an alternative to sugary sweets.

3. *The enjoyment of food is very important to dietary compliance.*

Long-term compliance with a weight loss or weight maintenance diet is very difficult. Two commonly cited obstacles are feeling hungry and not enjoying the food. Familiar, convenient, and good tasting foods are important to ensuring compliance with any change in eating patterns. Forcing radical reductions in salt to the point of making healthy foods

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[19] Even though more frequent snacking among adolescents was associated with greater caloric intake, it was not associated with a higher BMI. U.S. Dept. of Agriculture, Agricultural Research Service, Food Surveys Research Group, Dietary Data Brief No. 2, "Snacking Patterns of U.S. Adolescents, What We Eat in America, NHANES 2005-2006" (2010) p. 3.

[20] Marchiori D, Warquirer L, Klein O. 2011 Smaller food item size of snack foods influenced reduced portions and calorie intake in young adults. J Am Diet Assoc. 111:727-731.

unpalatable will make it more difficult for people to comply with needed changes in their diets.

Children should be encouraged to eat foods that may help them to achieve or maintain a healthy weight. Consequently, nutrition criteria for children should encourage, and certainly not ban, soups and healthier snacks.

D. The Nutrition Criteria contradict established nutrition policy in the Dietary Guidelines.

The Dietary Guidelines are intended to "establish the scientific and policy basis for all federal nutrition programs, including research, education, nutrition assistance, labeling, and nutrition promotion."[21] Furthermore, it is a statutory requirement that all federally-issued dietary guidance be consistent with the Dietary Guidelines.[22] Consequently, the Nutrition Criteria must align with the Dietary Guidelines as a matter of national policy.

The Dietary Guidelines were

> released at a time of rising concern about the health of the American population. Its recommendations accommodate the reality that a large percentage of Americans are overweight or obese and/or at risk of various

[21] Dietary Guidelines Backgrounder. 2010, available at http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/Backgrounder.pdf .
[22] Or, that it "is based on medical or new scientific knowledge which is determined to be valid by the Secretaries." National Nutrition Monitoring and Related Research Act of 1990, Pub. L. No. 101-445, §301, 104 Stat. 1034 (1990).

> chronic diseases. Therefore, the Dietary Guidelines for Americans, 2010 is intended for Americans ages 2 years and older, including those who are at increased risk of chronic disease.[23]

The Dietary Guidelines are recommendations for everyone, including children and those at increased risk for diet-related disease. Given that the "nutrition principles are designed for the specific purpose of guiding the industry in determining which foods are appropriate to market to children,"[24] there is no reason why the Nutrition Criteria should be inconsistent with the Dietary Guidelines.

It is clear, however, that there are at least three important inconsistencies between the Nutrition Criteria and the Dietary Guidelines, namely (1) an absence of caloric targets in the Nutrition Criteria, (2) the criteria make it difficult to deliver the taste appeal helpful to increasing consumption of whole grains and vegetables, and (3) a focus in the Nutrition Criteria on nutrients related to cardiovascular disease (rather than obesity), including a medical-intervention-level sodium restriction that is at odds with the Dietary Guidelines.

1. *The Nutrition Criteria ignore the importance of calorie control for achieving healthy weight.*

The Working Group fails to provide guidance on calories in its recommendations to industry and the American public. In this respect, the Nutrition Criteria are not aligned

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[23] Dietary Guidelines for Americans, 2010, p. 1.
[24] IWG Proposal, p. 5.

with the Dietary Guidelines. "The prevalence of overweight and obesity in the United States is dramatically higher now than it was a few decades ago. This is true for all age groups, including children, adolescents, and adults."[25] Among the consequences of obesity are that "cardiovascular risk factors, such as high blood cholesterol and hypertension, and type 2 diabetes are now increasing in children and adolescents."[26] Thus achieving healthy weight through balancing caloric intake and physical activity should be the priority of the Nutrition Criteria. As stated in the Dietary Guidelines:

> The adverse effects [of overweight and obesity] also tend to persist through the lifespan, as children and adolescents who are overweight and obese are at substantially increased risk of being overweight and obese as adults and developing weight-related chronic diseases later in life. Primary prevention of obesity, especially in childhood, is an important strategy for combating and reversing the obesity epidemic.[27]

Any proposal that fails to take into account the role of calories is clearly flawed.

2. *The Nutrition Criteria undermine efforts to increase consumption of whole grains and vegetables.*

The Dietary Guidelines recommend an increased consumption of whole grains. Among the foods recognized by the Dietary Guidelines as those that can help people meet the

[25] Dietary Guidelines for Americans, 2010, p. 9.
[26] Ibid., p. 9.
[27] Ibid., p. 10.

whole grain recommendation are those "with at least 8 grams of whole grains per ounce-equivalent."[28] The Nutrition Criteria, however, demand at least 12 grams (0.75 oz equivalent) of whole grain, creating a conflict of authority as to how much whole grain is enough to make a difference. The 12-gram standard also makes it much more difficult for food makers to make whole grain products palatable for children, who perceive whole grain products to be bitter, because sugar and sodium are severely restricted.

The Dietary Guidelines also recommend an increased consumption of vegetables. As parents know, children often do not choose to eat their vegetables. Efforts to make them taste good to children can require a bit of seasoning. One popular form of vegetables for children is, for example, *Campbell's* Tomato soup, providing over 10 million servings of vegetables every year to children and teens between the ages of 2 and 17. In fact, we advertise Tomato soup to children and it is a "healthy" food according to the relevant federal regulations, but we could not encourage them to eat it under the Nutrition Criteria.

Nutrition Criteria that make healthy vegetables and whole grain foods less attractive to children undermine the Dietary Guidelines.

3. *The Nutrition Criteria do not focus on obesity, but cardiovascular disease, and prescribe nutrient levels inconsistent with the Dietary Guidelines.*

The Working Group has chosen to issue Nutrition Criteria directed primarily to cardiovascular risk factors, essentially ignoring the pressing issue of overweight and

[28] Ibid., p. 37.

obesity. In this respect, the Nutrition Criteria are not based on the Dietary Guidelines and are inconsistent with other current guidelines for children's feeding programs and food labeling. The values chosen by the Working Group are also inconsistent with both the Dietary Guidelines and current federal regulations allowing products to be characterized as "healthy." Most notably, the Nutrition Criteria mandate a sodium level that is less than one-third[29] of the amount of sodium permitted in foods properly labeled as "healthy."

Indeed, the issue of sodium is particularly important because it is one of the most important reasons why compliance with the Nutrition Criteria is beyond the capability of current food science technology to develop good tasting, safe, and affordable foods that children would be receptive to eating.

The sodium standard was not, however, derived from the Dietary Guidelines. While the Nutrition Criteria specify a single sodium intake recommendation to apply to children ages 2–17, the Dietary Guidelines set age-specific recommendations for this population (ages 1–3, 4–8, 9–13 and 14–18), recognizing that macro- and micronutrient needs differ for different age groups.

The Working Group does not disclose how the Dietary Guidelines were used to determine the interim and final daily sodium targets for this mixed age group of children and adolescents. Whatever this derivation, the recommended sodium levels for

[29] In the case of small RACC individual foods, the IWG sodium standard is less than 20% of the sodium permitted to characterize the food as "healthy."

individual foods, entrees, and meals do not appear to have a logical basis. Those levels are highly restrictive and they eliminate a majority of the foods currently consumed by children and teens from those they may be encouraged to eat.

The sodium levels in the Nutrition Criteria are not, on their face, grounded in the Dietary Guidelines where 2300 mg[30] per day is recommended for all Americans and the needs of adults and children at risk for chronic disease have already been taken into account by, among other things, establishing a recommendation for that subset of the population.[31] Based on the restrictiveness of the recommendation for sodium in individual foods, entrees, and meals, it appears that the Working Group based its sodium recommendation on the idea that the entire American population of children and adolescents must be treated for high blood pressure by mandating a therapeutic level of sodium in the food supply. We are deeply concerned that this severe measure is not justified by an appropriately cautious view of the science behind it.

A drastic population-wide solution is not, in fact, warranted where the science on which it is based suggests that it will be both inadequate and directed to an objective that is short of the goal of saving lives. For four federal agencies to take the position that it is irresponsible to encourage anyone under 18 to eat a bowl of soup because of a sodium level complying with the government's "healthy" standards is a severe judgment. It is, in fact, good intentions run amok.

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[30] For African American children and children at risk, the daily target is 1500 mg.
[31] Dietary Guidelines for Americans, 2010, p. 1.

The Nutrition Criteria sodium requirement for 2021puts foods at "low sodium" or "no salt added" levels (140 mg). For some foods with small RACC servings, the proposed sodium level is even lower than low sodium (at 85 mg).

Under the current recommendation, the overwhelming majority of healthful foods currently enjoyed by children will be eliminated from consideration due to the restricted sodium levels. Healthy soups, a well-loved and popular food with children, will be precluded from being marketed as an attractive food for children due to sodium levels, even though soups are known to be very low in calorie density and many contain multiple food components and are nutrient dense. And, nutritious snack crackers will be similarly precluded despite their role in many households as a kid-pleasing alternative to more sugary or fatty snacks.

4. *Research has not demonstrated a long-term benefit for sodium reduction among children, but the benefits of weight loss and other risk reduction tactics are well established.*

According to the Dietary Guidelines, there is a strong body of evidence in adults that salt (sodium chloride) reduction is associated with a decrease in blood pressure. For children, the evidence is just "moderate."[32] However, sodium intake is only one of the many lifestyle factors affecting blood pressure. Other variables, especially weight loss, may play a more effective role in the reduction of blood pressure than sodium intake reduction

[32] Ibid., p. 21.

according to the National Heart Lung and Blood Institute.[33] Both DASH I and II (Dietary Approaches to Stop Hypertension) studies conducted among adults showed that the incorporation of more fruits, vegetables, lean meats, low fat dairy, and nuts were more effective in reducing blood pressure than sodium reduction. In DASH I, subjects significantly reduced their blood pressures even though the sodium was held at 3000 mg per day, but their fruits, vegetables, lean meats, low fat dairy, and nut intakes were increased. When sodium was restricted to the levels recommended by the Dietary Guidelines (2300 mg/day), their blood pressure went down a bit more. However, weight loss has been consistently demonstrated to reduce blood pressure, independent of sodium levels, and more significantly than sodium reduction. In children, the critical question is whether sodium reduction to the level proposed by the Working Group, from childhood, would make a real difference in morbidity and mortality. The effectiveness of dietary sodium restriction on systolic and diastolic blood pressure is modest, and sodium restriction may not, in fact, be sufficient to restore a diagnosed hypertensive to a normal blood pressure level without drug therapy.

There is simply no evidence suggesting that a drastic reduction in everyone's sodium intake would decrease mortality from heart disease or that it would be as effective as other dietary or lifestyle changes. Indeed, a recent study published in the Journal of the

[33] National Heart Lung and Blood Institute, *The 7 Report of the Joint National Committee on Prevention, Detection, Evaluation, and Treatment of High Blood Pressure*, NIH Publication number 04-5230, August 2004, 26.

American Medical Association concluded that lower sodium consumption is more associated with death from cardiovascular disease than is higher sodium consumption.[34]

While we applaud the good intentions of using sodium reduction to improve the nation's health, we strongly believe that (i) there is insufficient evidence that forcing population-wide sodium reduction by insisting that individual foods never exceed a "low" sodium level would be an effective tactic in combating hypertension and cardiovascular disease, and (ii) the unanticipated consequences of doing so would be to the detriment of public health because it would require industry to make many foods that are helpful in addressing obesity less attractive and affordable to the American public.

II. The Marketing Definition is inappropriately broad.

Other commentators will certainly provide a more comprehensive critique of the proposed Marketing Definition, so we will confine our remarks to a few basic points.

A. There is no basis to justify restrictions on marketing to adolescents.

[34] S.K. Stolarz, et al., *Fatal and nonfatal outcomes, incidence of hypertension, and blood pressure changes in relation to urinary sodium excretion.* JAMA, 2011 May 4; 305(17);1777-85.

As the IWG Proposal itself acknowledges, the Institutes of Medicine concluded in 2006 that "the evidence was insufficient on whether television advertising influenced the diets of adolescents."[35] Consequently, there is simply no basis to justify any restriction on food advertising to adolescents, let alone restrictions as draconian as those proposed by the Working Group. Adolescents have developed a sufficient level of skepticism and resistance to authority to enable them to evaluate messages directed towards them. It would also place unreasonable burdens on industry were it necessary to avoid, for example, label graphics that would appeal to adolescents, but not to twenty-somethings.

B. Defining "marketing to children" to include packaging and in-store communications is unreasonable.

CFBAI excludes packaging and in-store communications from its definition of advertising to children for good reason. Advertising or marketing to children means that the child is being addressed – as a child – with a message intended to encourage purchase of the product. Advertising or marketing to children does not include advertising or marketing to an adult when a child happens to be present. The product package and the store environment are extremely important marketing "media" because they communicate to prospective purchasers at the most important moment, *i.e.*, when the shopper is looking at the product and is considering buying it. Consequently, the package and in-store marketing material are very important adult media because it is the adult who is making the purchase decision. That images or graphics or language may signal to adults "your child will like this product" because they are "designed to appeal to

[35] IWG Proposal, p 17.

children" does not transform these media into children's advertising media. Mom or Dad will make the purchase and these media speak to them.

C. Children will be harmed if companies are discouraged from engaging in philanthropic activities in schools or label redemption programs providing equipment and materials to their schools.

The Marketing Definition casts a shadow across many activities of food makers that benefit children and their communities, such as programs addressing concerns of obesity or supporting local schools. Although some of these activities may not be "caught" in the definition's net, the lack of clarity in the Marketing Definition encourages expectations about the conduct of companies that do not advance the public interest.

Labels for Education ("LFE") is, for example, a program under which equipment and materials supporting Art, Athletics, and Academics are provided to schools in exchange for proofs of purchase of consumer products. The proofs of purchase are from products purchased by families and community members that are brought into school by children in an effort coordinated by parents. In addition to proofs of purchase of Campbell products, proofs of purchase of other participating food and non-food manufacturers are accepted. Since its inception, the LFE program has contributed more than $100,000,000.00 of equipment and materials to the nation's schools, the majority of which has been for physical education equipment. This assistance can make a meaningful difference to children and their schools. For example, LFE has since 2000

provided seven minivans to Red Bird Mission schools (serving communities in the Appalachian Mountains) and materials and equipment are provided to 35,000 of 50,000 registered schools annually.

The benefits of programs such as LFE go beyond the material support they provide the nation's schools. Such programs teach the value of working together and of enlisting the help of others towards a common goal of supporting a shared institution. With the support of parent volunteers and their teachers, children bring proofs of purchase to school from widely-purchased consumer goods to collectively amass sufficient proofs of purchase for the school to redeem for items not funded by the local school district. When the LFE proofs of purchase are brought to school, there are receptacles for the children to deposit them. As part of our commitment through CFBAI and to better assure that we are not marketing to children in elementary schools, Campbell rebranded its LFE program to simply *Labels for Education* and removed "*Campbell's*" from those receptacles and any other student-directed material.

Consequently, the self-regulatory efforts of industry have helped Campbell maintain its support of schools while addressing the important issue of brand marketing to children in elementary schools. Nonetheless, the Marketing Definition as a governmental standard raises a question as to the propriety of even such a carefully designed and valuable program.

The Marketing Definition is overly broad in that it (a) includes adolescents, (b) includes media such as in-store and packaging that do not primarily address children under 12, and (c) does not unambiguously exclude activities that should, in fact, be encouraged.

III. Dictating standards to industry is not self-regulation and will be less effective than genuine self-regulation.

Self-regulation is most appropriate and effective when there is a need to accommodate important public values in the conduct of a complex industry in which technologies and business practices can evolve rapidly. It is also useful when governmental regulation may pose legal or constitutional issues.

Self-regulation of advertising has been very successful. The National Advertising Division (NAD) of the Council of Better Business Bureaus ("BBB") has been a valued partner of both industry and the FTC. Its extensive caseload has served to explore and resolve many difficult issues of advertising law to the satisfaction of both the industry and government. It has served industry very well by helping to maintain public trust in advertising, because advertising is worth little if people don't believe it.

Industry's interest in maintaining public trust has also been very well served by its support of the Children's Advertising Review Unit ("CARU") of the BBB. CARU has

been effective in helping industry to create and enforce responsible standards for how it communicates with children under the age of twelve. Among the self-regulatory standards it has enforced for many years, for example, is a prohibition on encouraging the overconsumption of foods.

It was natural for the food industry to turn to the BBB to help it establish a voluntary self-regulatory program in responding to the call in the IOM Report "Food Marketing to Children and Youth: Threat or Opportunity?" to shift the mix of advertising to children to healthier foods. Heeding that call by, among other things, creating CFBAI launched an effective force for change in the industry and in society generally.

One of the most important reasons for the success of CFBAI has been that industry has been the driving force behind it and has been accountable for its success. Each company has challenged itself to address public expectations and stretch to achieve great-tasting products that are continuously improved in terms of their nutritional profiles. Industry taking responsibility for its own publicly-stated standards has put the accountability where it needs to be for success.

Overt direction from government would, of course, immediately take that accountability away from the people who need to achieve the changes demanded for success. Determination by government of both the standards to be met and the timing within which they must be met is an attempt to outsource regulation by delegating the enforcement of standards with which the regulated do not agree. It is not likely that such

an arrangement would continue the success of the genuinely voluntary system of self-regulation that is currently in place.

As genuine self-regulation, industry efforts through CFBAI have resulted in significant change within five years. This is because the members of CFBAI were able to evaluate their products and practices and rapidly improve them with knowledge of what could and could not be done without either increasing costs beyond what parents could afford to pay or delivering products that no one would be willing to eat. In that five year period, products Campbell markets to children have been reduced significantly in both sodium and fat and more products have been introduced with whole grains. Campbell has also engaged children with activities to encourage them to get out and play.

The recently announced CFBAI common nutrition criteria, the result of collaboration among industry nutrition experts, are a significant advance in self-regulation and serve the public interest better than the IWG Proposal because they will be implemented more quickly, recognize the differences among types of foods, and directly address the nation's most important public health issue by placing constraints on calorie levels in foods marketed to children.

IV. The Working Group should encourage support for the work of CFBAI and withdraw the IWG Proposal.

The new CFBAI uniform nutrition criteria are a better alternative to the Nutrition Criteria and deserve the support of the Working Group. They have been carefully designed to allow children to benefit from the nutritional merits of different kinds of foods while nutrients to limit are appropriately restricted with practicable standards. By focusing on types of foods instead of a one-size-fits-all approach, the CFBAI work has set goals for industry that are both nutritionally meaningful and realistic to achieve. And, by tying its requirements to what is disclosed on food labels and providing detailed explanations of the rationale behind each decision, CFBAI has also created a set of standards that are more consumer-friendly, understandable, and verifiable.

Consequently, Campbell respectfully recommends that the Working Group should withdraw the IWG Proposal and recommend support for the work of CFBAI as a practicable means to improve the nutrition of foods we encourage children to eat through marketing that is primarily directed to them. The Working Group should also recommend that no special program is needed to address marketing directed primarily to adolescents because their perceptual acuity and their interests, as well as their use of media, are often indistinguishable from those of adults.

Mr. PITTS. The Chair thanks the gentleman and recognizes Mr. Jaffe for 5 minutes.

STATEMENT OF DANIEL L. JAFFE

Mr. JAFFE. Good afternoon. So again I would like to thank Chairwoman Bono Mack, Chairman Pitts, Congressman Pallone and the other members of the subcommittees for this opportunity to testify. I am Dan Jaffe, Executive Vice President of the Association of National Advertisers. And our membership includes 400 companies with 10,000 brands that collectively spend over $250 billion in marketing and advertising annually in the U.S.

ANA strongly opposes the proposed IWG guidelines. These are unprecedented extreme proposals with far reaching implications for individual companies and our Nation's economy. The IWG's proposed guidelines defy common sense and are inconsistent with other Federal nutrition standards. They are not well-founded or likely to reduce childhood obesity.

You have heard a great deal about childhood obesity throughout this hearing. But there is no words in the report that you have received, in the preliminary report that in any ways discusses how the various proposals if followed would have an impact on obesity. These guidelines need to be formally withdrawn and returned to the drawing board.

The IWG in effect is attempting to reengineer the American diet by declaring war on many healthy products, including whole wheat bread, 2 percent milk, cereals, yogurt, oatmeal and literally thousands of other healthy products. Again you have heard this questioned, but when we have had this study by our experts and then talked to our company members, they all confirmed that this is the truth.

Of the 100 most popular foods consumed in America, only 12 could be advertised under the IWG standards. And you say, well, that is your claim, but the IWG in its own report on page 5 admits that, quote, a large percentage of food products currently in the marketplace would not meet the IWG principles, which I think really answers the question pretty definitively when they admit that they are wiping out most products in the marketplace.

The Federal Government seems to be suffering from a severe split personality when it comes to nutrition standards. The IWG proposals are dramatically inconsistent with other Federal nutrition standards. They do not match the standards set forth in the School Lunch Program. They could not match the Department of Agriculture's dietary guidelines issues just last year. They do not match the WIC, Women, Infants and Children Program.

This defies common sense. Foods that meet the Federal Government's stringent criteria for being labeled healthy both by the USDA and by the FDA should be advertised more, but the IWG says that they should not be advertised at all. In his Executive order issued in January, the President required Federal agencies to consider the costs and benefits of any regulation. It does not appear that the IWG involved here have ever considered these impacts. Lost jobs and lost sales are certainly likely outcomes of the proposal.

The noted economic firm, his Global Insight, analyzed the IWG proposal using a macroeconomic model developed—and I emphasize this—by Nobel Laureate in economics, Dr. Lawrence Klein. They estimate that the guidelines, if acceded to, could drive down food and beverage advertising expenditures substantially. These reduced expenditures would result they claim in a decreased in total annual sales of $28.3 billion and elimination of 74,000 jobs. This has already been argued about in this hearing, and we will hear from another witness questioning that. But the facts are that there is nothing in the report on the costs or benefits. So how is the Congress going to determine who is telling the truth and who is stating things that are not accurate?

The IWG proposal is a veritable Sword of Damocles hanging over the head of industry while avoiding the requirements of cost-benefit analysis that any sweeping proposal such as this should require.

Two of our country's leading constitutional scholars, Professors Martin Redish, Northwestern University Law School, and Kathleen Sullivan, former Dean of the Stanford University Law School, analyzed the IWG proposals and found them to be a thinly disguised attempt at backdoor regulation.

The four agencies were specifically directed to conduct a study and make recommendations to Congress concerning nutrition standards and their impact on childhood obesity. So far, the IWG has produced no study. And instead of reporting to Congress, they issued a specific, highly technical performance mandate with an implementation timetable. Worst of all, there is absolutely no proof or discussion about how the massive changes called for in the proposal which would cost multi-billions of dollars just in reformulations would have any direct impact on reducing childhood obesity rates if they were all carried out.

We believe it is critical that before any final report is issued by the IWG, that the Congress demand at the very least, two key things: A complete cost-benefit analysis and a specific demonstration on how any proposed changes will directly impact childhood obesity rates. This is what the Congress called on the IWG to do and what they still have not even attempted to provide.

Thank you again for giving me this opportunity to speak to you today.

[The prepared statement of Mr. Jaffe follows:]

Testimony of Daniel L. Jaffe
Executive Vice President, Government Relations
Association of National Advertisers

Subcommittee on Commerce, Manufacturing and Trade and the Subcommittee on Health
House Energy and Commerce Committee

Hearing on
Food Marketing: Can "Voluntary" Government Restrictions Improve Children's Health?

October 12, 2011

The Association of National Advertisers (ANA) appreciates the opportunity to present our serious concerns about the proposals for marketing food to children that were announced by the Interagency Working Group (IWG) on April 28th 2011.

ANA represents more than 400 major global and national marketers, including companies from the food, beverage and restaurant industries that would be severely adversely impacted if these proposals are finalized.

We commend the Subcommittees for holding this hearing. Your Subcommittees have unique experience about the health, nutrition and marketing and advertising issues that are fundamental to the understanding of the current discussion about the IWG guidelines.

We also commend Chairman Upton and the other members of the House Energy and Commerce Committee who wrote the September 12, 2011 letter to IWG requesting answers to

ten key specific questions about their proposal. Those questions go directly to the fundamental defects with the IWG proposal. No report should come forward to the Congress unless and until these questions are answered. In addition, the IWG should not issue any report until they provide specific answers to the request of the Congress in the FY 2009 Omnibus Appropriations Act that specifically asked the IWG to provide a "study" and "recommendations" including "the role of consumption of nutrients, incredients and *food in preventing or promoting the development of obesity among such children."(emphasis added)*

Introduction

The marketing and media communities recognize that childhood obesity is a serious national challenge. In the decade since the U.S. Surgeon General's call to action, our industries have voluntarily developed broad ranging and multi-billion dollar efforts to help respond to this threat.

The FY2009 Omnibus Appropriations Act directed the IWG to conduct a study of food marketed to children aged 17 and younger and to make recommendations to Congress for standards for marketing food to these children. Instead of conducting a study, the IWG has released a radical, unprecedented proposal calling for massive changes impacting broad sectors of our economy, with absolutely no cost/benefit analysis.

While falsely labeled as "voluntary," this proposal is clearly "backdoor regulation" by four extremely powerful government agencies that seek to accomplish a goal indirectly that could

not be reached through normal rulemaking procedures. By using the coercive force of government agencies to suppress truthful advertising about a broad range of healthy, legal products for every segment of the public, the proposal clearly violates the First Amendment rights of both marketers and consumers. Worst of all, there is absolutely no discussion or proof that these massive changes in product formulation or marketing practices, which if carried out would cost the food, restaurant and media communities multi-billions of dollars, would actually have any direct or material impact on reducing childhood obesity rates in the United States.

As already noted, this failure is extremely significant. It demonstrates an unwillingness to respond to the explicit charge of the Congress to the IWG to carry out a "**study**" and provide "**evidence concerning the role of nutrients, ingredients, and foods in preventing or promoting the development of obesity...among children** (*IWG Report*, 2)."

We appreciate the recent statement from the IWG in the September 27, 2011 letter to Chairman Upton that the Group "anticipates making significant changes to both the marketing and nutrition principles as it develops final recommendations as required by the Congress."

As the saying goes, and which is particularly relevant to a discussion of the regulation of nutrition standards and food, beverage and restaurant advertising, the proof is in the pudding. We believe the IWG should formally withdraw this seriously flawed proposal and work with the business community and other interested groups to develop real solutions to the childhood obesity challenge.

The Ad Community Has Responded to the Childhood Obesity Challenge

No other group or segment of our society has done more to respond to the obesity challenge than the food, beverage, restaurant, media and advertising communities. Here are just some of the highlights of how the marketing and media communities have responded proactively to the childhood obesity challenge:

Product Changes: Food and beverage and restaurant companies, in just the last several years, have responded through more than 20,000 product reformulations and new menu options, directed to consumer concerns about calories and healthy diets. Parents have more choices in every aisle of the supermarket than ever before. Almost every restaurant menu has healthier options and quick service restaurants are now among the largest sellers of low calorie salads, yogurt and fruit.

Partnerships: Many food companies and media companies have launched individual partnerships with schools, YMCA's and other community groups to promote better diets and more physical activity. One food manufacturer, for example, has awarded $700,000 in grants to community YMCA's, hospitals for children, and 4-H programs to sponsor healthy lifestyle programs. Another is offering fifty $10,000 grants a year to help communities sponsor programs to promote balanced diets and physically active lifestyles. Yet another company is providing pedometers in schools to encourage kids to walk more. These programs exemplify

the multitude of similar efforts across the spectrum of the food, beverage, and restaurant communities.

The Healthy Weight Commitment Foundation: In 2009, industry launched the Healthy Weight Commitment Foundation, a national CEO-led group designed to help reduce childhood obesity. The coalition includes retailers, food and beverage companies, restaurants, sporting goods companies, professional sports organizations and more. The Foundation made a pledge in 2010 that its member companies will collectively cut 1.5 trillion calories from their products by the end of 2015. Companies in the coalition plan to accomplish this goal by offering low calorie options of products, changing product recipes to allow for lower calorie counts, and reducing portion sizes of single-serve products. The Foundation focuses on three critical areas – the marketplace, the workplace and schools. More information is available at: www.healthyweightcommit.org.

The Advertising Council: The Ad Council has partnered with the Department of Health and Human Services (HHS) since 2004 on obesity prevention programs, including the "Small Steps" campaign. In 2009, HHS and The Ad Council launched a new series of public service ads featuring characters from the film, "Where the Wild Things Are." Since the launch of the "Small Steps" campaign, there have been almost 12 million visits to the HHS website, www.smallstep.gov.

Last year, The Ad Council was chosen by First Lady Michelle Obama to produce a series of public service ads as part of her "Let's Move!" initiative. The ads, featuring Looney Tunes' characters, professional athletes and popular *Scholastic* characters Maya and Miguel, encourage children to get more physically active and eat healthy diets.

According to tracking studies conducted by The Ad Council, with the support of the Robert Wood Johnson Foundation, the campaigns are having a significant impact on attitudes and behaviors. Significant numbers of respondents report that their eating habits and activity levels are much healthier.

Media companies (broadcast, cable, online, print and outdoor) have donated almost half a billion dollars to this effort. Millions of dollars of time and talent have also been donated by marketers and advertising agencies to develop these campaigns. More information is available at: www.adcouncil.org.

Self-Regulatory Programs: Beginning in 2005, the marketing community conducted a comprehensive review of the guidelines of the Children's Advertising Review Unit (CARU), the self-regulatory organization of the advertising community which was designed to ensure that children's advertising is truthful and follows stringent industry-developed standards. That effort, led by Jodie Bernstein, former Director of the FTC's Bureau of Competition, updated the guides to address concerns about ads in new media and interactive games.

It also led to the creation in November 2006 of the Children's Food and Beverage Advertising Initiative (CFBAI). Through the voluntary commitment of the 17 member companies, the landscape of children's advertising is significantly different than it was several years ago.

Major quick service restaurants now advertise kid's meals with apple products and low fat milk. Other participating food manufacturers have significantly lowered sodium or sugar content of the products they advertise to children and some major confectionary and soft drink manufacturers have voluntarily committed not to advertise on child directed media. The CFBAI reports that over 80% of the CFBAI member products now being advertised on child directed media are a good source of nutrients that children do not get enough of in their diets - including calcium and fiber. As of 2010, all participating companies are required to direct advertising toward children under the age of 12 to products that are healthier. The seventeen participating companies carry out more than 80% of all food, beverage, and restaurant advertisements directed to children under the age of 12 in the United States.

These are real, significant and voluntary efforts undertaken to improve the mix of food advertised to children-- and that progress is continuing. On July 14th, CFBAI announced that the 17 participating companies will follow uniform nutrition criteria for the foods advertised to children. The new criteria take into account food science, U.S. dietary guidelines and the real-world challenges of changing recipes of well-known foods. These uniform nutrition criteria represent another huge step forward in voluntary efforts to improve child-directed advertising.

More information about the CFBAI is available at www.bbb.org/us/children-food-beverage-advertising-initiative.

As discussed in more detail below, ANA and the Grocery Manufacturers Association (GMA) have conducted several studies of Nielsen Media Research data to quantify food advertising expenditures over a period of years. The latest survey, which was released on April 28th, found that the average number of food and beverage ads that children aged 2 to 11 viewed on children's programming fell by 50% between 2004 and 2011. There was also a dramatic change in the type of food products that were advertised.

Interestingly, despite the enormous impact of all of these changes on food, beverage, and restaurant marketing, the IWG barely acknowledges any of these developments.
In fact, despite carrying out a more than 2 year study the IWG in its latest preliminary report released this April continues to use totally superannuated Nielsen data from 2006. This scientifically myopic approach, when up to date data is readily available, certainly is not what the Congress should expect from the regulatory agencies with subject matter responsibility for these critical areas.

The Proposed Nutrition Standards Are Radical and Unreasonable

The IWG, in effect, has declared war on cereals, peanut butter and jelly sandwiches, tomato soup, 2% milk, and thousands of other healthy foods and beverages as well as many restaurant

menu items. These products are legal to purchase. None of them have restricted availabilities due to age requirements.

Ironically, many of these same foods that "fail" the IWG standards meet the FDA's definition of "healthy" and bear FDA-authorized health claims. They satisfy the USDA's standards for the Women, Infant, Children (WIC) food assistance program. The 2010 U.S. Dietary Guidelines encourage families to consume these products and many families purchase them using federal funds through the SNAP (food stamp) program. It would seem that products that meet the federal government's stringent criteria for being labeled "healthy" would be considered candidates for increased advertising, rather than being relegated to those categories that the IWG is asserting should not be advertised to anyone under 18.

Yet, this proposal attempts to utilize the enormous regulatory authority of the IWG agencies over the growing, manufacturing, packaging, labeling and marketing arenas to pressure the food, beverage, restaurant, and media communities to end the advertising of all of these existing products to anyone less than 18 years of age.

The IWG proposal goes far beyond any nutrition or marketing standards ever considered by any government agency. They represent an extraordinary effort by the government to completely re-engineer the American diet. This is not industry hype or overstatement but is tacitly acknowledged in the IWG report. Indeed, the IWG report specifically states that it "recognizes that, if the proposed nutrition principles were fully implemented by industry as

proposed, a large percentage of food products currently in the marketplace would not meet the principles." (*IWG Report*, page 5)

According to the NPD Group, Inc., out of the 100 most commonly consumed foods and beverages in America, only 12 would meet the IWG's proposed nutrition standards. Among the "top 100" of these foods that would not meet those standards are: most cereals, both hot and cold, most salads, many bottled waters, canned green beans, peas and corn, whole wheat bread, oatmeal, most soups, reduced fat yogurt, rice, 2% milk, and numerous others. Can these types of foods that the IWG would ban from advertising to anyone under 18 be described with a straight face as "junk food?" If so, why are many of them being promoted as "healthy" under government standards or being promoted under existing food and nutrition programs?

The only foods within the "Top 100" list that would meet the IWG's nutrition standards are: bananas, grapes, broccoli, a few other similar fresh fruits and vegetables, apple sauce with no added sugar, and some frozen vegetables. These are certainly healthy foods, but in and of themselves, they hardly constitute an overall balanced and healthy diet for children or adults.

We do not believe the government has either the legal authority or responsibility to define "good foods" and "bad foods" in such an extreme and rigid manner and thereby adversely target broad categories of healthy foods and beverages for proposed severe marketing and advertising restrictions. Government efforts to ban the advertising of such broad categories of foods clearly would be unconstitutional.

Childproofing the Marketplace

The IWG proposal also contains an extraordinarily broad definition of marketing, listing 20 specific categories, including all major media. Packaging, point-of-purchase displays, sponsorship of events and sports teams, word-of-mouth advertising, and even philanthropic activities tied to branding opportunities are included. In fact, the last category listed by the IWG proposal is a "catch-all other" category (*IWG Report*, 18).

Does anyone seriously believe that "voluntarily" removing corporate icons such as "Tony the Tiger" or making "Snap, Crackle and Pop" Public Enemy Number 1 or removing pictures of well-known athletes from cereal boxes would materially reduce childhood obesity? Should support of Little League teams (a major source of physical activity for youth) be banned for branded food and beverage products? Because of the coverage of word-of-mouth advertising under the IWG proposal, even the sale of Girl Scout Cookies by Girl Scouts themselves could be challenged under the IWG proposal.

In addition, this proposal could have the effect of calling on food companies to "voluntarily" end sponsorship of Olympic athletes and NASCAR teams if 20% of the audience viewing such marketing is between 12 to 17 years old. A number of food companies and retailers are corporate sponsors of the Children's Miracle Hospital Network. By stigmatizing these types of sponsorships, the IWG proposal could have serious impacts on a broad range of non-profit groups across the country, large and small.

We believe the all-inclusive approach of the marketing definition in regard to advertising and marketing "directed to children" in the IWG proposal is overly broad and could encompass preponderantly parent-directed or family ad campaigns.

Advertising is considered "child-directed" under the IWG definitions if: various audience thresholds are reached (30% for children 2-11 and 20% for adolescents age 12-17); or the marketing plan indicated an intent to reach kids; or if the ad includes "child-directed features" such as animated or licensed characters, celebrity endorsers popular with children, or the ad promotes child-oriented products or media (*IWG Report,* 18).

Thus, virtually any ad that shows a child or mentions children could get caught up in the FTC's sweeping definition of child-directed marketing. We estimate utilizing Nielsen data that over 1, 700 programs on broadcast TV and cable will be swept into this inadequately differentiated net. Such an approach, which captures marketing to audiences that overwhelmingly consist of adults as well as children or teens, is clearly excessively broad and raises extremely serious First Amendment issues.

Infantilizing Teenagers

We are also very concerned about the IWG's proposal to impose special protections for all children under18 years of age. Advertisers have long believed that children under 12 years old deserve special protection and consideration. We understand that children are not miniature

adults and that advertising material that might be appropriate for adults might be inappropriate or even deceptive for children. It is for this reason that we created the tough self regulatory programs under the Children's Advertising Review Unit (CARU) and the Children's Food and Beverage Advertising Initiative (CFBAI) to provide special protections for all children under 12.

It takes an analytical contortionist, however, to accept the view that teenagers are incapable of handling various types of food advertising but are ready to take on other major societal responsibilities. Many 17 year olds are allowed to drive by themselves and stand at the threshold of being allowed to vote, to marry and to go into the military. When we urge treating a 17 year old like a seven year old with regard to advertising, how can you stop there in regard to speech censorship? It is just not possible to place adolescents from 12 to 17 in hermetically sealed containers until they somehow emerge magically mature at the age of 18.

It is also important to remember that children have independent First Amendment rights. In *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), Judge Richard Posner described this critical reality: "People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."

The IWG proposal also would seriously undermine funding for thousands of television shows. While the impact would be most severe on children's programming, the extremely broad scope of the definitions of the IWG proposal could affect many other adult-oriented programs,

ranging from *American Idol* to the Super Bowl and college sports. The IWG report itself admits that this proposal would have substantial impacts on adult programming (*IWG Report*, 17).

The IWG, while admitting that their proposals would "not take into account developmental difference between adolescents and younger children" (*Ibid*, 17), suggest that this problem might be eliminated or mitigated by "limiting the scope to in-school marketing and social media, such as the Internet, digital, word-of-mouth, and viral marketing." (*Ibid*, 17) The IWG admitted that they were "unaware of studies concluding whether or not such marketing is any more successful in affecting adolescents' food choices than traditional media." (*Ibid*, 17) Nevertheless, the IWG proposal suggests that they are seriously considering upholding these teenage-directed restrictions in the new media arena.

Under these circumstances, where the regulatory agencies themselves admit a complete lack of evidence, proposing limits to kids in new media is totally unjustified, and if enforced by the government, almost certainly unconstitutional.

Voluntary By Demand

The Working Group and other critics have recently argued that the proposed IWG principles are merely "voluntary" and do not call for government regulation of food marketing. Therefore, these spokesmen seem to imply that industry should relax and stop worrying. However, we believe that the government, particularly powerful groups like the four major organizations that make up the Working Group, should never make formal proposals, whether mandatory or

voluntary, that if acceded to would cause, as here, enormous economic damage without demonstrable measurable benefits.

In addition, there is every reason to believe that the IWG when it launched their proposals had no intention that their nutrition and marketing standards be easily evaded or ignored. The IWG proposals are the product of over two years of development. They include highly technical, rigid and specific performance requirements that are so complex that only nutrition experts can understand their full impact. They also become far more restrictive over time. The four agencies that promulgated these proposals have extraordinary regulatory authority over the day-to-day operations of the food industry, including the power to order product recalls and the ability to subpoena specific information from marketers, as the FTC has repeatedly done.

The agencies have publicly indicated that noncompliance with these "voluntary" principles could trigger mandatory regulation. At the public forum on December 15, 2009, where the preliminary IWG proposal was first released, David Vladeck, Director of the FTC's Bureau of Consumer Protection, stated: "We would not be talking about government regulation if industry self-regulation had made greater strides" and further noted that if industry does not "make great strides in limiting children-directed marketing" in compliance with this proposal, Congress is likely to "decide for all of us what additional steps are required." (*Sizing Up Food Marketing and Childhood Obesity*, http://www.ftc.gov/bcp/workshops/sizingup/index.shtml, 261, 263).

On May 11, 2010, the White House Task Force on Childhood Obesity issued a report on "Solving the Problem of Childhood Obesity Within a Generation." While the report acknowledged the need for comprehensive, society-wide steps to address childhood obesity, it called for industry to do even more to change the "food marketing environment." The report stated that if voluntary efforts to limit the marketing of "less healthy foods and beverages" do not yield substantial results, the Federal Communications Commission (FCC) should consider changes in the regulations concerning advertising during children's programming. Another recommendation proposed involving the FCC in developing a system of ratings for TV commercials that would enable parents to block "unhealthy food and beverage advertising from all programming."

Furthermore, interest groups have organized major lobbying efforts to demand that the IWG proposals be upheld as "reasonable" and "scientifically based." Does anyone really believe that all these various types of major effort would be launched if the groups involved did not believe that the proposals would impose substantial coercive pressure?

Clearly the IWG proposals have been developed as the standard to assure effective industry self-regulation. And the FCC proposals within the White House Task Force Report have clearly signaled that these standards should be used to penalize industry if a failure to implement effective self-regulation occurs.

In fact, the FCC, at least in regard to broadcasters, does not need to develop new regulations or restrictions to attempt to enforce these IWG proposals. The IWG, by extensively detailing what should be the government's view of the appropriate and healthy way to advertise food and beverage products to those under the age of 18, has developed a clear regulatory enforcement map for the FCC. Under the Federal Communications Act, all broadcasters receive their licenses based on their operating in the "public interest." As licenses come up for review, however, it is almost certain that the FCC and advocacy groups will challenge the licenses if the broadcasters have failed to block any advertising for foods, beverages, or restaurants that fails to conform to the clear strictures of the IWG. They are closely premised on the claim that this approach will further the health and well-being of children.

With such a drumbeat of strong threats of new laws and regulations to restrict food, beverage, and restaurant advertising, no one should be misled by the "voluntary" label.

In fact, two of this country's leading constitutional scholars, Martin Redish and Kathleen Sullivan, have analyzed the IWG proposal and found it to be a thinly disguised attempt at backdoor regulation. Martin Redish, who is the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law and a noted First Amendment expert, has written a "White Paper" discussing the serious constitutional implications of the "voluntary" proposal of the IWG. That paper, entitled "Childhood Obesity, Advertising and the First Amendment," is available at http://www.ana.net/getfile/16519.

Reviewing the coercive effect of the IWG proposal and its impact on commercial speech, Professor Redish stated: "Simply as a matter of common sense it is all but inconceivable that the federal government would incur the burdens and expense involved in establishing the Interagency Working Group and preparing the advertising regulations only to have the food industry summarily ignore them (*Redish*, 5)." Professor Redish then concludes: "The voluntary nature of the regulations is therefore appropriately deemed to be nothing more than a precursor to coercive enforcement in the event that the industry fails to comply (*Ibid*, 5-6)."

At a recent public forum, Professor Redish gave a less legalistic example of the power of a "voluntary" request: a boss informs all of his employees that his daughter is selling Girl Scout cookies and he just "hopes" they will all voluntarily buy some for this highly worthy cause. This is the same type of volunteerism that the IWG proposal offers the business community.

Professor Redish's "White Paper" also notes that even a proposed "voluntary" government action can create a serious and imminent First Amendment threat. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the U.S. Supreme Court invalidated the actions of government officials who unilaterally notified publishers that certain books were obscene for children under age 18 and thereby coerced the publishers into removing the books from circulation. According to Professor Redish, the Supreme Court in *Bantam Books* "squarely rejected the government's argument that mere agency exhortations, unaccompanied by 'formal legal sanctions,' did not violate the First Amendment where the targets of the governmental statements inevitably felt compelled to alter their speech activities. *Bantam Books* is consistent with a long line of cases

holding that the government cannot use its regulatory authority and police power as a veiled threat to discourage speech (*Ibid*, 6-7)."

Kathleen Sullivan, the Stanley Morrison Professor of Law and former Dean of the Stanford Law School, wrote in a statement to the IWG: "The food marketing guidelines cannot escape full First Amendment analysis merely because they are styled as 'voluntary.' A set of guidelines used by a group of regulatory agencies with enormous regulatory and investigatory power over the food and media industries that are subject to those guidelines is the functional equivalent of government action, and companies may not be required to surrender free speech protections in exchange for the 'benefit' that government refrains from regulating them directly."

Professor Sullivan further notes that "[g]overnment action undertaken with the purpose and predictable effect of curbing truthful speech is de facto regulation and triggers the same First Amendment concerns raised by overt regulation, " and that the Supreme Court has long held that such efforts are unconstitutional "even where the mode of censorship is informal and even where the acceptance of the speech restrictive conditions is nominally voluntary."

Thus, even the so-called "voluntary" proposed marketing standards of the IWG, which seek to suppress speech about healthy food products, can give rise to serious First Amendment issues. While lawyers can debate whether an immediate injunction against the IWG proposals once finalized would succeed, it would stretch credulity to argue that these proposals were not

designed and intended to impose as much pressure as possible on the food, beverage, restaurant, and media communities. With these proposals having the potential for such wide-ranging and severe economic damage to the specific groups targeted and to the economy as a whole, the IWG proposal should not be allowed to be imposed and should be withdrawn.

The Proposal Should be Subjected to Regulatory Review

This proposal clearly violates the spirit of the Executive Order on Improving Regulation and Regulatory Review which was signed by President Obama on January 18, 2011. That Order states that federal regulations must promote economic growth, innovation, competitiveness and job creation; they must be based on the best available science; they must include a cost/benefit analysis and use the best, most innovative and least burdensome tools for achieving regulatory ends; and they must measure and seek to improve the actual results of regulatory requirements.

The IWG proposal does not include any of this type of analysis and clearly fails all of these principles. It calls for sweeping changes in the way food products are produced and marketed which would have multi-billion-dollar implications for jobs and important sectors of our economy – with absolutely no cost/benefit analysis.

A new study conducted by IHS Consulting, for example, a highly regarded economic think tank, utilizing a macro-economic model of the U.S. economy that was developed by Dr. Lawrence R. Klein, who was awarded the Nobel Prize in economics for his work in developing this model,

demonstrates that if the proposals were enacted, food and beverage advertising expenditures, even by highly conservative estimates, would decrease by 20%. This, in turn, would lead to a decrease in sales by food and beverage producers of $30 billion and to a loss of as many as 74,000 jobs in just one year. Over a four year period, there would be a cumulative sales loss of $152 billion and a decrease of roughly 378,000 jobs. (http://www.ana.net/getfile/16535) This type of economic and job loss would clearly send serious shockwaves into our economy.

The disturbing fact is that the more successful the IWG proposals are in suppressing food, beverage, and restaurant advertising, the greater will be the economic damage to jobs and numerous businesses throughout the United States. How can the government justify promulgating this type of proposal that could have these types of adverse effects?

Most importantly, there is absolutely no discussion about how this proposal, if fully implemented, would actually reduce childhood obesity rates. The fact is, as discussed in detail below, it simply will not work.

We also believe that the IWG proposal violates the National Nutrition Monitoring and Related Research Act of 1990 (NNMRRA). That Act provides that "[a]ny federal agency that proposes to issue any dietary guidance for the general population or identified population subgroups shall submit the text of such guidance to the Secretaries" of HHS and USDA. When an agency intends to propose "dietary guidance," the Secretaries of HHS and USDA must "assure that the guidance either is consistent with the 'Dietary Guidelines for Americans' or that the guidance is

based on medical or new scientific knowledge which is determined to be valid by the Secretaries." Critically, if either Secretary finds that the new guidance is *not* consistent with the Dietary Guidelines, it must be published in the Federal Register and submitted for public comment. If the Secretaries choose to approve the new guidance, despite its inconsistency with the Dietary Guidelines, they must provide "an explanation of the basis and purpose for the final guidance which addresses significant and substantive comments as determined by the proposing agency."

The IWG proposal is neither consistent with the Dietary Guidelines nor based on medical or new scientific knowledge validated by the Secretaries. Nor has the proposal been published in the Federal Register for public comment. Thus, we believe the IWG proposal conflicts with the NNMRRA.

No Causal Link Has Been Found Between Food Advertising and Childhood Obesity

The Institute of Medicine (IOM), an independent organization of experts, at the direction of the Congress, carried out a comprehensive analysis of food advertising and means to combat obesity in 2005. The IOM concluded in that report that they could not find a causal link between advertising and adiposity. According to the authors, the report, entitled *Food Marketing to Children and Youth: Threat or Opportunity*, was based on a thorough and impartial review of existing scientific data.

The IOM report concluded: "the current evidence is not sufficient to arrive at any finding about a causal relationship from television advertising to adiposity." (*IOM 2005 Report*, 8-9) The IOM also found that the data, while "weak," suggested that for teenagers advertising not only did not drive their food choices but was negatively associated with these choices. In other words, teenagers' obesity issues were not being fueled by advertising. Therefore, there is absolutely no scientific basis for limiting ads to children aged 12 to 17, and the IWG proposal flies in the face of the IOM findings without presenting any evidence to support their proposals in this regard.

One of the authors of the IOM report, J. Howard Beales, recently conducted a further, careful review of the literature that has been published since the IOM report. Beales is a Professor of Economics and Business at George Washington University, and he is the former head of the FTC's Bureau of Competition. He concluded: "the state of the evidence concerning the relationship between television advertising and childhood adiposity remains much as it was at the time of the IOM report (Beales, 38)." Beales concluded that there was no scientific basis for ascribing obesity trends to food or beverage advertisers and that the few studies that have attempted to draw a connection between food advertising and obesity have serious methodological flaws. The paper, entitled: "Television Advertising and Childhood Obesity" (October 2010), is available at http://www.gmaonline.org/file-manager/Health_Nutrition/Beales-Review-of-Recent-Studies.pdf.

Todd Zywicki, Foundation Professor of Law at George Mason University School of Law and former Director of the Office of Policy Planning at the FTC, also has conducted a comprehensive review of existing literature on the causes of rising obesity rates, including the possible contribution of advertising to the obesity problem. In his paper, "Obesity and Advertising Policy," Professor Zywicki concluded:

> "Based on our review of the evidence and economic theory, we believe that a host of factors have contributed to the increased rate of obesity in the American population. Our review of the available evidence does not indicate that food marketing to children has grown markedly during the years that children's obesity has increased. **Thus, it seems that food advertising is not a primary causal factor in children's increased obesity rate.** Furthermore, there may be negative consequences to banning or restricting truthful food advertising. As the public becomes more educated on the importance of weight control to health, there may be increased pressure on marketers to compete on calorie content; food ad restrictions could inhibit such competition (Zywicki, *Obesity and Advertising Policy*, http://mason.gmu.edu/~tzywick2/GMU%20Article.pdf, 1011)." (Emphasis added)

Food and Beverage Advertising Has Declined While Obesity Rates Grew

Many critics of food marketing allege that children are "bombarded" by an ever-increasing number of food commercials leading to increased obesity rates. Unfortunately, some of the reports of these advocates have been based on assumptions and assertions rather than

scientific data and analysis. In fact, food and beverage marketers are spending less in real dollars on TV advertising and children under 12 are seeing far fewer TV commercials for food products during children's programming.

Beginning in 2004, ANA and the Grocery Manufacturers Association (GMA) have commissioned a series of studies of Nielsen Media Research data to quantify food advertising expenditures and exposures. The latest survey, which was carried out by Georgetown Economic Services and was released on April 28, 2011, found that **the average number of food and beverage ads that children 2 to 11 viewed on children's programming fell by 50% between 2004 and 2010**. There was also a dramatic change in the composition of food and beverage ads viewed: ads for cookies fell by 99%; ads for soft drinks fell by 96% and ads for candy fell by 68%. More information about the most recent study is available at: www.gmaonline.org/news-events/newsroom/new-research-shows-dramatic-changes-in-food-and-beverage-ads-viewed-by-chil/.

Our first survey of the Nielsen data focused on ad expenditures and exposures for the period from 1993 to 2003. This ten-year period has been cited as the time during which obesity rates grew the most and at the highest rate and is, therefore, of particular interest.

The data again was analyzed by Georgetown Economic Services, LLC and the study drew the following conclusions:

- Adjusting for inflation in order to hold the value of dollars constant, real expenditures on food and restaurant advertising on all television, including cable, fell over the ten-year period from 1993 to 2003. In 1994, ad spending in these categories reached $5.92 billion. In 2003, ad spending in these categories had dropped to $4.98 billion. This was a 13% drop from the first four years of the period to the last four years.

- Rather than being increasingly bombarded by restaurant and food ads, children under 12 in fact saw fewer ads on TV in these categories between 1993 and 2003. The Nielsen data showed that the number of food and restaurant ads reached 5,909 per year in 1994 but dropped to 5,038 in 2003.

In July 2008, the FTC released its long-awaited report on food/beverage ad spending in all media. The report found that the total amount spent on food and beverage advertising to children aged 2-17 in 2006 was $1.6 billion, covering an extremely broad range of media and marketing activities. This figure is significantly lower than the $10 to $12 billion dollar figure that was cited in the 2004 Institute of Medicine (IOM) Report on marketing to children and by several industry critics. This finding once again emphasizes the need to carefully develop a childhood obesity agenda based on fact, not on unsupported conjecture no matter how often those conjectures are repeated.

The Nielsen numbers and the FTC report clearly refute those advocates who claim that children are being increasingly bombarded by TV ads for foods, beverages and restaurants. It is also

important to note that advertising for these products is not a new phenomenon for parents or children. There have been substantial amounts of television commercials for food and beverage products and restaurants since the beginning of television, long before the recent increase in childhood obesity rates.

Unfortunately, the IWG analysis, as noted, utilized old data from 2006 or earlier that failed to capture these dramatic changes in the food marketing environment.

Restricting Food Advertising Will Not Combat Obesity

There also is strong reason to believe that governmental manipulation of food marketing will not effectively combat obesity and therefore cannot be justified on a cost benefit basis.

In a number of countries, there are broad restrictions on food advertising. In fact, in Sweden and the Canadian province of Quebec, broad across-the-board bans on advertising to children have been imposed. Recent analysis of these bans, however, suggests that they have had minimal, if any, impact on obesity levels. Additionally, in the Netherlands and certain other European countries, where there are no ad restrictions and relatively high levels of food advertising, obesity levels are lower than in either Quebec or Sweden.

Furthermore, in the United States, the amount of advertising for food products is relatively uniform across this nation. Television viewers in Jackson, Mississippi see most of the same commercials for foods and beverages that are seen by viewers in Boulder, Colorado. Yet there

are significant differences in obesity levels across the country for both adults and children, even in closely contiguous areas. CDC numbers from 2007 indicated that 9.6% of children in Oregon were obese, while in Mississippi the rate was 21.9%. Utah's rate was 11.4% while Georgia's was 21.3%.

According to 2009 figures from the Centers for Disease Control and Prevention, the state with the lowest rate of obesity was Colorado, at 18.6%. By contrast, the rate of obesity was 31.4% in Oklahoma, 28.1% in Kansas and 27.2% in Nebraska. Eight other states (Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, Tennessee and West Virginia) had obesity rates equal to or greater than 30% (http://www.cdc.gov/obesity/data/trends.html). These kinds of findings demonstrate that there clearly are major issues at work on childhood and adult obesity that far transcend the impacts of adverting.

As we will discuss further, these findings directly relate to the constitutional burdens that the government faces in restricting food advertising directed to children.

Food Advertising Has Substantial First Amendment Protection

Speech enjoys a uniquely favored status in democratic culture and in free markets. The whole trend of First Amendment law, since the mid-1970's, has been to provide greater protection to commercial speech. At that time, the U.S. Supreme Court recognized that a "particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener

by far, than his interest in the day's most urgent political debate." *Virginia Bd. of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 763 (1976).

Over the next thirty years, the Supreme Court has repeatedly strengthened the protections that commercial speech enjoys under the First Amendment. In *Thompson v. Western States Medical Center,* 535 U.S. 357 (2002), the Supreme Court ruled that a federal law prohibiting pharmacists from advertising compounded drugs violated the First Amendment. Writing for the majority, Justice O'Connor enunciated the clearest expression of the Supreme Court to date concerning the constitutional limits on restricting advertising: "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort."

The *Western States* case makes clear that the First Amendment should not be perceived as merely a defense against government overreaching in regard to speech regulation in general or advertising restrictions in particular. Instead, it sets up clear parameters for government policy formation. *Western States* commands that consistent with the First Amendment, non-speech restrictive options need to be examined and found inadequate before speech restrictive options can be legitimately turned to for consideration.

The government has not come close to examining, let alone exhausting, all of the non-speech options that can be taken to directly address childhood obesity. We believe the marketing restrictions contained in the IWG proposal if imposed would clearly violate the First Amendment rights of marketers to speak about their legal products and the First Amendment

rights of both parents and children to receive important information about these legal products.

The Supreme Court has made it clear that truthful, non-deceptive commercial speech cannot be banned or restricted unless the restriction "directly and materially advances" a "substantial governmental interest" and is "narrowly tailored" to "reasonably fit" that interest. See *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). Any government restriction on commercial speech also must be "no more extensive than necessary." *Lorillard Tobacco Company v. Reilly,* 533 U.S. 525 (2001). Also, the burden of proof concerning all of these issues must be met by the government. *Edenfield v Fane*, 507 U.S. 761 (1993).

Given the complex and multifaceted causes of obesity and the welter of inconsistent studies on the role of advertising and media, with the most comprehensive IOM study not able to find a causal connection between advertising and obesity, we do not believe that bans or restrictions on food or beverage advertising aimed at children could possibly meet the stringent *Central Hudson* test.

Given this multitude of facts, it is highly unlikely that banning or restricting food advertising would directly and materially advance the government's interest in protecting the health of children.

In addition, it would be very difficult to craft a "narrowly tailored" restriction on advertising to children that is no more extensive than necessary. As noted above, the IWG's marketing proposals would restrict advertising in measured media when the percentage of children in the audience reaches 30% for children 2-11 and 20% for children from 12-17. That means that companies would be precluded from marketing in media where the audience consists of 70% or 80% adults. The U.S Supreme Court has consistently refused to allow a "child protection" rationale to justify blocking information from reaching adults. In *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983), the Court noted that communication in society cannot be lowered to the level of the sandbox under the guise of protecting children.

The Supreme Court reaffirmed this important principle earlier this year. In *Brown v. Entertainment Merchants Association*, No. 08-1448, announced on June 27th, the Court struck down a California law that restricted the sale or rental of violent video games to minors, holding that the law violates the First Amendment.

Writing for the majority in the case, Justice Scalia stated: "No doubt a State possesses legitimate power to protect children from harm, (citations omitted), but that does not include a free-floating power to restrict the ideas to which children may be exposed." 564 U.S. ____ (2011) (Slip Opinion at 7)." Justice Scalia concluded: "California's effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors . . . Even where the protection of children is the object, the constitutional limits on governmental action apply." 564 U.S. ____ (2011), (Slip Opinion at 17).

Can it be conceived that violent video game advertising, however gory and graphic, must receive First Amendment protection for kids under 18, but food products that can be labeled "healthy" under FDA regulations could constitutionally face government efforts to have them withdrawn from the media and other marketing venues?

As noted above, the very broad definitions of marketing included in the IWG proposal have the effect of sweeping in much programming and advertising that is intended for adults. The IWG may genuinely believe that restricting these messages about certain food products may protect children. Nevertheless, it is highly unlikely that the courts would uphold a government effort to protect children from food advertising. As Professor Redish noted in his "White Paper:" "Indeed, in the last fifteen years the Supreme Court has invalidated all governmental regulations of commercial advertising to have come before it, always on the grounds that those regulations violate the First Amendment right of free expression" (*Redish*, 1). There is no reason to believe the Court would uphold the sweeping proposed marketing restrictions that are the fundamental foundation of the IWG proposal.

Indeed, another Supreme Court decision announced this year demonstrates the constitutional defects of efforts by the government to impose content-based burdens on speech, such as those in the IWG proposal. In *Sorrell v. IMS Health, Inc.*, No. 10-779, which was announced on June 23rd, the Court struck down a Vermont law that restricted the use of prescriber histories for purposes of marketing pharmaceutical products to physicians. Writing for the majority,

Justice Kennedy stated: "Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech. (citations omitted) 'The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." 564 U.S. ____ (2011) (Slip Opinion, 22).'"

In striking down the Vermont law which banned pharmaceutical marketing, the Court stated that the government cannot burden the speech of others in order to tilt public debate in a preferred direction: "Likewise the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers." 564 U.S. ____ (2011) (Slip Opinion, 22).

Much like the effort of the Vermont Legislature to restrict speech it did not like, the exact same reasoning applies to the IWG proposals. The IWG seeks to restrict truthful speech about products that are disfavored: (1) because they do not meet the extraordinarily restrictive and burdensome nutrition standards proposed by the Working Group; (2) because they believe the food advertising children see is "too persuasive;" and (3) because they do not trust the ability of children and parents to use the commercial information they see "appropriately." The marketing restrictions in the IWG proposal are clearly content-based burdens on speech, and as

pointed out earlier, are not "voluntary." Therefore, they do not pass constitutional muster. And they certainly cannot, in light of the lack of scientific analysis and evidence to support the IWG's proposed sweeping restrictions on speech, be constitutionally upheld. In a period where the Supreme Court has built stronger fortifications against government's direct restrictions of commercial speech, we should become particularly wary of efforts to avoid these restrictions through indirect government censorship.

Déjà Vu All Over Again

The FTC's own history and experience should be a beacon to guide us in regard to these critical speech issues. The FTC has wrestled in detail with the constitutional issues surrounding food marketing and children's advertising before. Back in 1978, the FTC launched a rulemaking to consider whether to ban all children's food advertising. After three years of review, more than sixty thousand pages of written comments and six thousand pages of hearing transcript, much of it focusing on constitutional issues, the Commission staff recommended termination of the rulemaking. The staff found that there did not appear "to be workable solutions which the Commission can implement through rulemaking in response to the problems articulated during the course of the proceeding." FTC Final Staff Report and Recommendation, March 31, 1981 at 13.

In 2004, Howard Beales, then the Director of the Bureau of Competition, reviewed this history in detail in a paper entitled, "Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present (http://www.ftc.gov/speeches/beales/ 040802adstokids.pdf)." Beales, after

a careful analysis of the constitutional and policy issues, forcefully stated: "Based on the history of FTC regulation of children's advertising experience with the prior Kidvid rulemaking and the current state of the law, one can only conclude that restricting truthful advertising is not the way to address the health concerns regarding obesity (Beales, 18)."

Conclusion: Look for Solutions That Work and Respond to Congressional Mandates

The advertising community, the media community and food, beverage and restaurant companies already have voluntarily spent billions of dollars in various efforts to address the childhood obesity challenge. These steps substantially exceed the efforts of any other sector of our society, including the government.

We intend to continue these efforts forcefully, as they are being carried out in response to continuing market demand from consumers. We also stand ready to respond to government requests when they are reasonable, scientifically-based and likely to be effective in reducing obesity rates. The current IWG proposal falls far short of those criteria.

For some time now there have been suggestions, rumors and even recently specific statements from the IWG that the Working Group "anticipates making significant changes to both the marketing and nutrition principles as it develops final recommendations as required by Congress." This is a positive signal that the IWG has begun to realize some of the serious flaws of their proposal. **However, no proposal should come forward to the Congress, whatever its new dimensions, unless that proposal can (1) be justified through the best science and on a**

cost/ benefit basis; and (2) specifically respond to the requests of the Congress in regard to the relationship of the nutrition and marketing standards to preventing obesity in the United States.

ANA and the rest of the advertising community stand ready to work with the IWG and all other groups in society to combat obesity impacting young people and the population at large. However, we must do so carefully, systematically, scientifically and within the parameters of the First Amendment.

We therefore urge the Interagency Working Group to formally withdraw their proposal on food marketed to children and carefully analyze and reevaluate their numerous proposals to focus on real solutions that work.

ANA is the advertising industry's premier trade association dedicated exclusively to marketing and brand building. We represent more than 400 companies with over 9,500 brands that collectively spend more than $250 billion annually in marketing communications and advertising. Many of America's largest food and beverage companies and restaurants are members of ANA, although we represent virtually every segment and sector of the advertising community. More information about our association is available at www.ana.net

Mr. PITTS. The Chair thanks the gentleman and recognizes Ms. Kolish for 5 minutes.

STATEMENT OF ELAINE D. KOLISH

Ms. KOLISH. Thank you, Mr. Chairman, Madam Chairwoman, members of the committee. I am delighted to be able to participate today, and I would like to make three points.

First, self-regulation through the Children's Food and Beverage Advertising Initiative is steadily improving the foods in child directed advertising. Our participants, 17 of the Nation's leading food companies, represent the vast majority of child-directed advertising. By using meaningful nutrition criteria, they have shifted the emphasis of their advertising to children to foods that are substantially lower in total calories, lower in fats, salt and added sugars and higher in nutrient content, just as the Institute of Medicine recommended in its 2006 report on food marketing.

Indeed, many of the foods advertised to children today meet the FDA's definition of healthy foods. The companies have accomplished these product improvements by devoting vast amounts of time and by spending millions and millions of dollars. As a result, kids watching children's television programming regularly see ads for foods such as apples or applesauce or other fruits, milk, yogurt and veggies either as a part of a canned pasta dish or as part of a meal. And now more than ever, products are including whole grains or larger amounts of whole grains.

And I would like to say in response to Mr. Waxman's concern, it is also important to know that major candy companies, Mars, Hershey, Cadbury's have agreed to stop advertising to kids under self-regulation and are participating—Nestle has agreed to stop advertising its Wonka and other confections to kids as well.

Second, the CFBAI's new groundbreaking category specific uniform nutrition criteria will further improve the foods in child-directed advertising and make self-regulation work even better. Our new criteria build on the successes from our current program in which companies use meaningful but individually based standards. Our new uniform criteria will replace the company standards by the end of 2013. After that date, products across companies will meet the same criteria for the relevant product category.

Our process for developing the new criteria was informed by the experience of high level in-house nutrition professionals who on a daily basis work on the development of new products and recipe changes. As a result, we have the benefit of their food technology and food science experience, as well as their understanding of the barriers to consumer acceptance of changes to popular products and newly developed products.

In developing the criteria, we also were sensitive to competitive issues, and the criteria are purposely flexible to encourage even greater participation and self-regulation and to promote competition in the marketplace. The new criteria take into account the inherent differences in food product categories. A one-size-fits-all approach simply does not work. Grain products and dairy products, for example, are different and they need to be treated differently. Accordingly, we set limits for calories, fat, trans fats, sodium, sugars and requirements for positive nutrients such as fruits and

whole grains that are appropriate to each category to spur product improvement and innovation. And our new criteria are tough. They will require the participants to change almost one-third of the products they currently advertise to children, products that already meet meaningful nutrition standards if they wish to continue advertising them after these criteria go into effect.

Third, the Interagency Working Group proposal was not realistic or workable. It inappropriately would have swept in advertising to moms and families and its proposed nutritional criteria greatly underestimated the technological and consumer acceptance barriers to reformulating well-liked products. Our new criteria, in contrast, provide a rigorous yet realistic roadmap for future improvements. Our new criteria also are well within the scope of what the IWG said it was seeking as an alternative to its own proposal. Our new criteria are based on or closely aligned with regulations to finding healthy products and disclosure levels just as the IWG suggested. They also are informed by IOM's recommendations for school meals and other foods sold in schools.

In conclusion, we were delighted to learn that the IWG considers our new criteria a significant development and that it intends to take them into account in its report to Congress. That is good news. Self-regulation has accomplished a significant amount in just a few short years. It has changed not only what products are advertised to kids, but the expectations about what should or should not be advertised to kids. So our new criteria will continue the steady improvements already occurring in foods advertised to kids and result in self-regulation working even better.

Thank you so much.

[The prepared statement of Ms. Kolish follows:]

Summary of Prepared Statement of Elaine D. Kolish, Vice President and Director
Children's Food and Beverage Advertising Initiative, BBB
Before the Subcommittee on Commerce, Manufacturing, and Trade, and the Subcommittee on Health of the House Energy and Commerce Committee
"Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health?"
October 12, 2011

Self regulation, through the Children's Food and Beverage Advertising Initiative (CFBAI), is steadily improving the foods in child-directed advertising. While the answer to the Committee's question about "voluntary government restrictions" is uncertain, it is clear that self regulation – the CFBAI – is changing the landscape of child-directed food advertising in observable and meaningful ways. CFBAI's participants are committed to addressing the concerns that have been raised about children's food and beverage advertising by advertising healthier foods (or not engaging in such advertising).
Using meaningful nutrition criteria, they have shifted the emphasis of their advertising to children to foods "that are substantially lower in total calories, lower in fats, salt, and added sugars, and higher in nutrient content," just as the Institute of Medicine (IOM) recommended in 2006.

The CFBAI's new groundbreaking category-specific uniform nutrition criteria will further improve the foods in child-directed advertising and make self regulation work even better. The new criteria build on the successes from the use of company-specific criteria yet have a number of advantages over those criteria. The new criteria will require the participants to change almost one-third of the products they currently advertise to children – products that already meet meaningful nutrition standards – if they wish to continue advertising them after these criteria go into effect on December 31, 2013.

The Interagency Working Group's (IWG) Proposal was not realistic or workable. The IWG's advertising scope inappropriately would have swept in advertising to moms and families, and its proposed nutritional criteria greatly underestimated technological and consumer acceptance barriers to reformulating well-liked products. The CFBAI's new criteria, in contrast, provide a rigorous, yet realistic, roadmap for future improvements. They also are well within the scope of what the IWG was seeking as an alternative. The CFBAI's new criteria are based on, or closely aligned with, regulations defining "healthy" products and "disclosure" levels, as the IWG suggested. They also are informed by IOM's recommendations for school meals and foods sold in schools. We're delighted that the IWG intends to take CFBAI's new criteria into account in its report to Congress, because the criteria continue responsible companies' positive work in the fight against childhood obesity.

Prepared Statement of Elaine D. Kolish, Vice President and Director
Children's Food and Beverage Advertising Initiative
Council of Better Business Bureaus

Before the

House Energy Commerce Committee
Subcommittee on Commerce, Manufacturing, and Trade
and the
Subcommittee on Health

United States House of Representatives

"Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health?"

October 12, 2011

Washington, DC

Introduction

Chairmen, Ranking Members and Members of the Committee and Subcommittees, I am Elaine Kolish, Vice President and Director of the Children's Food and Beverage Advertising Initiative (CFBAI) of the Council of Better Business Bureaus (BBB).[1] The CFBAI appreciates the opportunity to testify at your hearing on *"Food Marketing: Can 'Voluntary' Government Restrictions Improve Children's Health?"*

The answer to that question is uncertain. But it is clear that self regulation – the CFBAI – is meaningfully changing the landscape of child-directed food advertising for the better.

This statement provides an overview of the CFBAI's program and our changes over the last several years that make an already robust program even stronger. It also describes the recent ground-breaking agreement with our participants to use new CFBAI category-specific uniform criteria, in place of company-specific criteria, as of December 31, 2013. This agreement, by the nation's leading food and beverage companies, will further improve the children's food advertising landscape. Finally, it summarizes the CFBAI's views on the Interagency Working Group's (IWG) Preliminary Proposed Nutrition Principles to Guide Self-Regulatory Efforts.

The 17 leading food and beverage companies comprising the CFBAI share the goal of combating childhood obesity. They are committed to being a part of the solution to this grave problem by voluntarily agreeing to restrict their child-directed advertising to healthier foods or to not engage in such advertising. The CFBAI participants support parents' efforts to guide their children to healthier choices by developing and advertising wholesome and nutritious products to children, by providing information about healthy eating and lifestyles, and by supporting or sponsoring events and organizations that promote healthy eating, physical activity and sports.

Advertisers' self regulation efforts, while very important, can play only a small part in addressing the complex problem of childhood obesity when important building blocks for establishing healthy eating patterns are missing. Survey data consistently show, for example, that most consumers do not understand calories,[2] and that many overweight moms underestimate their own weight and that of their children.[3] Unless and until we work together to address these key information deficiencies and promote healthy lifestyles that include physical activity, it will not be possible to stem the tide of childhood obesity.

About the Council of Better Business Bureaus (CBBB)

As the leader in advancing marketplace trust, BBB is an unbiased non-profit organization that sets and upholds high standards for fair and honest business behavior. Every year, more than 87 million consumers rely on BBB Business Reviews® and BBB Wise Giving Reports® to help them find trustworthy businesses and charities across North America. The CBBB is the network hub for 116 BBBs in the United States and Canada. CBBB also is one of the nation's recognized leaders in developing and administering self-regulation programs for the business community.

About the CFBAI

In November 2006, BBB and 10 (now 17) leading food companies joined forces to create the CFBAI to respond to the FTC's 2006 call for additional self regulation addressing advertising directed to children, because of childhood obesity,[4] and to the Institute of Medicine's (IOM) recommendations in its 2006 report, "Food Marketing to Children and Youth: Threat or Opportunity" (IOM Report). While no casual link had been established — or has yet been established — between advertising and obesity, these founding companies were not interested in debating causality. Instead, they wanted to be a part of the solution, by using nutrition standards to govern what products they would advertise to children.

Our focus is on advertising primarily directed to the under 12 age group. Our focus on advertising that is *primarily directed at children under 12* strikes the right balance and thus minimizes the impact on advertising primarily directed to others. This reflects a thoughtful and proportionate response by responsible food marketers who participate in self regulation.

It seems easy now – almost five years later – to take for granted that food companies will limit what they advertise to children to products that meet meaningful nutrition criteria. But, in 2006 that was an innovative idea. After all, we're talking about advertising to children for products that are legal to sell and products that parents, not children, actually purchase.

As IOM specifically recommended, the CFBAI participants have shifted the emphasis of their advertising to children to foods "that are substantially lower in total calories, lower in fats, salt, and added sugars, and higher in nutrient content." (IOM Report at p. 11). During the last several years, as their commitments became operational, the participants reformulated or newly created more than 100 products that are advertised to children, to meet nutrition standards. In addition, the participants stopped advertising other products, or discontinued selling products that did not meet their nutritional commitments. Some participants also reformulated additional products prior to joining the CFBAI.

At the same time, the CFBAI program itself has evolved since its inception. In July we announced that the participants have agreed to replace current company-specific nutrition criteria with newly developed CFBAI category-specific uniform nutrition criteria as of December 31, 2013. (Attached as Appendix B.) As described in more detail below, this announcement was the latest in a series of significant program developments. Other changes include a substantial expansion of the CFBAI's already rigorous and far-reaching requirements, harmonization of the definition of "child-directed" advertising, and an increase from 10 to 17 participants.

Since the outset, our participants have represented a substantial share of all the food advertising to kids and that continues to be the case. (Some participants have stopped child-directed advertising and the ad expenditures of others change from year to year.) In an informal, in-house study of ads appearing during kids' programming that CFBAI conducted in spring 2010, we found our participants' ads were 79% of the total food ads. We also observed, however, that food ads accounted for only *24%* of the total number of ads. Interestingly, the largest percentage of ads was for sedentary entertainment – almost twice as many. This is consistent with the findings of the 2007 FTC Bureau of Economics Staff report. [5] In that report, the FTC also found that food advertising to kids had declined between 1977 and 2004, and subsequent studies by other researchers have reported a *further* decline in TV food ads directed to kids.[6] The CFBAI's goal is to increase the proportion of ads for healthier products, not to reduce food ads to kids. But, policy makers should be aware of the overall decline in food advertising to kids and the modest portion of food advertising within the total amount of advertising to kids.

CFBAI Program Overview

Our intent in creating the program was for it to be rigorous and dynamic, and to evolve over time, as it has.

First, we increased our core requirement to a 100% commitment. The CFBAI's original Core Principles required that participants commit to advertising healthier products at least half the time. All the participants, however, committed that 100% of their advertising primarily directed to children under 12 (child-directed advertising)[7] would be for healthier products. Consequently, in December 2009 the CFBAI announced Enhanced Core Principles that incorporated the 100% commitment in the Principles, effective January 1, 2010.[8]

Second, we eliminated healthy lifestyle messaging as a compliance option. Originally, the participants could satisfy the Initiative's advertising commitment through ads for healthier products, healthy lifestyle messaging or some combination of the two. Now all advertising commitments must be met through healthier products (or by not advertising). (Nonetheless, the participants continue to support and promote healthy lifestyles.) Consequently, under the revised CFBAI Core Principles the participants commit either that they will not engage in child-directed advertising, or that 100% of their child-directed advertising will be for healthier products.

Third, we expanded our program requirements significantly. To complement our coverage of traditional media, TV, print, radio and websites, we added new and emerging social and digital media, such as child-directed ads on apps on Ipads or Iphones and ads in video games, when they are child-directed. Word-of-mouth advertising that is primarily directed to children under 12 is also covered. Although we expect television to continue to be the main venue for advertising to children, the Core Principles now include newer and still-emerging platforms.

Fourth, we strengthened our program by substantially harmonizing the definition of "child-directed" advertising. Initially we permitted participants to use existing, reasonable definitions that most already had in place. Although in practice their definitions were very comparable, facially they appeared to differ. So we asked our participants to use a threshold of no higher than 35% children under 12 in the audience to define child-directed advertising and they agreed. Now the participants are substantially harmonized, with no one using a standard higher than 35% children age 2-11 in the audience as their baseline for determining what is child-directed advertising.

Fifth, we've added to the program compliance monitoring of participant policies not to engage in advertising that is primarily directed to children under age six. This came about because we had asked our participants to consider adopting policies not to engage in advertising of *even their healthier foods* that is primarily directed to children under age six, as this is the age group that is the least sophisticated. Five participants adopted CFBAI's suggestion and joined the six that already had such a policy in their CFBAI pledge. Because these policies are now prevalent, CFBAI will monitor and report on compliance with them.

Participants' Current Nutritional Commitments

Three candy companies no longer engage in child-directed advertising, and another participant is continuing its longstanding commitment to not direct any advertising to children under 12.[9] Thirteen participants have pledged to advertise to children under 12 only foods that meet science-based nutritional standards that BBB has reviewed and approved.[10] The standards the companies use today are recognizable ones familiar to nutrition professionals. They are generally based on the Dietary Guidelines for Americans (2005) and FDA standards, such as FDA's definition of "healthy."

The Initiative's current approach of balancing flexibility (company-proposed nutrition standards) with rigor (standards must be science-based and approved by BBB) and transparency (standards and commitments are publicly available on BBB's website at http://www.bbb.org/us/children-food-beverage-advertising-initiative/2010-pledges/) has encouraged participation and competition among the participants, resulting in significant improvements in products advertised to children. The CFBAI publishes annual reports on compliance and progress and each year has found that compliance is excellent and that the foods being advertised to children are getting even better.[11]

The foods that CFBAI's participants advertise today include items such as cereals, crackers, soups, canned pastas and meals with fruit and low-fat dairy — products that meet meaningful nutrition standards familiar to nutrition professionals. The advertising also includes many foods that meet FDA's definition of "healthy" foods. These foods are neither high in calories nor products that represent the top sources of calories in children's diets.[12] In the individual food category, all foods currently advertised contain no more than 200 calories (except two peanut butters with 210 calories). Main dishes do not exceed 350 calories and meals do not exceed 600 calories. In addition, the participants have reduced the sugar content of products, in particular in ready-to-eat cereals, the sodium content of products such as soups, pastas and other meal items, and the fat content of many products. At the same time the nutritional richness of products has increased, with more products than ever containing, for example, whole grains or a larger amount of whole grains.

The CFBAI's informal study of advertising during a sample of children's television programming in 2010 showed that the CFBAI participants' child-directed ads usually are for, or include, nutrient dense foods that also meet reasonable limits on calories, fats, sugars and sodium. More than three-quarters of participant child-directed food advertising was for products providing at least 10% of the Daily Value (DV) of a nutrient that is a shortfall in children's diets (potassium, fiber, calcium, magnesium and Vitamin E) or a half-serving of a "food group to encourage" (fruit, vegetable, low-fat dairy and whole grains). Our analysis also showed that participant ads included the following:

- *Apples*. 24% included apples or applesauce.
- *Milk*. 21% included milk.
- *Vegetables*. 8% were for products that included at least a half-serving of vegetables.
- *Whole Grains*. 27% were for products or meals that included at least 8 grams of whole grains/50% whole grains.
- *Yogurt Products*. 12% featured low-fat yogurt products.

Since 2010, there have been more improvements in the composition of foods participants advertise to children. Appendix C summarizes and illustrates key changes.

New CFBAI Category-Specific Uniform Nutrition Criteria

Although company-specific criteria have been working well to drive positive changes in foods advertised to children, the CFBAI has taken a bold new step and adopted category-specific, uniform nutrition criteria. The new criteria build on what CFBAI's participants have already accomplished and will continue and advance the development of products that are aligned with the Dietary Guidelines for Americans. These new uniform nutrition criteria will pose significant challenges for the participants. They will require the participants to change many products they currently advertise to children – products that already meet meaningful nutrition standards – if they wish to continue advertising them after these criteria go into effect. The participants also have agreed to a challenging implementation date of December 31, 2013.

The CFBAI's process for developing the criteria was informed by the insightful experience of high-level in-house nutrition professionals who, on a daily basis, work on the development of new products and recipe changes. As a result, we had the benefit of their food technology and food science expertise, as well as their understanding of the barriers to consumer acceptance of changes to popular products and newly developed products. In developing the criteria, the CFBAI also was sensitive to competitive issues and the criteria are purposefully flexible to encourage even greater participation in self regulation, and competition.[13]

For more than a year the CFBAI and company scientists and nutrition professionals (Nutrition Science Review committee) worked to review nutrition policy developments to identify potential improvements in company-specific nutrition standards or uniform CFBAI criteria. The then-planned issuance of the Dietary Guidelines for Americans 2010 was a key

impetus for the review, as the CFBAI requires that company nutrition standards be consistent with established scientific and/or government standards. The "White Paper on CFBAI's Uniform Nutrition Criteria" describes in detail the CFBAI's nutrition science review and the basis for the new category-specific nutrition criteria.[14]

The new uniform nutrition criteria set limits on calories, saturated fat, *trans* fat, sodium and sugars (Nutrients to Limit or NTL) and include requirements for nutrition components to encourage (NCTE) for 10 product categories. While building on the successes from the use of company-specific criteria, they have a number of advantages over those criteria.

First, they are uniform. Now products across companies will meet the same criteria for a product category. The CFBAI's product-category approach allows criteria to be tailored appropriately to reflect the inherent difference in food product categories. A one-size-fits-all approach does not work. For example, regular peanut butter, a healthy food in common parlance, is not a "low" saturated fat food. A saturated fat limit that was appropriate for the general category of individual foods including peanut butters would be higher than the limit that would be appropriate for other individual foods such as cereals, or would require creating an exemption for peanut butters. In contrast, the CFBAI's product category approach allows limits to be set that reflect meaningful, but realistic, goals for different food categories. Product-category specific criteria can take into account food science/technology challenges specific to different categories as well as the need for incremental reductions of fat, sugars and sodium to build consumer acceptance of foods that have lower amounts of these nutrients.

Second, the new criteria are an improvement over the current criteria because they fill gaps that currently exist in the participants' individual standards. Further, overall the limits for nutrients are more stringent. Additionally, to be consistent with and to promote the 2010

Dietary Guidelines for Americans, the CFBAI has incorporated requirements for "nutrition components to encourage" for all product categories. These requirements include (i) a minimum amount of at least a ½ serving of fruit, vegetable, whole grains or low-fat dairy ("food groups to encourage"), (ii) at least one essential nutrient at the 10% DV level,[15] or (iii) a combination of both. These requirements increase as calories increase and as the role of the food in the overall diet takes on greater importance (e.g., entrees). In lower-calorie foods, it may not always be feasible to include a meaningful amount of a food group to encourage. Yet lower-calorie foods, through their essential nutrient content, may contribute meaningfully to a healthy diet. Products that are a larger contributor to caloric intake, however, must meet minimum food groups to encourage requirements.

Third, they are even more transparent and easier to understand and apply than the current standards. Thus, they can more easily serve as a roadmap for child-directed advertising practices for other U.S. food (or media) companies, and simplify compliance monitoring for the CFBAI and others. For example, they are based on the labeled serving size, which appears on the required Nutrition Facts Panel (NFP) on products, and the NFP can serve as a reference, for virtually all products, on whether key criteria have been met.

The new criteria also will eliminate some of the ways products may qualify as products participants may advertise to children. Specifically, in the future a product may not qualify based solely on a "reduced" claim (e.g., ≥ 25% less sodium) or only because it is in a portion controlled, 100-calorie pack.

Overall these new uniform nutrition criteria will pose significant challenges for the participants. They will require reformulation of many products, about one-third of the products participants currently advertise – ones that already meet meaningful nutrition standards – if they wish to continue advertising them after these criteria go into effect on December 31, 2013.

Dr. Eric Decker, Chair of the Department of Food Science, at the University of Massachusetts-Amherst, and a member of the Institute of Medicine's Committee on School Foods, commented favorably on CFBAI's thoughtful approach and the benefits of the CFBAI criteria when they were issued. He said, "These criteria are meaningful, but practical, science-based standards that will further encourage healthier foods to be developed and advertised to children. Having criteria that are balanced for both nutritional significance and yet allows inclusion of foods that taste good and are affordable is critical because no matter how healthy a food is, if it's not consumed it will not improve health and wellness."

In keeping with our core requirement that nutrition standards be consistent with established scientific and/or government standards, the CFBAI intends to review the nutrition criteria periodically to determine whether new or different categories or subcategories are necessary to reflect innovation and new products in the marketplace. For example, the criteria will be reviewed after the issuance of the Dietary Guidelines for Americans 2015. At that point the participants will have had more than two years worth of experience with the new criteria. If necessary, they will be aligned with any new dietary guidance and, if appropriate and feasible, will be strengthened even further.

CFBAI Comments on the IWG Proposal

As explained in CFBAI's comment on the IWG proposal we believed that the IWG's proposed nutrition principles were not realistic and greatly underestimated technological and consumer acceptance issues (available at http://www.bbb.org/us/children-food-beverage-advertising-initiative/info/comments/). The CFBAI also expressed concern over the scope of the IWG's proposal, which would have swept in advertising to moms and families.

The CFBAI conducted an analysis of the products currently on the CFBAI list of participant products that meet company-specific nutrition standards to determine whether they meet the IWG's proposed nutrition principles. We found that only 14% of participants' CFBAI-listed products meet all the principles, using its *interim* sodium standard and only 7% meet all the principles using its *final* sodium standard. The products that do meet the IWG's proposed principles are primarily 100% fruit juices, low-fat milk products and granola bars.

We also analyzed the participants' "savory" and "sweet" products separately and found, as shown below, that the impact was even greater than appeared when all products are analyzed together.

- **"Savory" Product Category**. A mere 1% of "savory" foods – soups, savory crackers, mixed dishes (e.g., macaroni and cheese products), main dishes (e.g., canned pasta), and meals – meet the IWG's final sodium criterion (12% meet the interim sodium criterion) and *none* meet the IWG's criteria *overall* (interim or final).
- **"Sweet"-tasting Product Category**. Focusing on "sweet" foods and beverages – fruit snacks, cereals, sweet crackers, juices, fruit drinks and other beverages – we found that 46% meet the IWG's sugars criterion. But, only 8% meet the IWG's overall criteria (interim and final).

We also analyzed products by type and found that virtually none of the yogurts (and none of the kids-specific yogurts) and none of the soups, breakfast cereals, mixed dishes, main dishes, meals, or crackers (both sweet and savory) that CFBAI participants currently advertise to children under 12 — foods that already meet meaningful nutrition standards — would meet the IWG's proposed principles.

Our focus in commenting on the IWG's proposal, however, was on whether the proposed principles would provide a realistic roadmap for future product changes. Based on our experience working with our participants, we advised the IWG that they did not. Specifically,

the IWG's goals for nutrients, such as sugar and sodium, and for food groups, such as fruit and whole grains, exceed what reasonably could be accomplished within its proposed five year timeline, and its longer term goals presented even greater problems.

As we explained in our comment, reformulating familiar and well-liked products can be enormously difficult when a food producer is trying to increase, for example, a product's whole grain or vegetable content, *or* decrease nutrients such as sodium and sugars. When *dramatic* changes are necessary, as the IWG proposal would require for many products, the problems are greatly compounded. For example, under the IWG's proposed principles, even for products that have achieved FDA's "healthy" level for sodium (480 mg for individual foods), producers would need to decrease the sodium level by more than 50% to 210 mg in five years. To significantly decrease certain nutrients while simultaneously increasing others, as might be necessary under the IWG proposal, would be even more challenging, from both a taste standpoint and a functional and product performance standpoint. Because of these serious issues, we feared the IWG's principles would discourage, rather than encourage innovation.

The CFBAI accordingly accelerated its work on its new criteria so that we could submit them as part of our comment, and they are well within the scope of what the IWG was seeking as an alternative to its own proposed nutrition principles. The IWG expressly invited the submission of alternatives based on "federal food labeling regulations defining the nutrient content claim 'healthy,' federal regulations establishing disclosure levels for certain nutrients in connection with other nutrient content claims, or the disqualifying nutrient levels used for health claims" (IWG Request for Comments at p. 6).[16] CFBAI's new criteria are based on or closely aligned with regulations defining "healthy" products, "disclosure" levels and Institute of Medicine report recommendations for school meals and foods sold in schools. They provide a rigorous but realistic roadmap for future product changes.

Conclusion

We're delighted that the IWG views CFBAI's new criteria "as a significant development" and that it intends to take them into account in preparing its report to Congress. Self regulation has accomplished a significant amount in just a few short years – it's changed not only what products are advertised to kids, but the expectations about what should or should not be advertised to kids. Our new uniform nutrition criteria will encourage further improvement in the nutritional content of foods advertised to children. Yet advertising self regulation alone will not work. Unless and until we work together to address key information deficiencies about nutrition and healthy body weights and promote healthy lifestyles that include physical activity, it will not be possible to stem the tide of childhood obesity. Thank you.

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[1]The bio of Elaine Kolish is attached as Appendix A.

[2] International Food Information Council Foundation, *2011 Food & Health Survey: Consumer Attitudes Toward Food Safety, Nutrition & Health* (2011), available at http://www.foodinsight.org/Content/3840/2011_IFIC_FDTN_Food_and_Health_Survey.pdf. *See also* 2010 Dietary Guidelines Alliance, *Consumer Research Report: Motivating Families to Lead a Healthier Lifestyle in 2011 and Beyond* (2010), available at http://www.foodinsight.org/Content/3651/FINAL2010DGAConsumerResearchReport.pdf.

[3] Nicole E. Dumas *et al.*, *Obesity and Intergenerational Misperception of Body Size Prevalent among Urban Women and Their Children*, presentation at the AHA 2011 Conference, "Nutrition, Physical Activity and Metabolism/Cardiovascular Disease Epidemiology and Prevention 2011 Scientific Sessions," on March 23, 2011, available at http://www.newsroom.heart.org/index.php?s=98&cat=217&mode=gallery.

[4] The recommendation emerged from a joint FTC/HHS workshop conducted in July 2005 on "Perspectives on Marketing, Self-Regulation and Childhood Obesity," and a follow up report on the workshop that FTC/HHS jointly issued in April 2006. *See* http://ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCandHHSReportonJointWorkshop.pdf at 50-51.

[5] *Children's Exposure to Television Advertising in 1977 and 2004: Information for the Obesity Debate: A Bureau of Economics Staff Report* (available at http://www.ftc.gov/opa/2007/06/childrenadsstudy.shtm).

[6] For example, a recent study found that the average number of food and beverage advertisements that children ages 2 to 11 viewed on children's programming fell by 50% between 2004 and 2010. Georgetown Economic Services (GES), *Food and Beverage Advertising 2004 and 2010: Children's Impressions and Expenditures on Children's Programs* (2011), available at http://www.gmaonline.org/file-manager/Health_Nutrition/ges_report_on_childrens_tv_advertising.pdf.

[7] Historically, self regulation has focused on children under 12, and thus the CFBAI's efforts also focus on this age group. Although studies suggest various ages at which children begin to understand the persuasive intent of advertising, it is generally agreed that by age 12 children do have that ability. Because special protections are important for children under 12, the advertising industry always has had a set of stringent rules for advertising primarily directed to children under 12. The Children's Advertising Review Unit or CARU, which is a BBB-administered program, has promoted high standards of responsible advertising to children under 12 since 1974. (CARU's operational policies are set by the National Advertising Review Council, which is a strategic alliance of the advertising industry and the BBB.) CARU has Guidelines for children's advertisers to ensure that children's advertising is not deceptive, unfair or inappropriate for its intended audience. CARU and CFBAI are complementary

programs, with CFBAI focusing on *what* foods are advertised to children, and CARU focusing on *how* products, including foods, are advertised to children.

[8] This document is available at http://www.bbb.org/us/enhanced-core-principles/.

[9] The participants that do not engage in child-directed advertising are Cadbury Adams, The Coca-Cola Co., The Hershey Co., and Mars, Inc. (Kraft Foods has purchased Cadbury Adams and its activities will soon be entirely subsumed into the Kraft Foods pledge). In addition, Nestlé USA no longer advertises its Wonka brand (or other confections) to children. It does advertise other products such as 100% fruit juice.

[10] These are Burger King Corporation; Campbell Soup Company; ConAgra Foods, Inc.; The Dannon Company; General Mills, Inc.; Kellogg Company; Kraft Foods Global, Inc.; McDonald's USA, LLC; Nestlé USA; PepsiCo, Inc.; Post Foods, LLC; Sara Lee Corp., and Unilever United States.

[11] The most recent report, on the year 2009, is available at http://www.bbb.org/us/storage/0/Shared%20Documents/BBBwithlinks.pdf. The CFBAI's comment to the IWG also contains a detailed analysis of the changes that have occurred since the 2006 period analyzed in the FTC's 2008 Report, *Marketing Food To Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation: A Federal Trade Commission Report To Congress,* which is referenced in the IWG's proposal (available at http://www.ftc.gov/opa/2008/07/foodmkting.shtm). As noted, there have decreases in the amount of food advertising to children (see note 6 above) and many improvements in the nutrition composition of the products CFBAI participants advertise to children.

[12] The participants' ads certainly are *not* focused on "cookies, cakes, pizza, soda or energy or sports drinks" that are the top sources of calories in the diets of children 2-18, according to the FTC. *See* IWG's "Food for Thought."

[13] In crafting the criteria, we also were mindful of competition issues. Although the criteria will encourage all participants to promote healthier foods to kids, they provide flexibility on how products may meet the requirements and thus do not unfairly favor one participant over another. Promoting, rather than stifling, competition among participants encourages the broadest array of healthy and quality product choices at the lowest cost.

[14] As detailed in the White Paper, the Nutrition Science Review committee reviewed new dietary recommendations; regulations for nutrition labeling and nutrient content claims for foods and beverages; and recommendations for nutritional criteria for foods marketed directly to children, foods sold in competition with school meals, and school breakfast and school lunch programs; and standards of identity for foods. The Nutrition Science Review committee also was mindful of the IWG's December 2009 proposed tentative nutrition standards for marketing to children, and the subsequent April 2011 proposed nutrition principles. The White paper is available at http://www.bbb.org/us/storage/0/Shared Documents/CFBAI White Paper on Uniform Nutrition Criteria.pdf.

[15] Essential nutrients include protein, fiber, and vitamins and minerals for which a DV has been established, including those added to meet standards of identity that have an enrichment requirement or to restore naturally occurring nutrients that are lost in processing. If the essential nutrient requirement is met through fortification, it must be a nutrient of public health concern as specified in the DGA 2010 (i.e., dietary fiber, potassium, calcium, and vitamin D) or a nutrient required to be listed on the NFP (i.e., iron, vitamin A, and vitamin C in addition to dietary fiber and calcium). In 1993, in final regulations implementing the Nutrition Labeling and Education Act, the FDA identified calcium, iron, vitamin C, and vitamin A as nutrients of public health concern and required the amount of these nutrients to be declared in the NFP. These same nutrients also are included in FDA's definition of "healthy."

[16] We note that the IWG asked whether its principles should include these same nutrients (ones that are of public health concern and those listed on the NFP; IWG Request for Comments at p. 20, question 3) as a way for a product to make a meaningful contribution to the diet. We agree they should. We do not, however, agree that the list should be limited to those nutrients. The presence of any "essential" nutrient at the good source (10% DV) level should suffice. Such nutrients are called *essential* for good reason, and when meeting FDA's definition of a good source they should be recognized as making a meaningful contribution to the diet.

Appendix A. Biography of Elaine D. Kolish

Ms. Kolish, Vice President & Director, Children's Food and Beverage Advertising Initiative, Council of Better Business Bureaus (BBB) is a nationally recognized expert on advertising and consumer-protection issues.

Prior to joining BBB in 2006, Ms. Kolish was a partner at the national law firm Sonnenschein Nath and Rosenthal LLP (now SNR Denton), where she specialized in counseling national advertisers on advertising and marketing compliance. From 1980 until 2005, Ms. Kolish was an attorney at the Federal Trade Commission. There she was a member of the Senior Executive Service and was the head of the Division of Enforcement in the Bureau of Consumer Protection. She has worked extensively on national advertising matters and led the Bureau's regulatory review efforts, as well as a number of other key policy initiatives including the Class Action Fairness Monitoring Project and the Hispanic consumer-protection program.

Ms. Kolish has served as vice chair of the American Bar Association Antitrust Section's Privacy and Information Security Committee, and was an editor of the ABA's Antitrust Section treatise on consumer protection law.

She is a 1976 graduate of the University of Massachusetts, Amherst, and graduated magna cum laude from Western New England College School of Law in 1980.

Appendix B. CFBAI Category-Specific Uniform Nutrition Criteria

Children's Food and Beverage Advertising Initiative
Council of Better Business Bureaus, Inc.
Category-Specific Uniform Nutrition Criteria

Product Category	Unit	Nutrients to Limit (NTL)				Nutrition Components to Encourage (NCTE)	Notes
		Calories	Sat Fat	Sodium	Total Sugars		
1. Juices	LSS	≤ 160	0 g	≤ 140 mg	No added sugars	≥ ½ c F/V juices	– A serving must contain ≥ 4 fl oz of 100% F/V juice – Sugars limited to those naturally occurring in F/V
2. Dairy products							
– Milks and milk substitutes	8 fl oz	≤ 150	≤ 2 g	≤ 200 mg	≤ 24 g	1 c dairy	– For LSS < 8 fl oz, NTL & NCTE to be scaled proportionately – Powder/syrup flavorings mixed with 8 fl oz non-fat milk are allowed ≤ 25 g total sugars as prepared
– Yogurts and yogurt-type products	6 oz	≤ 170	≤ 2 g	≤ 140 mg	≤ 23 g	≥ ½ c dairy and ≥ 10% DV calcium	– 6 oz (170 g) is most common single serving size – For LSS < 6 oz, NTL & NCTE to be proportionately lower
– Dairy-based desserts	½ c	≤ 120	≤ 2 g	≤ 110 mg	≤ 20 g	≥ ¼ c dairy and ≥ 10% DV calcium	– Serving sizes limited to ½ c – For LSS < ½ c, NTL & NCTE to be scaled proportionately
– Cheese and cheese products	LSS	≤ 80	≤ 3 g	≤ 290 mg	≤ 2 g	≥ ½ c dairy equivalent (provides ≥ 10% DV calcium)	– For LSS < 1 oz, NCTE to be scaled to ≥ ½ c dairy equivalent and ≥ 10% DV calcium
3. Grain, fruit and vegetable products, and items not in other categories	LSS	≤ 150	≤ 1.5 g	≤ 290 mg	≤ 10 g	≥ ½ serving of F/V/D/WG or ≥ 10% DV of any essential nutrient	– Subcategories differentiate, on a calorie basis, among products that have a small RACC (i.e., ≤ 30 g or ≤ 2 tbsp) and/or are lighter in density (e.g., g/cup) from those with a larger RACC and/or higher density – Examples of ≤ 150 calorie products: most children's breakfast cereals, crackers, & pretzels – Examples of > 150-200 calorie products: denser breakfast cereals (e.g., shredded wheat), waffles, & vegetable products with sauces
	LSS	> 150-200	≤ 2 g	≤ 360 mg	≤ 12 g		
4. Soups and meal sauces	LSS	≤ 200	≤ 2 g	≤ 480 mg	≤ 6 g	≥ ½ serving of F/V/D/WG or ≥ 10% DV of any essential nutrient	– Tomato-based products allowed ≤ 12 g of total sugars/LSS to include sugars naturally occurring in tomatoes & those added to balance product pH
5. Seeds, nuts, and nut butters and spreads	1 oz or 2 tbsp	≤ 220	≤ 3.5 g	≤ 240 mg	≤ 4 g	≥ 1 oz protein equivalent	– For LSS < 1 oz or 2 tbsp, NTL & NCTE to be scaled proportionately
6. Meat, fish, and poultry products	LSS	≤ 120	≤ 2 g	≤ 480 mg	≤ 2 g	≥ 1 oz equivalent of meat, fish, or poultry, and ≥ 10% DV of any essential nutrient	– For LSS ≤ 1 oz, NTL reduced to ≤ 60 kcal, ≤ 1 g sat fat, ≤ 240 mg sodium and ≤ 1 g total sugars
7. Mixed dishes	LSS	≤ 280	≤ 2.5 g	≤ 540 mg	≤ 10 g	≥ ½ serving of F/V/D/WG or ≥ 10% DV of *two* essential nutrients	– Products include casseroles, burritos, pizzas, & sandwiches that do not meet FDA/USDA definition for *main dishes* – Items that contain ≤ 200 kcal and meet NTL criteria may qualify if they contain ≥ ½ serving of F/V/D/WG or ≥ 10% DV of any essential nutrient

8. Main dishes and entrées	LSS	≤ 350	≤ 10% kcal	≤ 600 mg	≤ 15 g	≥ 1 serving of F/V/D/WG or ≥ ½ serving of F/V/D/WG and ≥ 10% DV of *two* essential nutrients	– Items must meet FDA/USDA definition for *main dishes*
9. Small meals	LSS	≤ 450	≤ 10% kcal	≤ 600 mg	≤ 17/12 g (See notes)	≥ 1½ servings of F/V/D/WG or ≥ 1 serving of F/V/D/WG and ≥ 10% DV of *three* essential nutrients	– Small meals contain multiple items but do not meet FDA/USDA definition for *meals* – Meals must meet FDA/USDA definition for *meals* – Sugars from one qualifying milk/milk substitute, or qualifying yogurt/yogurt-type product, or qualifying fruit (i.e., without added sugars) or qualifying F/V juice are not counted in the 17 g or 20 g total sugars limits – When two qualifying items are present, the sugars from both items are not counted in the total sugars limit, but the limits (to account for all other items) are reduced to 12 g (small meals) and 15 g (meals) – All other NTL criteria for small meals and meals (calorie, sat fat, and sodium limits) must be met
10. Meals (entrée and other items including a beverage)	Meal	≤ 600	≤ 10% kcal	≤ 740 mg	≤ 20/15 g (See notes)	≥ 2 servings of F/V/D/WG or ≥ 1½ servings of F/V/D/WG and ≥ 10% DV of *three* essential nutrients	

***Trans* fat**. The criteria for *trans* fat is 0 g labeled for all categories. For foods in the meat and dairy categories served as individual foods or as part of composite dishes or meals (e.g., soups, mixed dishes, entrees, meal-type products), naturally occurring *trans* fats are excluded.

Exemptions

- Sugar-free mints and gum.
- The following products also are exempt from the nutrient criteria specified above, except as indicated in notes to Categories 9 & 10:
  - Fruit products without added sugars;
  - Vegetable products without added fats and which meet FDA regulations for "very low sodium;"
  - Beverages, including bottled waters, that meet FDA regulations for "low calorie" and "very low sodium" (diet sodas are excluded from this exemption).

Abbreviations and Glossary

DV: Daily Value.

Essential Nutrients: Those occurring naturally in foods (or that are added to foods to meet standards of identity or to restore nutrients lost in processing), and for which a DV has been established. If fortification is used to meet the criteria, the nutrient must be a DGA 2010 nutrient of concern (calcium, fiber, potassium, vitamin D) or a nutrient that is required to be listed on the Nutrition Facts Panel (iron, vitamins A & C).

F/V/D/WG: Any combination of fruits, vegetables, non/low-fat dairy, and/or whole grains.

LSS: Labeled serving size.

NA: Not applicable.

NCTE: Nutrient components to encourage are F/V/D/WG or Essential Nutrients.

NTL: Nutrients to limit are calories, saturated (sat) fat, *trans* fat, sodium and total sugars.

Qualifying F/V Juice: Any fruit or vegetable juice or blend that contains no added sugars and meets the requirements of Category 1.

Qualifying Flavored Milk/Milk Substitute/Yogurt/Yogurt-type Product: These are products that meet the Category 2 criteria for milk/milk substitutes, or yogurt/yogurt-type products.

RACC: Reference amount customarily consumed.

Serving(s): See USDA Food Group Serving Equivalents.

Total Sugars: Include naturally occurring and added sugars.

Calories

In the individual food and beverage categories, all foods contain no more than 200 calories (except two peanut butters that contain 210 calories). Main dishes do not exceed 350 calories and meals do not exceed 600 calories.

Sugars

The CFBAI participants have reduced the sugar content in many products. For example, General Mills reformulated its Yoplait Trix Yogurt to decrease total sugar content by 18%. And, in 2010, PepsiCo advertised Quaker Chewy granola bars with 25% less sugar.

The breakfast cereal category is notable for sugar reductions. Before the CFBAI, some cereals advertised to children had 15 or 16 grams of sugars per serving. Under the CFBAI, participants committed to advertise only cereals with no more than 12 grams added sugars per serving (or a comparable limit based on percentage of calories or weight). This required many products to be reformulated to meet that limit. Since 2007, sugar reductions have ranged from about 10% to more than 25%.[1] Now, all program cereals contain ≤ 12 grams of sugars, and, as seen in Figure 1, most cereals (86%) contain ≤ 10 grams per serving.[2]

Figure 1. Sugar Content of Cereals 2009-2011

Sugar Content (grams)	2009	2010	First Half 2011	Second Half 2011
≤ 9	16%	16%	24%	33%
≤ 10	41%	52%	84%	86%
11 or 12	60%	48%	16%	14%

Sodium

Virtually all participants have been reducing sodium in their products. Before the CFBAI, some products advertised to children had over 900 mg of sodium. Now the highest is 750 mg, but most have far less. The participants have reduced the sodium content of dozens of soups, canned pastas, and other items, generally to FDA "healthy" levels. Examples include:

- Kraft Foods reduced the sodium limit for *Lunchables* products advertised to children from 960 mg, to 840 mg, and most recently to 600 mg.
- Burger King Corp. reformulated its Chicken Tenders in 2009, reducing sodium by about 1/3.

[1] However, even before the sugar reductions occurred, in the diets of the U.S. population ages 2 years and older, only 3.8% of added sugars came from ready to eat (RTE) cereals according to NHANES 2005-2006 data. Dietary Guidelines For Americans 2010, Figure 3-6, at p. 29. Similarly, for children aged 4-12, RTE cereals account for only 4% of calories on average and 5% of total sugars. Centers for Disease Control and Prevention and National Center for Health Statistics, *National Health and Nutrition Examination Survey Data* (2005-06), available at http://www.cdc.gov/nchs/nhanes.htm. Further, empirical data consistently show that frequent cereal eaters (including eaters of pre-sweetened cereal) tend to have healthier body weights. A.M. Albertson *et al., The Relationship between Ready-to-Eat Cereal Consumption Categorized by Sugar Content and Body Measures in American Children: Results from NHANES 2001-06*, 23 FASEB Journal 550.22 (April 2009) (Meeting Abstracts). While further improvements are possible, this category already has changed substantially since 2006.

[2] This results from reformulation and from business decisions to remove some cereals from the list CFBAI maintains of products that may be advertised to children. The cereals also have strong nutritional characteristics: all contain no more than 130 calories; all provide essential vitamins and minerals; virtually all meet FDA's definition for "healthy;" the vast majority are low in fat and a "good" source of Vitamin D; and two-thirds provide at least 8 grams of whole grains.

- Campbell Soup Company now advertises to children only soups that have no more than 480 mg sodium, a level that meets the FDA's "healthy" criterion for sodium in individual foods. As shown in Figure 2, sodium was reduced 49% (from 940 mg to 480 mg) in Campbell's Chicken & Stars Soup. Campbell also reduced the sodium content in its pasta category by 5 to 10% and set a 600 mg sodium limit—the "healthy" level for main dishes).

- ConAgra Foods steadily has reduced the sodium content in its Chef Boyardee products. For example, since 2007, the sodium content in Chef Boyardee Mini O's has decreased by 34%, as shown in Figure 3. It also has reduced the sodium content in its Kid Cuisine products (e.g., in Kid Cuisine Cheese Blaster Mac-n-Cheese, sodium decreased to 510 mg from 750 mg).

Figure 2. Sodium Reduction in Campbell's Chicken & Stars Soup

Pre-2007 Pledge

Nutrition Facts

Amount/serving	%DV*	Amount/serving	%DV*
Total Fat 2g	3%	**Total Carb.** 10g	3%
Sat. Fat 0.5g	3%	Fiber 1g	4%
Trans. Fat 0g		Sugars 2g	
		Protein 3g	
Sodium 940mg	39%		

Serv. Size 1/2 cup (120mL) condensed soup
Servings about 2.5
Calories 70
Fat Cal. 7

*Percent Daily Values based on a 2,000 calorie diet. Vitamin A 10% • Vitamin C 0% • Calcium 0% • Iron 0%

Current Formulation

Nutrition Facts

Serving Size: 1/2 cup (120 ml) condensed soup
Servings: about 2.5
Calories 70
Fat Cal. 28

Amount Per Serving	% DV *	Amount Per Serving	% DV *
Total Fat 2g	3%	Sodium 480mg	20%
Sat. Fat 0.5g	3%	Potassium 360mg	15%
Trans Fat 0g		Total Carb. 11g	4%
Polyunsat. Fat 0.5g		Fiber 1g	4%
Monounsat. Fat 1g		Sugars 1g	
Cholest. 5mg	2%	Protein 3g	

Vitamin A 10 % • Vitamin C 0 % • Calcium 0 % • Iron 2 %

Figure 3. Sodium Reduction in ConAgra Foods Chef Boyardee Mini O's

2007 Formulation

Amount Per Serving		% Daily Value*
Calories 180	Calories from Fat 10	
Total Fat 1g		2%
Saturated Fat 0.5g		3%
Trans Fat 0g		
Cholesterol 0mg		0%
Sodium 990mg		41%
Potassium 300mg		9%
Total Carbohydrate 36g		13%
Dietary Fiber 2g		8%
Sugars 14g		
Protein 5g		10%
Vitamin A 40%	• Vitamin C 0%	
Calcium 2%	• Iron 6%	

* Percent Daily Values are based on a 2,000 calorie diet.

2009 Formulation

Nutrition Facts
Serving Size 1 cup (252g)
Servings About 2
Calories 170
Fat Cal. 10

Amount/serving	%DV*	Amount/serving	%DV*
Total Fat 1g	2%	**Potassium** 840mg	24%
Sat. Fat 0.5g	3%	**Total Carb.** 35g	12%
Trans Fat 0g		Fiber 3g	12%
Cholesterol 0mg	0%	Sugars 11g	
Sodium 700mg	29%	**Protein** 5g	10%

*Percent Daily Values (DV) are based on a 2,000 calorie diet.

• Vitamin C 0% • Calcium 10%
Iron 8% • Thiamine 10% • Riboflavin 10%
Folic Acid 10% • Phosphorus 10% • Zinc 10%
Selenium 10% • Manganese 10%

Nov. 2010 Formulation

Nutrition Facts
Serving Size 1 cup (252g)
Servings About 2
Calories 170
Fat Cal. 10

Amount/serving	%DV*	Amount/serving	%DV*
Total Fat 1g	2%	**Potassium** 840mg	24%
Sat. Fat 0g	0%	**Total Carb.** 34g	11%
Trans Fat 0g		Fiber 3g	12%
Cholesterol less than 5mg	1%	Sugars 12g	
Sodium 650mg	27%	**Protein** 5g	5%

*Percent Daily Values (DV) are based on a 2,000 calorie diet.

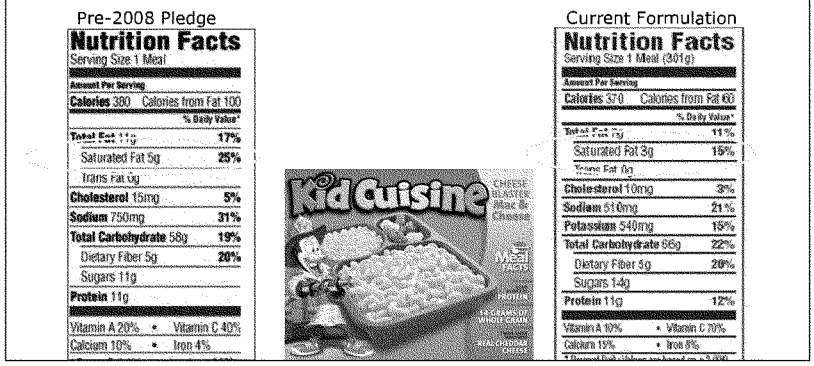
Vitamin A 2% • Vitamin C 0% • Calcium 10%
Iron 10% • Riboflavin 10% • Folic Acid 10%
Selenium 30% • Manganese 10%

Fats

The CFBAI participants have reduced the fat content of many canned pastas, meals, crackers and other products. The great majority of individual foods the CFBAI participants advertise to children have no more than 2 grams of saturated fat (or ≤ 10% calories sat fat). *Trans* fats are limited to 0 grams labeled or no added. Examples of fat reductions include:

- In 2009, Campbell Soup Company reformulated its Pepperidge Farm Goldfish Grahams to meet its CFBAI nutrition standards, reducing the saturated fat content to 1 gram from 2 grams.
- Burger King Corporation transitioned to fat-free milk from low-fat milk in 2009 in all of its restaurants, resulting in a significant reduction in fat in approved Kids Meals that feature milk.
- ConAgra Foods reduced the saturated fat content of its Kid Cuisine Cheese Blaster Mac-n-Cheese by 40%, as shown in Figure 4.

Figure 4. Saturated Fat Reduction in ConAgra Foods Kid Cuisine Cheese Blast Mac-n-Cheese



Nutrients and Food Groups to Encourage

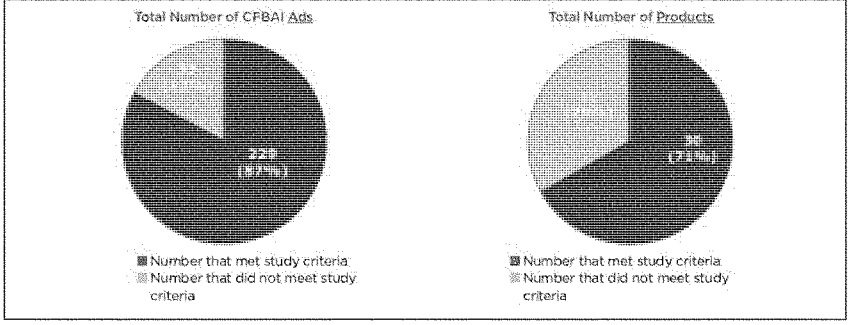
The CFBAI participants' use of meaningful nutrition standards is driving increases in nutrients and food groups to encourage (fruits, vegetables, low-fat dairy and whole grains). The CFBAI's informal study of advertising during a sample of children's television programming in 2010 found that the CFBAI participants' child-directed ads usually are for, or include, nutrient dense foods that also meet reasonable limits on calories, fats, sugars and sodium.[3] See figure 5.

Our analysis also showed that participant ads included the following:

- *Apples*. 24% included apples or applesauce.
- *Milk*. 21% included milk.
- *Vegetables*. 8% were for products that included at least a half-serving of vegetables.
- *Whole Grains*. 27% were for products or meals that included at least 8 grams of whole grains/50% whole grains.
- *Yogurt Products*. 12% featured low-fat yogurt products.

[3] The CFBAI conducted an analysis of advertising on 38.5 hours of children's television programming that aired during May-June 2010. We determined whether products provided at least a good source (10% DV) of at least one shortfall nutrients for children (calcium, potassium, fiber, magnesium or Vitamin E) as identified in the Dietary Guidelines for Americans 2005 (DGA), or provided at least a half-serving of food groups the 2005 DGAs recommend for increased consumption.

Figure 5. Nutrients & Food Groups to Encourage: Analysis of Ads on Sample of Kids' TV



The CFBAI participants' product developments and reformulations to increase nutrients and food groups to encourage are numerous, and include the following examples:

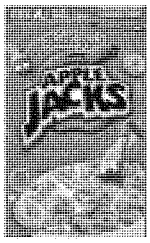
- Burger King Corporation implemented its CFBAI pledge with the launch of a new product, BK® Fresh Apple Fries, which provides one serving of fruit.
- General Mills, Inc. added Frosted Toast Crunch to its approved product list. Frosted Toast Crunch contains 9 grams of sugars and 11 grams of whole grains. The product also is an excellent source of iron and a good source of vitamin A, vitamin C and calcium.
- Kellogg Company has reformulated nearly 80% of its U.S. ready-to-eat cereals to be a good or excellent source (20% DV) of fiber as part of a company-wide initiative. The fiber content of Kellogg's Apple Jacks cereal increased from 1 gram to 3 grams, as shown in Figure 6. It also reformulated Apple Jacks cereal to contain at least 8 grams of whole grains per serving.

Figure 6. Fiber Increase in Kellogg's Apple Jacks

2008 Formulation

Nutrition Facts
Serving Size 1 Cup (28g/1.0 oz.)

Amount Per Serving	Cereal	Cereal with ½ Cup Vitamins A&D Fat Free Milk
Calories	110	150
Calories from Fat	5	5
	% Daily Value**	
Total Fat 0.5g*	1%	1%
Saturated Fat 0g	0%	0%
Trans Fat 0g		
Cholesterol 0mg	0%	0%
Sodium 135mg	6%	9%
Potassium 30mg	1%	7%
[illegible]		10%
Dietary Fiber less than 1g	3%	[illegible]
Sugars 12g		
Other Carbohydrate 10g		
Protein 1g		
Vitamin A	10%	15%
Vitamin C	25%	25%
Calcium	0%	15%
Iron	25%	25%
Vitamin D	10%	25%
Thiamin	25%	30%
Riboflavin	25%	35%
Niacin	25%	25%
Vitamin B_6	25%	25%
Folic Acid	25%	25%
Vitamin B_{12}	25%	35%
Zinc	10%	15%



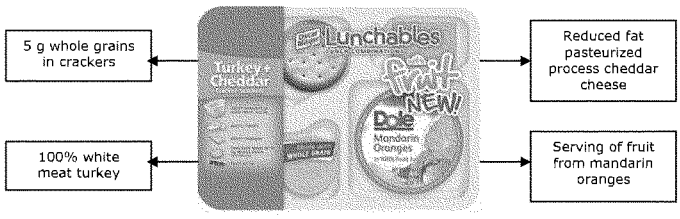
Current Formulation

Nutrition Facts
Serving Size 1 Cup (28g/1.0 oz.)

Amount Per Serving	Cereal	Cereal with ½ Cup Vitamins A&D Fat Free Milk
Calories	100	140
Calories from Fat	5	5
	% Daily Value**	
Total Fat 0.5g*	1%	1%
Saturated Fat 0g	0%	0%
Trans Fat 0g		
Cholesterol 0mg	0%	0%
Sodium 130mg	5%	8%
Potassium [illegible]	1%	7%
Total Carbohydrate 25g	8%	10%
Dietary Fiber 3g	10%	0%
Sugars 12g		
Other Carbohydrate 10g		
Protein 1g		
Vitamin A	10%	15%
Vitamin C	25%	25%
Calcium	0%	15%
Iron	25%	25%
Vitamin D	10%	25%
Thiamin	25%	30%
Riboflavin	25%	35%
Niacin	25%	25%
Vitamin B_6	25%	25%
Folic Acid	25%	25%
Vitamin B_{12}	25%	35%
Zinc	10%	15%

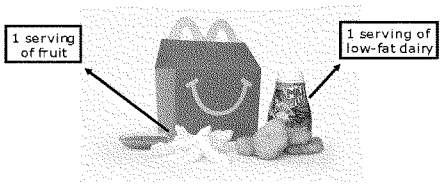
- Kraft Foods' *Lunchables* products offer many positive elements including whole grain, fruit, and dairy. The *Lunchables with Fruit* line provides one full serving of fruit. The product depicted in Figure 7 provides 5 grams of whole grains, reduced fat dairy, one serving of fruit, and 100% white meat turkey; is an excellent source of Vitamin A and Vitamin C, a good source of protein and calcium; and has 280 calories per serving.

Figure 7. Kraft Foods New Lunchables with fruit



- McDonald's Happy Meal advertising now always includes apple dippers and low-fat milk, as seen in Figure 8. McDonald's announced in July 2011 that by the end of the first quarter of 2012, Happy Meals nationwide automatically will include Apple Slices (½ serving) and a new smaller size of French Fries (1.1 ounces) as side dishes along with a customer-selected entrée and beverage. If customers prefer apples only, two bags of apples will be available upon request.

Figure 8. McDonald's Happy Meal with apple dippers and low-fat milk



- Nestlé USA updated its nutrition criteria in 2009 to require that all products provide at least 10% DV of one nutrient. The company also added a calcium-fortified low-fat milk product to its approved product list. This milk product provides 40% of the calcium DV, 10% more than regular low-fat milk.

- PepsiCo, Inc. introduced Tropicana Tropolis Real Fruit Squeezers, a blend of fruit puree and fruit juice that is a good source of fiber and provides 100% DV of calcium. PepsiCo also developed new Quaker Chewy Bars with 10 grams of whole grains per serving (also low in sodium and a good source of calcium). In the fall of 2011, PepsiCo added three oatmeal varieties to its CFBAI product list: Quaker Instant Oatmeal - Original Flavor, Quaker Old Fashioned Oats, and Quaker Quick Oats. All are 100% whole grain and have one or zero grams of sugar per serving.

- Post Foods increased Vitamin D in two products to 20% and 25% from 10%. All Post Foods cereals advertised to children are an "excellent" source of Vitamin D. It also launched a new product, Pebbles Boulders, with 12 grams of whole gains per serving.

Mr. PITTS. The Chair thanks the gentlelady and recognizes Ms. Johnson for 5 minutes for an opening statement.

STATEMENT OF BETH JOHNSON

Ms. JOHNSON. Thank you. Good afternoon, Chairman Pitts, Madam Chair Bono Mack, Mr. Pallone and Mr. Butterfield and committee members. Thank you for the opportunity to testify today. My name is Beth Johnson. I am a dietician and mother of two girls, 8 and 11, and have worked in the food policy world for almost 20 years. I am pleased to be speaking to you today on behalf of the American Beverage Association, Food Marketing Institute, Grocery Manufacturers Association, the National Council of Farmer Cooperatives, National Grocers Association, National Restaurant Association and the North American Millers Association.

I want to start with what most of us agree on, there is an obesity problem in the United States. How to address the problem, though, has been a question for as long as I have been working in the area of food policy. Some ideas that the government is wisely engaged in, as is the private sector, are backed by clear evidence, like community interventions or school interventions that we talked about earlier. Others, like food marketing, are less clear in their causal evidence.

To that end, Congress directed the Interagency Working Group to conduct a study of the issue and report its findings and recommendations to Congress. Among other issues, Congress directed the IWG to consider calories. Instead of conducting a study, it appears the IWG did a literature review and proceeded directly to proposing comprehensive food marketing restrictions that contradict established nutrition science, ban the marketing of many healthy products to our children, and impact thousands of food and farm jobs. Interestingly, even though the effort was clearly about obesity and the agencies have longstanding positions on the importance of calorie balance on obesity, the calorie portion of the report is at a minimum very confusing, if even there.

What the restrictions would do, however, is add to the confusion that is already out there on nutrition. Once fully implemented, the proposal would restrict the marketing of most whole grain breads, not all, yogurts, even though those foods provide important nutrients like fiber and calcium. Many cereals, too, would be prohibited from advertising because of sodium and/or sugar, both of which are far lower today than in the past. Some would argue that many children's cereals are high in sugar and shouldn't be advertised. But sugar levels have come down significantly and now represent a mere 5 percent of daily sugar intake and only 4 percent of calories. Cereal provides significant levels of important vitamins and minerals and is a vehicle for about 40 percent of milk consumption. Numerous government studies show that kids who eat cereal for breakfast have lower BMIs and do better in school. As a dietician and a mom, I think that is a pretty good track record.

Equally as troubling is the lack of consistency within the Federal Government. Recently the Department of Agriculture updated the WIC food package based on recommendations by the Institute of Medicine. Certain foods like yogurt and cereal have been determined by nutrition experts to be important enough to supplement

children's up to 5 diets through the WIC program, yet most of these same foods couldn't be advertised according to the IWG. The IWG criteria also don't match FDA's definition of healthy. At a minimum, this is very confusing and adds to the confusion that Americans are already facing today about nutrition.

To be clear, the industry supports finding innovative ways to address the obesity challenge. In the past few years, the industry has reformulated over 20,000 product choices to reduce calories, sugar, sodium and other ingredients. These changes have occurred with significant research and resources to ensure safety, quality and consumer satisfaction. Kids are not fooled that easily. If it doesn't taste good, they won't eat it. And preventing the advertising of foods won't make healthier foods taste better.

In addition to reformulation, the industry has listened to concerns about marketing to children. As a result of the Children's Food and Beverage Advertising Initiative, all marketing to children by CFBAI participants is for nutritious foods that meet the science-based standards. Let me note that critics dispute some of the results as far as the lowering of advertisements for food and beverages, but that is because their standards—they base their analysis on different standards.

Finally, the question of costs and benefits must be addressed. A recent study by Georgetown Economic Services concluded that IWG's proposed restrictions if fully implemented would have a significant and negative impact on the U.S. economy in part because the cost of the IWG compliant foods are much higher than healthy foods in the diet. Indeed, if we ate the way the IWG would like us to eat, we would be spending 60 percent more on our food than we do today. There would be other implications across the economy as well. But despite two recent Executive orders, which require government proposals to take into account benefits and costs and to be based on best available science, the IWG has not done a cost-benefit analysis.

We urge the administration to withdraw the food marketing restrictions proposed by the IWG. Instead, we urge the IWG to do as Congress directed and conduct a study. Additionally, we urge them to follow the President's direction and look at the benefits and costs of its proposal. Obesity needs attention, but none of us can afford to waste limited government resources.

Thank you for the opportunity.

[The prepared statement of Ms. Johnson follows:]

Summary of Testimony of Beth Johnson

- The food marketing restrictions proposed by the Interagency Working Group (IWG) contradict established nutrition science, ban marketing of many healthy products, and impact thousands of food and farm jobs.
- The IWG failed to produce any evidence that the Administration's proposed restrictions would improve diet and failed to provide any estimate of costs to farmers, food companies, advertisers, broadcasters, charitable organizations, or consumers.
- The IWG's food marketing restrictions contradict established nutrition science. In particular:
    - Nutrition standards proposed by the IWG are inconsistent with and stricter than the standards used for foods sold in public schools and foods offered through federal feeding assistance programs;
    - Nutrition standards proposed by the IWG conflict with the 2010 Dietary Guidelines for Americans.
- The IWG's proposed nutrition standards would effectively ban marketing for many foods that meet the FDA definition of "healthy," including most soups, cereals, meats, breads, cheese and yogurt.
- As a result of the Children's Food and Beverage Advertising Initiative, all marketing to children is for nutritious foods that meet science-based nutrition standards. The IWG ignores the progress that has been made by industry and fails to provide any evidence that the IWG's standards would produce additional public health benefits.
- Banning marketing of most foods would have significant impacts on farm and food jobs and on charitable organizations. But, the Administration has not completed an estimate of benefits and costs.
- The IWG proposal is designed to drive food *reformulation,* not limit food marketing.
- We urge the Administration to withdraw the food marketing restrictions proposed by the IWG and to instead complete a study of the benefits and costs of this proposal, as Congress directed and as the President has pledged in two recent Executive Orders.

Statement by Beth Johnson

On behalf of the Grocery Manufacturers Association

Before the House Committee on Energy and Commerce

Subcommittee on Commerce, Manufacturing, and Trade

Subcommittee on Health

On

Food Marketing: Can 'Voluntary' Government Restrictions

Improve Children's Health

October 12, 2011

Thank you for the opportunity to testify. My name is Beth Johnson and I am testifying today on behalf of the Grocery Manufacturers Association.

The food marketing restrictions proposed by the Interagency Working Group (IWG) contradict established nutrition science, ban marketing of many healthy products, and impact thousands of food and farm jobs. Because the IWG failed to conduct an analysis of benefits and costs, the IWG failed to produce any evidence that the Administration's proposed restrictions would improve diet and failed to provide any estimate of costs to farmers, food companies, advertisers, broadcasters, charitable organizations, or consumers. We believe the Administration should withdraw their proposed marketing restrictions and should instead complete a study and report to Congress, as Congress explicitly directed in the FY 2009 Omnibus Appropriations Act.

We are especially troubled that the IWG's food marketing restrictions contradict established nutrition science. In particular, the nutrition standards proposed by the IWG are inconsistent with and stricter than the standards used for foods sold in public schools and foods offered through federal feeding assistance programs. What's more, the nutrition standards proposed by the IWG conflict with the 2010 Dietary Guidelines for Americans (DGAs). In particular, the standards proposed by the IWG ignore the important role of calories in weight management, set different intake levels for sodium

than the DGAs, and contradict dietary guidance with respect to shortfall nutrients. A more detailed critique is attached.

As a result of these contradictions, the IWG's proposed nutrition standards would effectively ban marketing for many foods that meet the FDA definition of "healthy," including most soups, cereals, meats, breads, cheese and yogurt. Only 12 of the 100 most commonly consumed foods in America could be marketed under this proposal and only three of those items are packaged foods: apple sauce with no sugar added, plain non-fat yogurt, and frozen vegetables. By implication, the IWG's proposal would lead consumers to conclude that many healthy products promoted for consumption by children by other government programs are unhealthy.

Many products which meet both the regulatory and any common sense definition of healthy could no longer be advertised to audiences primarily comprised of adults, including whole grain bread, chicken noodle soup, and a peanut butter and jelly sandwich. Nearly all food advertising on children's shows would be prohibited even though the majority is currently for food which the FDA defines as "healthy."

As a result of the Children's Food and Beverage Advertising Initiative, all marketing to children by CFBAI participants is for nutritious foods that meet science-based nutrition standards. The adoption of these standards in 2006 has dramatically changed the marketplace: the number of advertisements for food and beverages viewed by children on children's programming has fallen by half and advertisements for cookies, candy and soda have largely disappeared.

Nevertheless, the IWG proposal completely ignores the progress that has been made by industry and fails to provide any evidence that the IWG's standards would produce additional public health benefits. What's more, the IWG produces no evidence linking advertising to obesity. In 2005, the Institutes of Medicine found there was insufficient evidence to link advertising to obesity and the IWG has produced no peer-reviewed studies which draw such a connection.

Banning marketing of most foods would have significant impacts on farm and food jobs and on charitable organizations. But, the Administration has not completed an estimate of

benefits and costs, despite explicit congressional direction to complete a study and despite two recent executive orders which require government proposal to "take into account benefits and costs" and to be "based on best available science." A recent study by IHS Global Insight, which used an economic model relied upon by Federal agencies, concluded that the IWG's proposed restrictions would have a significant and negative impact on the U.S. economy.

Nevertheless, the IWG has not completed a study and presented no evidence that these marketing restrictions would improve public health. We find it equally troubling that the IWG proposal is designed to drive food *reformulation,* not limit food marketing. As the IWG notes, one of the "underlying objectives" of their proposal is to "create foods" that are consistent with the IWG's nutrition standards. In recent years, food manufacturers have changed the recipes of more than 20,000 products to reduce calories, sodium, saturated fat, and sugars. But, the IWG proposal ignores recent reformulation efforts and fails to consider the impacts of proposed reformulation on price, palatability, or safety.

We urge the Administration to withdraw the food marketing restrictions proposed by the IWG and to instead complete a study of the benefits and costs of this proposal, as Congress directed and as the President has pledged in two recent Executive Orders.

Comment of the Grocery Manufacturers Association
on
Interagency Working Group on Food Marketed to Children:
Proposed Nutrition Principles: FTC Project No. P094513

I. Introduction

Based in Washington, D.C., the Grocery Manufacturers Association (GMA) is the voice of more than 300 leading food, beverage and consumer product companies that sustain and enhance the quality of life for hundreds of millions of people in the United States and around the globe. The food, beverage and consumer packaged goods industry in the United States generates sales of $2.1 trillion annually, employs 14 million workers and contributes $1 trillion in added value to the economy every year.

Obesity rates have been rising in the population since the government began reporting periodic nutrition and health surveys in 1970s. In the last decade, the trends had reached levels that caused public health officials to call for action to arrest them. The food and beverage industry responded by taking a leadership role in the fight against obesity. Since 2004, America's food and beverage companies have introduced more than 20,000 new products and packages, and they have promoted healthy lifestyle choices in the marketplace, the workplace and schools. GMA and its members have been providing consumers with the products, tools and information they need to achieve a healthy diet and an active lifestyle.

Summary of Comments

GMA appreciates the opportunity to provide the Interagency Working Group (IWG) – and therefore representatives of the Food and Drug Administration (FDA), United States Department of Agriculture (USDA), Federal Trade Commission (FTC) and Centers for Disease Control and Prevention (CDC) – with feedback regarding its proposed nutrition principles for foods marketed to children ages 2-17. While GMA and its member companies support the IWG's goal of improving children's diets and addressing the high rates of childhood obesity in America, we oppose the proposed standards in the strongest possible terms, and we urge that they be withdrawn. As the following comments illustrate, the IWG proposal is **not** evidence-based, it is **not** aligned with existing federal food and nutrition programs and guidance, and the proposed nutrition principles are unworkable. Perhaps most importantly, the proposal fails to identify evidence that, if implemented, the recommended nutrition principles would have any significant effect on childhood weight reduction and obesity rates. In addition, the proposed standards would disallow marketing of many foods that are known to contribute to the health of American children.

GMA's comments focus on four specific areas:

1) **The IWG proposal is fundamentally flawed, as it is unlikely to combat obesity and would prevent marketing of many types of foods that should be encouraged in the healthy, balanced diets of children.**

   By focusing on the delivery of food groups and failing to consider the importance of calories and portion sizes, the proposed IWG nutrition criteria fail to address the key cause of obesity.

2) **The proposed IWG nutrition standards are arbitrary, have no basis in scientific evidence, and conflict with federal dietary guidance and nutrition policy.**

   While the IWG asserts that its proposed nutrition standards are based on federal dietary guidance and policies, and FDA regulations, numerous conflicts with those established and proposed policies are evident. GMA's comments discuss conflicts with the 2010 Dietary Guidelines for Americans (DGA), Special Supplemental Nutrition Program for Women, Infants and Children (WIC) regulations, Institute of Medicine (IOM) recommendations; nutrition criteria for participation in Healthier U.S. Schools Challenge (HUSSC); USDA's 2011 proposed rules for the National School Lunch Program (NSLP) and the School Breakfast Program (SBP), and regulatory definitions for the "healthy" nutrient content claim (FDA and USDA-FSIS).

3) **The proposed IWG nutrition standards are extreme and reflect an unwarranted bias against prepared, value-added foods.**

   The IWG proposal arbitrarily and without any basis in science would characterize many foods universally recognized as part of a healthful diet as "foods of little or no nutritional value." This includes many commonly consumed foods that the federal government and even many food industry critics, recommend as foods to be encouraged in a healthful diet.

4) **The proposed IWG nutrition standards are poorly elaborated, and are unworkable.**

   In order to build healthful diets, all consumers, including parents, need to be aware of the types of foods that contribute to such a diet. The proposed IWG nutrition standards are so restrictive that they could not be applied by large portions of the food industry, including companies that manufacture products that make valuable contributions to a healthful diet. Food and beverage products such as whole wheat bread, breakfast cereals, reduced fat yogurt, canned vegetables, and bottled water could not be promoted for consumption by children. The proposed nutrition standards also reflect inadequate consideration of technical details.

Throughout the nutrition standards proposal, the IWG has ignored product acceptance and technical feasibility factors. The food and beverage industry has provided comprehensive comments and evidence that the product reformulation goals that appear to be driving the IWG

guidelines can only be successful if the products are well accepted in the marketplace by consumers. Successful acceptance hinges on several factors that act concomitantly, including taste and palatability, affordability, technical feasibility, safety, and accessibility. Sufficient recognition and understanding of the importance of these factors is absent from the IWG proposal. Also, the "one size fits all" approach adopted by the IWG will not work. Using such an approach may result in the elimination of classes of healthful foods that should be promoted for consumption by children. This directly contradicts the IWG's stated goal of shifting the marketing mix to include a greater number of products with improved nutritional profiles.

The IWG's proposed nutrition principles place undue emphasis on restricting certain foods and nutrients rather than building healthful diets over time. This focus is short-sighted and lends itself to a "good food" vs. "bad food" approach that is not science-based. Banning the marketing of individual foods that exceed an arbitrary set of parameters without regard to total diet over time is neither logically nor scientifically defensible. In addition, the use of this type of approach fails to consider the American Dietetic Association (ADA) position that "the total diet or overall pattern of food eaten is the most important focus of a healthful eating style. All foods can fit within this pattern, if consumed in moderation with appropriate portion size and combined with regular physical activity. The ADA strives to communicate healthful eating messages to the public that emphasize a balance of foods, rather than any one food or meal."[1] The 2010 Dietary Guidelines for Americans (DGA) and MyPlate also adopt and represent the total diet concept by recommending types and amounts of foods to eat over time without prescribing rigid guidance.

The stated goal of the IWG proposal is to reduce the amount of marketing of foods to children that are "of minimal nutritional value," and increase healthier choices. The proposal characterizes all food that do not meet the standards as food "of minimal nutritional value"—a label that hardly fits such nutritious and nutrient-dense foods as ready-to-eat cereal, yogurt and whole wheat bread. The approach taken by the IWG in its proposal instead would result in an outright prohibition of advertising and promotion for nutritionally valuable, nutrient-dense, low calorie foods, and would remove incentives to improve food product promotion through product reformulation and portion size information.

In several places in the proposed nutrition standards, the IWG has demonstrated that it has not carefully considered the potential impacts of these criteria on the formulation and marketing of foods. For all the reasons noted, which are elaborated further in these comments, GMA and its member companies urge the IWG to withdraw the proposed nutrition principles.

II. The IWG Proposal Is Fundamentally Flawed, as It Is Unlikely to Combat Obesity and Would Prevent Marketing of Many Types of Foods that Should Be Encouraged in the Healthy, Balanced Diets of Children

By focusing on the delivery of food groups and overlooking the importance of calories and portion sizes, the proposed IWG nutrition criteria fail to address the key cause of obesity. The

[1] Position of the American Dietetic Association: Total Diet Approach to Communicating Food and Nutrition Information. *JADA*. Volume 107, Issue 7, Pages 1224-1232 (July 2007).

consistent, science-based conclusion of the federal government and its agencies focused on public health and nutrition is that obesity is fundamentally about the balance between "calories-in" and "calories-out." Both the CDC and FDA advise that "calories count" and this is the message that both agencies communicate to the public.[2] In its 2004 report "Calories Count: Report of the Working Group on Obesity," FDA has noted that obesity fundamentally represents an imbalance between calories consumed and calories expended. FDA further states, "Although there is much discussion about (1) the appropriate makeup of the diet in terms of relative proportions of macronutrients (fats [lipids], carbohydrates, and protein) that provide calories and (2) the foods that provide these macronutrients, for maintenance of a healthy body weight it is the consumption and expenditure of calories that is most important." [3] Despite the scientifieally-based conclusions of federal public health bodies, as well as Congress' directive to the IWG that it consider calories, the IWG has chosen to ignore this fundamental element.

The IWG has offered no evidence to suggest that its proposal will have any effect in reversing obesity trends. It is a consensus view that calories and portion sizes are key driving factors in the development of obesity. By not accounting for calories and portion size, the proposed IWG nutrition standards would limit the promotion of foods that can support healthier body weight. The FTC Bureau of Economics has noted that food advertising to children has declined while obesity rates have risen. GMA suspects that the IWG proposed nutrition standards could impede efforts to combat obesity, as they would ban the advertising of relatively nutrient-dense but non-calorie-dense foods that contribute valuable nutrition to consumers, and can help to move intake patterns toward healthier body weight outcomes – foods such as whole wheat bread, breakfast cereals, soups, reduced fat yogurt, reduced fat cheeses, and canned vegetables.

III. The Proposed IWG Nutrition Standards Are Arbitrary, Have No Basis in Scientific Evidence, and Conflict with Federal Dietary Guidance and Nutrition Policy

Although the IWG asserts that its proposed nutrition standards are based on federal dietary guidance and policies, and on FDA regulations, numerous conflicts with those established and proposed policies are evident. Conflicts exist between the proposed nutrition standards and the 2010 DGA, WIC regulations, nutrition criteria for HUSSC participation; USDA's 2011 proposed rules for the NSLP and the SBP, and regulatory definitions for the "healthy" nutrient content claim under both FDA and USDA-FSIS.

2010 Dietary Guidelines for Americans

The DGA are intended to "establish the scientific and policy basis for all federal nutrition programs, including research, education, nutrition assistance, labeling, and nutrition promotion." Furthermore, it is required by law that all federally-issued dietary guidance for the general public

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2 For CDC messages, see "Healthy Weight" information on energy balance at http://www.cdc.gov/healthyweight/calories/

3 FDA, "Calories Count: Report of the Working Group on Obesity," March 12, 2004. Section II A, Foundations of this Report: Scientific Principles.

be consistent with the DGA.[4] Thus, the proposed nutrition principles contained in the 2011 IWG proposed nutrition standards are required to align with the 2010 DGA, which apply to Americans aged 2 years and older.

Upon careful review of the IWG proposal, it is clear that several important inconsistencies exist between the 2010 DGA and 2011 IWG proposal:

- **Absence of Caloric Targets:** The IWG proposal disregards the 2010 DGA over-arching concept that energy balance over time is the key to weight management and that obesity is primarily a result of the over-consumption of calories in relation to the calories expended through physical activity by an individual. By omitting this important fact, the IWG proposal fails to provide an effective strategy for combating childhood obesity, and presents proposed guidelines that are fundamentally flawed.

  Portion size is noticeably missing from the proposed principles. The 2010 DGA emphasize the importance of portion size for weight management. Eating excess amounts of any type of food, including those that conform to the IWG proposed nutrition principles, can lead to obesity and overweight. The IWG proposal dismisses calories and portion sizes and instead prescribes extremely limiting food group and nutrient criteria, resulting in the exclusion of promotion for many nutrient dense, low caloric foods.

- **Consideration of Future DGA:** The IWG proposed nutrition standards would span ten years of step-wise nutrient content restrictions, particularly in the case of sodium, with final sodium targets to be achieved by 2021. This incremental restriction ignores the consideration and release of the next two editions of the DGA, due in 2015 and 2020. In the case of the 2020 DGA, the IWG proposed nutrition standards anticipate scientific research that is not yet undertaken, much less evaluated by experts in nutrition. The IWG proposal does not account for future development of the DGA, and fails to plan for a process to adjust the nutrition standards to reflect potential changes to nutrition science. This prospective approach clearly illustrates that science is not at the foundation of the proposed IWG nutrition standards.

- **Nutrients to Encourage:** The 2010 DGA clearly identify four nutrients of public health concern, or nutrients that are recommended for increased consumption in the U.S. These four "shortfall" nutrients are potassium, vitamin D, calcium and fiber. In addition, the 2010 DGA specify that "fortification of certain foods may be advantageous in specific situations to increase intake of a specific vitamin or mineral. In some cases, fortification can provide a food-based means for increasing intake of particular nutrients or providing nutrients in highly bioavailable forms."[5] In other words, fortification allows for shortfall nutrients to be formulated into products consumers will eat. While food group contributions are outlined in the IWG proposal via Nutrition Principle A, specific recommendations for beneficial nutrients are omitted.

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[4] 2010 Dietary Guidelines Backgrounder, available at: http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/Backgrounder.pdf.

[5] 2010 Dietary Guidelines, Chapter 5, page 49.

This omission is important when evaluating food groups such as grains, fruits and vegetables. Within a food group, there are natural variations and differences in nutrient composition. For example, sources of dietary fiber include vegetables, fruits and whole grains. Bran, although not a whole grain, is an excellent source of dietary fiber. Likewise, bananas and cauliflower provide potassium but little vitamin A and C. Also, some nutrient dense foods (e.g., breakfast cereal), that fall short of meeting Principle A contribute significant amounts of certain nutrients to a child's diet. Through the proposed nutrition principles, the IWG appears to disregard the important fact that products make significant contributions to the diet, through both food groups and individual nutrients.

Another example of the failure of the IWG proposed nutrition standards to address nutrients to encourage is with regard to enriched grain products. The 2010 DGA recommend 1½-ounce equivalents (1,000 kcal/day diet) to 5-ounce equivalents (3,200 kcal/day diet) of enriched grains consumption per day. This recommendation reflects the fact that enriched grain products such as bread and ready-to-eat cereals contribute important nutrients to the diet, including B vitamins, iron and folic acid. The nutrient enrichment of grain products in the U.S. with these nutrients has been a resounding success for both adults and children. In addition, the CDC has touted folic acid fortification as one of the great public health achievements in the last decade, with a proven outcome of lowering of the incidence neural tube defects. This public health benefit is available only through enriched grains, both because of requirements of food standards of identity, and because folic acid may not be added freely to foods, including whole grain flours and breads.

The IWG proposed nutrition principles preclude most enriched grains because of the whole grain contribution requirement, as well as the extremely restrictive final sodium target of 140 mg/RACC (Reference Amount Customarily Consumed) for individual foods. This ignores the nutritional merits of these products. Also important to consider is that reduced consumption increases the risk of adverse consequences resulting from lower levels of micronutrient intake.

Other Federal Nutrition Programs

Beyond inconsistencies with the 2010 DGA, the IWG proposal conflicts significantly with several federal food and nutrition programs. These conflicts are especially apparent and problematic when contradictory nutrition messages and recommendations come from the same federal agencies. Inconsistencies exist between the IWG proposal and the following programs: the WIC program, HUSSC, and the NSLP and SBP, to name a few.

- **WIC Food Packages:** Most foods that are included in the WIC food package (and therefore established by USDA as healthy and nutritious choices for women, infants and young children) cannot be marketed under the IWG proposed principles due to the restrictive nature of saturated fat, added sugar, and/or sodium levels proposed in Principle B. Examples of these foods include:

- 2% milk and flavored milk
- Most cheeses
- Most canned fish
- Many canned beans
- Many canned vegetables
- Some peanut butters

The 2021 sodium level of 140 mg/RACC for individual foods is unworkable and further excludes the following foods that are included in the WIC food packages:

- Almost every ready-to-eat breakfast cereal
- Most instant oatmeal products
- Many whole wheat and whole grain breads

- **HUSSC:** The nutrition criteria for HUSSC participation differ from the IWG proposed nutrition principles in several important ways. While there are some understandable differences between the two because the HUSSC criteria are based on average daily and weekly intake, and the IWG proposal concerns individual foods and meals, there is no policy basis for the difference between the HUSSC's measurement of total sugars, compared to the IWG proposal's measurement of added sugars. Further discussion on added sugars versus total sugars is included later in this document.

  Sodium levels in the HUSSC criteria are designed for entrée and non-entrée foods. Even schools that strive to attain "distinction" through the HUSSC are required to meet a sodium level of 200 mg per non-entrée, which is considerably higher than the final 140 mg target proposed by the IWG. Bronze and silver medals are awarded in the HUSSC for meeting the FDA "healthy" level of 480 mg per non-entrée food. Additional differences between these two programs are reflected when measuring fruit, vegetable and whole grain servings.

- **NSLP & SBP – 2011 Proposed Rule:** Most notably, USDA's recent proposed rule for the NSLP & SBP does not include specific restrictions related to total or added sugars. Instead, sugars consumption is built into the minimum-maximum caloric ranges provided for various age groups.

  Establishing consistent federal nutrition standards across national food and nutrition programs is essential for the development of actionable policy and effective programs. Consistent requirements would help to provide a benchmark from which science-based and workable guidelines may be built. *Another* new set of nutrition standards, as proposed by the IWG, that differ from other federal nutrition standards – including the DGA – will only increase confusion among implementers and interested consumers, potentially impeding progress in reducing rates of obesity and chronic disease. Such conflicting and competing standards cannot be defended on scientific grounds or on the basis of data demonstrating that these new standards will have a significant and positive effect on public health. Food and beverage manufacturers cannot be expected to engage in costly reformulations based on conflicting federal guidance.

Regulatory Definitions

GMA and its member companies support nutrition standards that align with regulatory definitions established by the FDA and the USDA Food Safety and Inspection Service (FSIS). Rules governing criteria for foods representing that they are "healthy" are well defined and codified in current food labeling regulations; the IWG should not propose conflicting and more stringent definitions. The setting of new criteria for these foods by the IWG is questionable. This approach will not result in an increase in food products marketed to children that would contribute to improved health, but would prevent promotion of foods that contribute to a healthy diet.

From a regulatory perspective, the recommendations made in Principle A conflict with those made in Principle B. Principle A requires that foods make a significant food group contribution. One of the recommended food groups is "fat free and low fat milk products." The regulatory definition for "low fat" is 3 grams per RACC. The term "low fat" is accompanied by a (1%) designation throughout the IWG proposal. Not all low fat milk products contain 1% fat. For example, a yogurt product that meets the "low fat" nutrient content claim criteria may contain more than 1% of total fat (1% fat equals 2.25 grams of total fat per RACC; "low fat" is $\leq$ 3g of total fat per RACC). Some low fat dairy foods containing 1% fat, per RACC and per labeled serving, may qualify to declare 0 grams fat per serving in nutrition labeling. It is therefore inaccurate to refer to all low fat milk products as 1%, and unclear to food and beverage manufacturers whether all dairy products are expected to be formulated using 1% milk or expected to contain only 1% fat per IWG criteria.

Additionally, because some of these low fat milk products may contain more than 1% total fat, they would be excluded from Nutrient Principle A by not fitting into a proposed food category. Therefore, these products would be precluded from taking advantage of the naturally occurring nutrient exemption in Principle B. Once again, the discord between established regulatory definitions and IWG principles causes unreasonable confusion and implementation challenges.

IV. The Proposed IWG Nutrition Standards are Extreme and Reflect an Unwarranted Bias Against Prepared, Value-added Foods

The IWG proposal arbitrarily and without any basis in science would characterize many foods universally recognized as part of a healthful diet as "foods of little or no nutritional value." This includes many commonly consumed foods that the federal government, and even many food industry critics, recommend as foods to be encouraged in a healthful diet, such as whole wheat bread, breakfast cereals, soups, reduced fat yogurt, reduced fat cheese, and canned vegetables. See Appendix B for a list of commonly consumed foods that would not qualify under the IWG's standards. The IWG proposed nutrition standards would undermine food manufacturers' ability to make and market foods important to the diet, while making no provisions for evaluation or consideration of the benefits of the proposed approach.

Importantly, the proposed IWG nutrition principles fail to identify evidence that the recommended criteria will have any effect on childhood obesity rates or any other health outcomes. While the IWG proposed nutrition principles span a ten-year period, no monitoring

and/or evaluation plan is defined or proposed to measure the impact on children's health. No evidence has been put forward as a predictor of success, and no evidence base is contemplated. This is a major concern to GMA and its member companies and should be to government as well. Essentially, the IWG is asking the food industry to undertake costly changes to food formulation based on speculation; this is not acceptable, and in many cases it is not possible.

V. The Proposed IWG Nutrition Standards are Poorly Elaborated, and are Unworkable

In order to build healthful diets, all consumers, including parents, need to be aware of the types of foods that contribute to such a diet. The proposed IWG nutrition standards are so restrictive that they could not be applied by many food companies, including those that manufacture products that make valuable contributions to a healthful diet. Food and beverage products such as whole wheat bread, breakfast cereals, reduced fat yogurt, canned vegetables, and bottled water could not be promoted for consumption by children. Further, the proposed standards may prohibit promotion of nutrient-dense foods developed for children to support catch-up growth and/or improve nutritional status. The proposed nutrition standards also reflect inadequate consideration of technical details. The comments below outline concerns regarding the proposed criteria and technical details.

Concerns Regarding Principle A – Food Group Contributions

GMA and its member companies oppose the technical elements reflected in the proposed nutrition principles, as follows:

Principle A: Option 1

- The 2010 DGA recommend consumption of at least half of total grains as whole grains; under the DGA, this goal can be met in a number of ways, including the consumption of partly whole-grain products that contribute a substantial amount of whole grain; the DGA specifically cites foods with at least 8 grams of whole grains per ounce-equivalent as a significant amount.[6] Yet the proposed IWG nutrition standards are so restrictive regarding whole grain content that they effectively would severely restrict advertising and promotion of ready-to eat cereal—a food which is the number one source of whole grain in American diets for adults and children,[7] and the third most frequently consumed school breakfast item in elementary schools.[8]

- The 2010 DGA recommend 2 to 3 cups of fat-free or low-fat dairy for children 2-12 years of age. Yogurt products can help to achieve this goal, as many yogurts provide more than 20

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6 Dietary Guidelines 2010 Chapter 4.

7 NHANES 2003-2004 and MyPyramid Equivalent Database version 2 0.

8 School Nutrition Dietary Assessment Study III. Nutrition Assistance Program Report Series. USDA Food and Nutrition Service, November 2007. Available at : http://www.fns.usda.gov/ora/menu/published/cnp/files/sndaiii-vol1execsum.pdf

percent of the Daily Value of both calcium and vitamin D, two essential nutrients identified by the DGA as "nutrients of concern," yet the proposed nutrient criteria are so restrictive that most products in this important food category effectively could not be promoted to children.

- It appears that bottled water, any calorie-free or low calorie beverage, as well as other beverages that contain <13 grams of added sugar, would not meet the required nutrition standards due to a lack of contributing food group. Other beverages that meet the fruit group requirement and do not exceed the added sugar requirement would be able to be marketed. If the proposed nutrition standards have been designed to identify healthier options, it is not sensible, and is not based on scientific evidence for water, zero-calorie and low calorie beverages to be excluded. These beverages are encouraged for consumption as important sources of hydration and to promote energy balance. Furthermore, excluding water from the IWG nutrition principles directly conflicts with the messaging to support the 2010 DGA. One of the consumer messages released as part of the USDA Center for Nutrition Policy and Promotion (CNPP) consumer education tools specifically encourages water consumption. The IWG proposal would prohibit companies from delivering this information to children and teens, serving as another example of how IWG recommendations clash with federal nutrition guidance.

- The IWG proposes food group requirements that would need to be met on a 50% by- weight basis. The IWG has not explained the meaning of this metric. The IWG has outlined no consideration for normalization of this metric across all food groups, including those for which dietary guidance describes a volumetric measurement. The IWG gives no consideration to the effect of moisture content on this metric. Consequently, there is no clarity on how the 50% by weight contribution would be applied or evaluated.

Principle A: Option 2

- There is no description on how the "proportionate combination" method for food group calculations would be applied or evaluated. There is no description of how main dish or meal products would account for food group contributions. In addition, there is no allowance for smaller portions of food groups or nutrient-dense formulated foods that fall short of the food group requirement but make meaningful contributions to the intake of a specific nutrient. There is no normalization described for combinations of weight-based and volume-based measures.

- The IWG process for determining food group conversions is confusing and not based on science. We understand the IWG used equivalents from the USDA Food Buying Guide and applied them on an average basis, assuming a 2,000 calorie diet and four-meal-per-day eating frequency. The resulting recommendations are awkward amounts that are difficult to implement (0.6 cups of vegetables or vegetable juice, for example). These amounts make calculations difficult and are again inconsistent with similar guidance provided through other Federal nutrition programs. For example, the 2010 DGA and HUSSC count fruit and vegetable servings in ¼ cup increments. The IWG does not describe how food group

conversions would consider prospective science that would constitute the bases for the 2015 and 2020 DGA.

- Amounts of foods groups deemed to provide a meaningful contribution are so high that combination foods would be excluded from marketing, such as fruited yogurt, vegetable, legumes or grain-containing soups and gelatin with fruit.

It is not clear what public policy objective is being served by this arbitrary set of competing standards nor is it clear how manufacturers or marketers could begin to reconcile these standards in a common-sense, science-based and consistent fashion. Consequently, GMA opposes both Option 1 and Option 2 of proposed Principle A.

Concerns Regarding Principle B – Nutrients to Limit

The four nutrients targeted in Principle B are referred to by the IWG as nutrients that potentially have a "negative effect on health and weight."[9] The proposed levels for these nutrients are unworkable and unachievable.

1. **Sodium:**

The sodium levels recommended by the IWG are unrealistic, extremely restrictive, and if adopted, may result in unintended consequences, including food safety risks, health risks, a decrease in affordability, and the elimination of marketing of close to whole categories of foods, without any evidence that the modifications in sodium content would prevent childhood obesity. The 2010 DGA, Healthy People 2020, and other Federal authorities support a sodium daily intake goal of 2,300 mg/day for the general population. The IWG proposed standard of 210 mg/serving by 2016 and 140 mg/RACC by 2021 do not align with these recommendations and are so severe that an unreasonable number of products would be prohibited from being marketed. GMA strongly opposes the proposed sodium targets.

The proposed levels for sodium in individual foods, main dish and meal products fail to take into account the complex role that sodium salts play in food systems, including food safety, functionality, shelf life and palatability. Sodium reduction tools available at present can only accommodate small reductions of 10-30% at a gradual rate. The fact that even today we fail to fully understand the basic mechanism of salt taste in humans underscores the challenges we still face regarding the development of reduced sodium products that are widely appealing and affordable.

Several barriers to wide-scale sodium reduction, as they relate to IWG recommendations, are presented below.

[9] Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts. Interagency Working Group on Food Marketed to Children. 2011. Page 11.

- **Food safety**: Salt (sodium chloride) and other sodium-containing salts (e.g., sodium ascorbate and sodium sorbate) play an important role in food safety by helping to inhibit the growth of both pathogenic and spoilage organisms. Meat products, for example, are particularly sensitive to the reduction of sodium. These products require appropriate time for new antimicrobial agents to be evaluated by industry and approved by USDA-FSIS, as well as time to develop new technologies to prevent significant food safety problems. Low acid, thermally processed canned goods require the addition of salt to inhibit the growth of potentially deadly pathogens. GMA and its member companies are committed to their responsibility to sell safe, high quality food.

- **Functionality:** Salt and sodium-containing functional ingredients are often necessary not only to ensure food safety, but also for leavening, binding, emulsification, fermentation control, osmolarity, water-activity, color development, texture, and other food preparation processes. At 140 mg of sodium per RACC, a significant number of whole wheat and whole grain bread products will fail to meet the IWG proposed nutrition standards due to a functional need for more sodium. This result appears out of line with the stated goals of the IWG, as whole grain and whole wheat products are recommended for increased consumption in almost every form of federal food and nutrition guidance. Discouraging the consumption of these types of foods through extremely restrictive sodium limits is unreasonable and unwarranted.

- **Taste:** Consumers expect their trusted food products to have consistent taste, quality and shelf-life at a reasonable and stable price. Dramatic changes in sodium or salt concentration that significantly alter taste, texture, appearance, shelf-life or price may not be acceptable to consumers. The IWG goal to shift the marketing mix to include more nutritious products has been shared by industry for a number of years. However, it is important to remember that food must be eaten in order to be nutritious. No matter what foods are marketed, children will not eat them if they are not tasty. This is an important consequence for the IWG to consider.

- **Salt substitutes:** There is no single salt substitute that is effective for all foods. Significant research and development investment has been put into finding good alternatives, such as salt replacers and enhancers, for salt and sodium-containing functional ingredients. Salt replacers, such as potassium chloride, have different chemical properties than sodium chloride and are not always effective in their functional role. Salt replacers also often confer off-flavors, decreasing consumer acceptability of the finished food.

- **Emerging research:** Recently, multiple studies have been published that suggest low sodium diets may cause adverse health outcomes. A May 2011 article published in the *Journal of the American Medical Association* found that low sodium urinary excretion

levels were associated with higher cardiovascular disease mortality.[10] This study also showed no association between sodium intake-related blood pressure increases and higher rates of hypertension and cardiovascular disease complications. Two additional studies published earlier this year reported that individuals with type I and type II diabetes experienced an increased risk in all-cause mortality (among other complications) when urinary sodium excretion levels were indicative of highly restrictive sodium diets.[11,12] Such research results suggest that it is even more important to complete rigorous studies and evaluations on low sodium diets before making prescriptive and extremely low sodium intake recommendations.

2. **Added Sugars**

The Added Sugars criterion is not supported by the scientific data. Making dietary recommendations based on added sugars is impractical, not based on science, and inconsistent with other authoritative and scientific guidance.

- **There is no scientific agreement on the amount of sugar that should be consumed.** The National Academy of Sciences recently stated in its Phase I Report on the Examination of Front-of-Pack Nutrition Rating Systems and Symbols: "There is a lack of scientific agreement about the amount of sugars that can be consumed in a healthy diet and about potential adverse health effects of sugars beyond an effect on dental caries. The IOM report also makes three points regarding added sugars and why including them on a front of package label is inappropriate:

> *"Despite the overall increase in calories that they provide to the American diet, at this time evidence and agreement are lacking about adverse health effects of added sugars, the exceptions being the extra calories that they contribute to a diet and their dilution of essential nutrient intake.*
>
> *An analytical test that can accurately determine added sugar content is unavailable, leaving the sharing of proprietary product formulations as the only apparent option for monitoring product compliance with established criteria*

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10 Stolarz-Skrzypek K, Kuznetsova T, Thijs L et al. Fatal and Nonfatal Outcomes, Incidence of Hypertension, and Blood Pressure Changes in Relation to Urinary Sodium Excretion. JAMA, 4 May 2011, Vol 305, No. 17.

11 Ekinci EI, Clarke S, Thomas MC et al. Dietary Salt Intake and Mortality in Patients With Type 2 Diabetes. *Diabetes Care*. 2 Feb 2011.

12 Thomas MC, Moran J, Forsblom C et al. The Association Between Dietary Sodium Intake, ESRD, and All-Cause Mortality in Patients with Type 1 Diabetes. *Diabetes Care*. 9 Feb 2011.

> *Added sugars are not included in the Nutrition Facts panel, so including added sugars in FOP system criteria would lead to inconsistencies between the Nutrition Facts panel and FOP symbols.*"[13]

The reasoning provided by the IOM in its report make it difficult to justify the IWG development of nutrition criteria surrounding added sugars. Clearly, current nutrition science and labeling regulations do not support the use of added sugars on labels, detracting from the nutrient's ability to contribute to meaningful and actionable guidelines. Below we provide additional comments on several challenges associated with the added sugars requirement:

- **Calories, not sugars, lead to obesity.** As was recently explained in the Dietary Guidelines for Americans: "Foods containing solid fats and added sugars are no more likely to contribute to weight gain than any other source of calories in an eating pattern that is within calorie limits."[14] The 2010 Dietary Guidelines Advisory committee also confirmed this view in their report: "A moderate body of evidence suggests that under isocaloric controlled conditions, added sugars, including SSB, are no more likely to cause weight gain than any other source of energy."[15]

- **There is no definition of "added sugar."** Science is similarly absent from the "added sugar" limitation. There is no well-understood definition of what is meant by "added sugar" that can be applied across all scenarios, nor does the IWG proposal point to one. "Added sugar" is an arbitrary concept that cannot be scientifically determined. Evaluating added sugar content would depend on information to which food companies may not have access, as in the case of a purchased yogurt-covered raisin ingredient to be added to breakfast cereal; information on both the naturally occurring sugars in the yogurt and the raisins would be required, along with information on other sugars, yet the ingredient supplier would be reluctant to disclose this level of detail as it may reveal a proprietary formula and trade secrets.

- **The human body treats added sugar the same as naturally occurring sugar.** Moreover, no definition will have any relevance to the human body, which processes all sugar, whether "naturally occurring" or "added," in precisely the same manner. The body does not see the arbitrary distinctions that may be drawn between "added sugar" and other sugar, nor is there a calorie difference between any sugar and other carbohydrates. The 2010 DGA state that "[T]he body's response to sugars does not depend on whether they are naturally present in food or added to foods…Both naturally occurring sugars and added sugars increase the risk of dental caries."[16]

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[13] Phase I Report on the Examination of Front-Of-Pack Nutrition Rating Systems and Symbols. Page 12.

[14] 2010 Dietary Guidelines for Americans, page 28.

[15] Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans 2010. May 2010, page 310.

[16] 2010 Dietary Guidelines for Americans, page 27.

- A new study funded by USDA found that intake of added sugar is not associated with obesity in 6-18 year old children. In this cross-sectional study, dietary intake data (from the 2003-2006 National Health and Nutrition Examination Survey) was used to evaluate the relationship between intake of added sugars and different measures of weight or adiposity using a nationally representative sample of U.S. children. Results showed that mean intake of added sugar was 21 teaspoons in 6-11 year olds and 25 teaspoons in 12-18 year olds, accounting for 17% of total energy intake for both groups. A key finding in this study was that consumption of added sugar did not contribute significantly to BMI Z scores in either age group. In fact, normal-weight children consumed 26 teaspoons of added sugar as compared to 22 teaspoons by obese children ($p<.01$).[17]

Concerns regarding Naturally Occurring Nutrient Exemption - Limitations

While GMA and its member companies acknowledge that the IWG included an exemption for naturally occurring nutrients in its proposal, the exemption is flawed and confusing. The human body uses natural and added sources of these nutrients in the same way; consequently, any argument for excluding certain foods and nutrients is not science-based.

- Naturally occurring amounts of saturated fat, sodium, sugars, and trans fat (and any macro- or micronutrient) are impossible to distinguish from added amounts by reading only the Nutrition Facts Panel and ingredient statement, as only total quantity is expressed on the label. To differentiate naturally occurring quantities from those provided by direct ingredient addition, proprietary company formulation data would be required. The difficulties of obtaining such proprietary data would make compliance monitoring virtually impossible; suffice it to say that food and beverage manufacturers are highly unlikely to provide such data on a voluntary basis.

- Because naturally occurring versus added amounts of the proposed nutrients to limit are not made visible on a product label, a significant amount of confusion is likely to occur among interested consumers attempting to interpret the reasoning for the types of foods being marketed to them. This presents an incredibly confusing situation without any commensurate public health benefit.

- Despite the exemption, some types of products generally considered to be nutritious choices (and therefore the types of products meant to be excluded from the proposed marketing restrictions) still fail to meet the proposed nutrition principles:

  1) **Yogurt:** Low fat yogurts in compliance with the FDA definition of "low fat" ($\leq$ 3 grams of fat per 225 gram RACC) may contain more than 1% total fat and therefore are prohibited from benefiting from the naturally occurring saturated fat exemption. In addition, it is impossible to tell, by reading the nutrition label of a yogurt product, how

[17] Nicklas TA, et al. Nutrition Research. 2011; 31:338-364.

many grams of total sugars (as displayed on the Nutrition Facts Panel) come from naturally occurring versus added sources, and therefore whether the product would comply with the IWG proposed nutrition guidelines.

2) **Extra Lean and Lean Meats:** USDA definitions of these meat cuts will not meet the threshold levels to qualify under nutrient Principle B.

VI. Conclusion

While GMA and its member companies support the IWG's goal of improving children's diets and addressing the high rates of childhood obesity in America, we oppose the proposed standards in the strongest possible terms, and we urge that they be withdrawn. As our comments illustrate, the IWG proposal is **not** evidence-based, it is **not** aligned with existing federal food and nutrition programs and guidance, and the proposed nutrition principles are unworkable. Perhaps most importantly, the proposal fails to identify evidence that, if implemented, the recommended nutrition principles will have any significant effect on childhood weight reduction and obesity rates. We urge the IWG to take to heart the focal points of our comments:

1) **The IWG proposal is fundamentally flawed, as it is unlikely to combat obesity and would prevent marketing of many types of foods that should be encouraged in the healthy, balanced diets of children.**

2) **The proposed IWG nutrition standards are arbitrary, have no basis in scientific evidence, and conflict with federal dietary guidance and nutrition policy.**

3) **The proposed IWG nutrition standards are extreme and reflect an unwarranted bias against prepared, value-added foods.**

4) **The proposed IWG nutrition standards are poorly elaborated, and are unworkable.**

For these reasons, as elaborated in these comments and in the marketing comments attached as Appendix B, GMA and its member companies oppose the proposed standards in the strongest possible terms, and we urge that they be withdrawn.

Appendix Contents

A. Comment of the Grocery Manufacturers Association on Interagency Working Group on Food Marketed to Children: General Comments and Proposed Marketing Definitions: FTC Project No. P094513

B. Foods Most Commonly Consumed and the IWG Standards

Appendix A

Comment of the Grocery Manufacturers Association on Interagency Working Group on Food Marketed to Children: General Comments and Proposed Marketing Definitions: FTC Project No. P094513

I. Introdnction

Based in Washington, D.C., the Grocery Manufacturers Association ("GMA") is the voice of more than 300 leading food, beverage and consumer product companies that sustain and enhance the quality of life for hundreds of millions of people in the United States and around the globe. The food, beverage and consumer packaged goods industry in the United States generates sales of $2.1 trillion annually, employs 14 million workers and contributes $1 trillion in added value to the economy every year.

Obesity rates have been rising in the population since the government began reporting periodic nutrition and health surveys in the 1970s. In the last decade, the trends had reached levels that caused public health officials to call for action to arrest them. The food and beverage industry responded by taking a leadership role in the fight against obesity. Since 2004, America's food and beverage companies have introduced more than 20,000 new products and packages, and they have promoted healthy lifestyle choices in the marketplace, the workplace and schools. GMA and its members have been providing consumers with the products, tools and information they need to achieve a healthy diet and an active lifestyle.

With the ***Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts***,[18] the Interagency Working Group ("IWG") has asked for comments on proposed standards that would stop the marketing that has brought those innovations to children, would declare most of the products that children and adults consume of little or no nutritional value, and would discourage children from consuming the products. GMA appreciates the opportunity to comment on this proposal.

The IWG's proposed regulations represent a departure from the policies of the agencies that proposed them. The federal government has long endorsed and participated in the dissemination of information to facilitate consumer choice. The IWG proposes the opposite. Rather than encouraging the use of information to inform consumers, the current proposal would encourage the suppression of information to steer consumers – to discourage sales of some foods and encourage sales of others. To be discouraged would be the consumption of the vast majority of foods and beverages that Americans eat today. The means of discouragement would be to make certain foods less attractive and less conspicuous, especially to children. The proposal rests on the notion that parents will not buy food their children do not want, and that children will not want food that they do not find appealing.

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[18] Interagency Working Group on Food Marketed to Children, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts, Request for Comments* (April 2011) (the IWG's marketing and nutritional proposal is referred to as the "Guides" or "Principles") (hereinafter *Request for Comments*), available at http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf.

The IWG, recognizing that the First Amendment constrains agencies from imposing the Principles, is asking food and beverage companies to adopt them as voluntary practices instead. This puts industry in an untenable position. If the companies decline the IWG's invitation, they would risk public opprobrium. If companies comply with the regulations, they would engage in practices the Federal Trade Commission has long condemned – interfering with consumers' efforts to find the products that best satisfy their desires.

Absent from this proposal is any evidence that children and adolescents would consume healthier diets or lose excess weight, in the new world the guides envision. The proposal disparages products that the Food and Drug Administration classifies as healthy, that the U.S. Department of Agriculture promotes for preschool children and school meal programs, and that experts have found associated with lower body weights in children who eat them.[19]

The IWG cites no evidence that any of the marketing the proposal targets has caused children to gain weight. This absence is no surprise, in light of a report the Institute of Medicine issued five years ago. After it conducted "the most comprehensive review to date of the scientific studies designed to assess the influence of marketing on the nutritional beliefs, choices, practices, and outcomes for children and youth,"[20] the IOM concluded that "*current evidence is not sufficient* to arrive at any finding about a causal relationship from television advertising to adiposity."[21]

That obesity could not be attributed to ads made sense in the light of the long-term trends of advertising that children see for food. Food and beverage marketing directed toward children has been declining for three decades, while children, adolescents and their parents have been gaining weight.

The vast majority of food and beverage marketing currently directed to children would disappear under the proposal. Such a decline of economic activity would impair vital sectors of the economy. The regulations would displace billions of dollars of economic activity, imperil thousands of jobs, jeopardize TV programs, and undermine charities that benefit children and adolescents.

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19 *See generally* Appendix A, *Comment of the Grocery Manufacturers Association on Interagency Working Group on Food Marketed to Children: Proposed Nutrition Principles: FTC Project No. P09451.*

20 *Food Marketing to Children and Youth: Threat or Opportunity?*, at xiv (Institute of Medicine, Committee on Food Marketing and the Diets of Children and Youth, J. Michael McGinnis, Jennifer Appleton Gootman, Vivica I. Kraak, eds. 2006) (emphasis added) (hereinafter *IOM Food Marketing Report*), available at http://www.iom.edu/Reports/2005/Food-Marketing-to-Children-and-Youth-Threat-or-Opportunity.aspx.

21 *IOM Food Marketing Report*, at 9 (emphasis added).

The IWG's proposal recalls an unfortunate chapter in the history of the FTC – the Children's Advertising rulemaking the Commission conducted in the 1970s.[22] The proposal then would have banned commercials for breakfast cereals and other food that activists alleged were inappropriate for children. The Commission abandoned the effort, after concluding that the cost and impracticality of the idea outweighed any conceivable benefits it might deliver. Since then, children have seen fewer food and beverage commercials on their programs, cereal consumption has been associated with lower body weight in children, and marketing has become recognized as a valuable and Constitutionally protected form of competition. The passage of time has confirmed the wisdom of the Commission's decision.

While many constructive efforts are underway, and more must be done, there is no evidence that these Principles would advance the public interest. There is good reason to predict that they would stifle marketing, competition and innovation. In the IWG's proposed world, consumers would see fewer messages, have poorer choices, and face higher prices. Those impediments would deprive manufacturers of the means to bring healthy and enjoyable foods to children, deny kids the foods they enjoy, and prevent parents from receiving the benefits of competition. Thus, the IWG should abandon this effort and start anew, beginning with conducting the study that Congress requested and then making recommendations based on the results of that study as to the efficacy of marketing standards to address health issues relating to childhood obesity.

II. Trends in Obesity and Marketing

It has been ten years since the Surgeon General reported on increasing trends of obesity in the U.S. population and issued ***The Surgeon General's Call To Action To Prevent and Decrease Overweight and Obesity 2001***.[23] The report cited government statistics showing that 61 percent of U.S. adults and 13 percent of children and adolescents were overweight in 1999 and that the trends had been rising for both young and old.

These gains, the Surgeon General wrote on the first page of his report, resulted "from excess calorie consumption and/or inadequate physical activity."[24] The factors contributing to the gap between calorie consumption and expenditure were more complicated and less obvious. The Call to Action therefore urged stakeholders to create:

> a multifaceted public health approach capable of delivering long-term reductions in the prevalence of overweight and obesity. This approach should focus on health rather than appearance and empower both individuals and communities to address barriers, reduce

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22 Children's Advertising, 43 Fed. Reg. 17,967 (Apr. 27, 1978).

23 *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity 2001*, available at http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf.

24 *Id.* at 1.

> stigmatization, and move forward in addressing overweight and obesity in a positive and proactive fashion.[25]

Critical to the success of the Call to Action would be research and evaluation to "understand the causes of overweight and obesity, to assess the effectiveness of interventions, and to develop new communication and action strategies."[26]

Experts at the IOM heeded the call for research and evaluation. At the behest of CDC, which itself was following Congressional direction, IOM reviewed a vast body of research on three decades of trends in nutrition, physical activity and contemporaneous changes in American society. The outcome of that effort, *Preventing Childhood Obesity, Health in the Balance*,[27] reinforced the conclusions that the Surgeon General had reached, shed light on many more facets of the growth of obesity, and offered recommendations for a coordinated, multi-sector approach to combat the problem. As the Report's title indicates, the IOM focused on children, but the review offered important insights on adult obesity as well.

IOM first observed the same trends the Surgeon General had reported. In three decades, the prevalence of obesity had doubled in children from 2 – 5 years old, had tripled in children 6 – 11, and had doubled in adolescents 12 – 19.[28] These trends mirrored "a similar profound increase over the same approximate period in U.S. adults, as well as a concurrent rise internationally in developed and developing countries alike."[29] Weight gains were pervasive. IOM noted evidence that even children younger than 2 years old were gaining weight.[30]

The data on prevalence of obesity reported from the National Health and Nutrition Examination Survey (NHANES) for children 6 – 11, youth 2 – 19 and adults 20 – 74 show the major trends well. The prevalence for children and youth have risen about 10 percentage points each while adult prevalence has risen by more than 15 points.

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25 *Id.* at XIV.

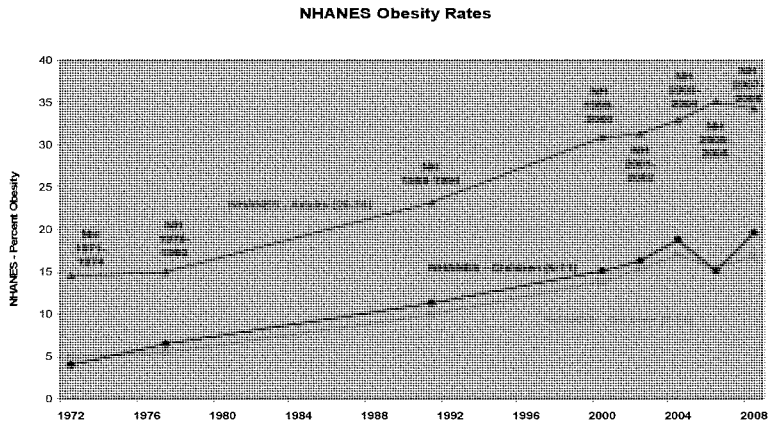
26 *Id.* at 16.

27 IOM, *Preventing Childhood Obesity, Health in the Balance* (2004) (hereinafter *2004 IOM Report*), available at http://www.iom.edu/Reports/2004/Preventing-Childhood-Obesity-Health-in-the-Balance.aspx.

28 *Id.* at 1.

29 *Id.* at 2.

30 *Id.* at 56.



Source: CDC, National Center for Health Statistics, NHANES Surveys.

In the three decades over which obesity had increased, society had changed dramatically. IOM observed transformations in family lives, eating habits, residential landscapes, media use, physical education, consumer perceptions, and many other factors that were posing challenges greater than any that parents and children had faced before. In combination, these forces contributed to the growing levels of obesity. And as the data that IOM presented made clear, no age group was resisting the forces that they all faced.

Some of the trends came as no surprise. For the population as a whole, IOM found evidence that calorie consumption had increased for both men and women.[31] More people were eating away from home, and portion sizes had increased for most foods consumed at home and away for both adults and children.[32] Reports on physical activity during leisure indicated little change for adults,[33] but physical activity of children declined. Daily enrollment in Physical Education for high-school students dropped from 42% in 1991 to 28.4% in 2003.[34] Between 1977 and 2001, the number of children ages 5 – 15 within walking distance of school who actually walked to school dropped from 20.2% to 12.5%.[35] And from 1981 to 1997 children

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31 *Id.* at 30.

32 *Id.*

33 *Id.* at 29.

34 *Id.* at 36.

35 *Id.* at 37.

aged 3 – 12 saw their free time decline by seven hours per week.[36] Children were losing opportunities to go out and play.

The IOM also noted ominous implications of some of the trends. "The average parents today are twice as likely to be obese as 30 years ago.... Parental obesity more than doubles the risk of adult obesity among both obese and nonobese children under 10 years of age."[37] Associations between obese parents and children at risk of obesity were observed not just for school children, but also for preschoolers and newborns.[38]

But the data also revealed some trends that did not track the increases of obesity. For example, the number of hours children spent watching television had declined by four hours a week between 1981 and 1997.[39] The proportions of calories children consumed from fat and saturated fat had declined between 1965 and 1996.[40] But perhaps most surprising was the observation that "no significant increased trends in energy intake were observed in children 6 – 11 between 1977 and 1996."[41] Children 2 – 5 and teens 12 – 19 had shown increases, but the rise in the prevalence of obesity was not associated with a comparable increase in the calories consumed by children 6 – 11 years old.

The 2004 IOM Report contained proposals and recommendations for the private and public sectors. In ten broad groups, the proposals suggested the implementation of dozens of actions – about ten apiece for schools, communities and federal authorities, seven for parents and three for the food and beverage industry. To each sector, IOM urged creating an environment that encouraged more healthful eating and more physical activity. Parents were encouraged to be role models in their own eating and activities. IOM recommended that food makers develop packages and products that help consumers make healthful choices, that restaurants expand menu choices and disclose more nutritional facts, and that advertisers and marketers adopt guidelines to minimize the risk of obesity in children and youth.

These recommendations were all intended to stem or prevent obesity from spreading. "Obesity prevention," IOM made clear, "involves maintaining energy balance at a healthy weight while protecting overall health, growth and development, and nutritional status. Energy balance refers to the state in which energy intake is equivalent to energy expenditure, resulting in no net weight gain or weight loss."[42] For adults the equation meant true equivalence between calories in and calories out. Children could afford to consume slightly more calories than they expended, because their bodies needed the additional energy for growth. But for everyone, the

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36 *Id.* at 36.

37 *Id.* at 64-65.

38 *Id.*

39 *Id.* at 39.

40 *Id.*

41 *Id.* at 30 (but noting at 97 "some indications" that a small increase might have occurred).

42 *Id.* at 90.

message was essentially the same: "Inappropriate weight gain (excess fat storage) results when energy expenditure is consistently exceeded by energy intake over time."[43]

IOM planned to assess progress toward its goals, but before it could do so, it received another assignment. It was asked to look again at just one facet of the 2004 report – marketing to children. As IOM described the mission:

> Congress, through the FY2004 Health, Labor, and Education Committee appropriation, directed the Centers for Disease Control and Prevention (CDC) to undertake a study of the role that marketing of food and beverages may play as a determinant of the nutritional status of children and youth, and how marketing approaches might be marshaled as a remedy.[44]

Explicitly beyond the scope of this second study would be many factors that IOM had identified in the first as critical to the understanding of obesity trends and promising as goals to reverse them. For this study, IOM would not address physical activity, parental obesity, community design, and the other forces. Instead, IOM undertook what became at the time and remains today the most comprehensive review of the evidence on marketing and obesity. As a consequence, the second review answered fewer questions than the first, and findings of the report shed little additional light on the causes of obesity. But the review addressed the most important issue at stake in the IWG's proposal.

IOM found insufficient evidence to conclude that advertising caused obesity in children or adolescents.[45] Although the evidence included studies that had found associations between advertising and obesity, IOM's experts could not rule out other causes for those associations. The experts reached this conclusion despite finding evidence that advertising to children 2 – 11 could stimulate their preferences for items advertised, and finding evidence that children would request food they preferred. (For teens 12 – 18 the evidence was insufficient to establish even an association between advertising and food preferences.) But as advertisers in many industries have discovered many times, IOM found that short-term curiosity does not necessarily translate into sustained purchase patterns. The evidence for an association between advertising and usual dietary intake for children 6 – 11 was weak. And when it came to usual dietary intake for teens, the evidence indicated that advertising did *not* have an influence, although that evidence was weak as well.[46]

As it had done a year earlier, IOM produced ten categories of recommendations. This time, because IOM had explicitly confined its review to marketing, all the proposals pertained to marketing. Increasing physical activity, creating caregiver role models and other goals were

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43 *Id.*

44 *IOM Food Marketing Report*, at xiii.

45 *Id.* at 9.

46 *Id.* at 8.

hardly mentioned. The principal charges to industry, governments and communities and caregivers extended the marketing and educational exhortations of 2004. IOM urged industry to use its creativity and resources to promote and support more healthful diets, and to adhere to the highest standards of marketing. It urged governments at all levels to marshal the full range of public policies to foster healthful diets. And it urged schools and parents to educate children about more healthful diets and to promote those diets.

In the space of two years, two bodies of experts under the auspices of IOM authored two comprehensive studies that sought to identify forces at work in society that had contributed to the rise in obesity in the population. After "examining the behavioral and cultural factors, social constructs, and other broad environmental factors involved in childhood obesity and identifying promising approaches for prevention efforts,"[47] and then "after specifically [examining] the role of food and beverage marketing in the diets of children and youth,"[48] one factor failed to test positive. IOM could not conclude that marketing was one of the forces causing obesity in children and adolescents.

Still, the experts of IOM urged advertisers to enlist marketing in the cause to improve health and nutrition. The agencies of the IWG echoed IOM's exhortations. FTC and HHS conducted public forums in 2005 and 2007 to encourage and assess the progress of industry marketing efforts. FTC did the same in its 2007 report on food marketing expenditures of 44 companies in 2006. Federal authorities uniformly commended information and education as the means to prevent obesity and improve health.

The food and beverage industry responded with initiatives in every category the IOM prescribed. For example:

Investing in Solutions
More than 140 major food and beverage manufacturers, retailers and advocacy groups have committed to a multi-million, multi-year initiative designed to help reduce obesity, particularly childhood obesity, by 2015.

The Healthy Weight Commitment Foundation helps kids and adults achieve a healthy weight through energy balance and focuses on three critical areas – the marketplace, the workplace and schools.

Teaching Kids about Calories In and Calories Out
Created by the food and beverage industry, the Healthy Schools Partnership teaches kids that the calories they consume and the calories they expend must be in balance. Understanding that nutrition and exercise are both key elements of a healthy lifestyle, the initiative brought physical education and nutrition professionals together to illustrate what an "energy balance" means. A pilot program was created with the help of PE4life

[47] *2004 IOM Report*, at 3.

[48] *IOM Food Marketing Report*, at 6.

and the American Dietetic Association Foundation, and is expanding beyond the original Kansas City pilot school to additional schools in Kansas City and schools in the Des Moines area.

Using Advertising to Encourage Good Decisions
More than two-thirds of food and beverage television advertising geared toward kids under 12 is used to promote good nutrition, healthier lifestyles and simply making better food choices. The Children's Food and Beverage Advertising Initiative (CFBAI) pulled together 17 of the nation's top food and beverage manufacturers to pledge that they would focus their efforts on promoting healthy eating and exercise habits.

Better Beverage Choices in Our Schools
America's leading beverage companies are providing students with a range of beverages that are lower in calories and packaged in smaller portion sizes. Following the School Beverage Guidelines of the Alliance for a Healthier Generation, companies are making only lower-calorie, smaller-portion beverages available in schools as part of a broader effort to teach children the importance of a balanced diet and exercise. The Alliance for a Healthier Generation is a joint initiative of the American Heart Association and the William J. Clinton Foundation.

Front-of-Pack Labeling
On January 24, 2011, GMA and the Food Marketing Institute (FMI) announced the launch of *Nutrition Keys*, a new voluntary front-of-pack nutrition labeling system that will help busy consumers make informed choices when they shop.

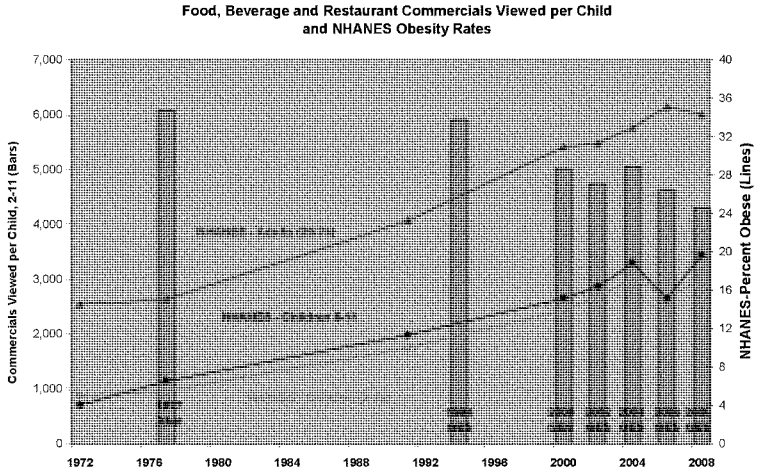
First Lady Michelle Obama challenged industry to find a way to provide busy parents with the front-of-pack nutrition information they need to make informed choices easily and quickly. To that end, GMA and FMI have worked over the last year to develop a fact-based, simple and easy-to-use front-of-pack icon that companies can use to inform consumers about how the key nutrients in each product fit into a balanced and healthy diet as part of the federal government's dietary guidance. In addition, as part of the beverage industry's Clear on Calories initiative, America's beverage companies are adding new labels to the front of every can, bottle and pack produced – and displaying the total calories per container on beverages 20 ounces or smaller.

Wellness in Workplaces Worldwide
As part of the Healthy Weight Commitment Foundation, GMA member companies are providing resources to help their employees achieve and maintain a healthy weight through promotion of energy balance and through adoption of a variety of model workplace wellness practices. In addition, the GMA and food and beverage companies have taken the lead in the World Economic Forum's "Working Toward Wellness" initiative. Knowing that where people work greatly affects their lifestyles and overall well-being, the effort promotes business engagement in the global fight against chronic disease.

GMA and its member companies have made significant progress on each of these fronts, all of which are critical in the battle to prevent obesity. More information about them is available at www.gmabrands.com. Because the IWG proposal deals principally with marketing, this comment will elaborate on the accomplishments there.

First, the aggregate trends of food marketing reveal some important context. Advertising of food and beverages to children has been in a long-term decline. The commercials that children see on television – still the dominant medium for children's advertising – have declined over the past three decades. In 2000, on the eve of the Surgeon General's Call to Action, children 6 –11 were seeing significantly fewer ads on children's TV than they had seen in 1977. The number of commercials viewed were about the same four years later – still much less than in 1977 – when IOM issued its 2004 report. Just as TV viewing had declined for children, so had their viewing of commercials for food and beverages.

The chart below shows that decline, along with the obesity trends reported by NHANES. In light of these trends, it is not surprising that IOM was unable to conclude that the evidence identified advertising as a cause of obesity. The advertising and obesity trends move in opposite directions.

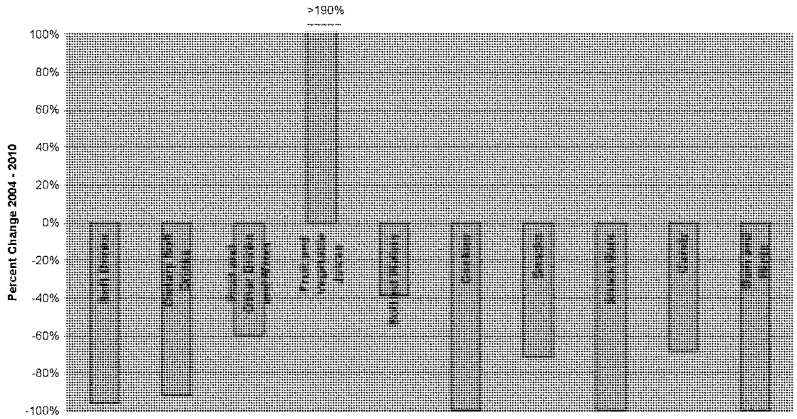


Sources: Nielsen Media Research Monitor-Plus (GES data); The Henry J. Kaiser Family Foundation Report: Food for Thought, Television Food Advertising to Children in the United States (Abel data); CDC, National Center for Health Statistics, NHANES Surveys.

The chart also shows how the long term decline in advertising impressions began to accelerate in 2004. The acceleration is fueled by drops in food and beverage commercials that children viewed on their TV programs, which fell by 50 percent between 2004 and 2010.

This steeper decline came in the wake of the launch of the Children's Food and Beverage Advertising Initiative, in which members either concentrated on healthy life-style messages and foods that satisfied nutritional criteria in their advertising directed to children, or stopped advertising directed to children. The most significant effect of CFBAI emerges in the shifts of advertising among food categories. Commercial impressions fell precipitously for cookies, candy, soda and snacks, while growing for fruit and vegetable juices.

Percentage Change in Children's TV Ad Views per Average Child (2-11)
for Beverages, Cookies, Snacks, Candy & Gum 2004 - 2010



Source: Nielsen Media Research, Monitor-Plus. The Monitor-Plus data contained herein are the property of The Nielsen Company, © 2011 The Nielsen Company. Unauthorized use of this copyrighted material is expressly prohibited.
Excludes cable TV networks not in the database for 2004.

As commercials viewed by children declined overall and shifted from some categories to others, food makers were introducing thousands of new products with smaller portion sizes, fewer calories, reduced fats and less sugar. Reformulated products with more vitamins, fiber and whole grains continued to appear on supermarket shelves. In all, over 20,000 different products, portions and packages that did not exist when the IOM first surveyed the landscape are filling the shelves today.[49]

Not all of these products succeeded, but a great many did. The successful products typically had two things in common – intelligent marketing, which helped shoppers find them

[49] Press Release, GMA, Food and Beverage Companies Have Introduced More than 20,000 Healthier Product Choices Since 2002 (Aug. 2010), available at http://www.gmaonline.org/news-events/newsroom/food-and-beverage-companies-have-introduced-more-than-20000-healthier-produ/.

and gave shoppers reasons to try them, and intrinsic value, which meant consumers enjoyed them when they tried them.[50] A product that is not marketed may never make it into the home. A product that fails to satisfy the household is not likely to make it back in.

The thousands of products in the market today represent the knowledge accumulated through millions of decisions. Companies go through countless trials and errors in their kitchens and in their marketing departments to create products that consumers want, communications that tell consumers about them, and brands that consumers can recognize. This knowledge took decades to build and apply. The icons that have represented products for half a century and longer are but a few illustrations of these efforts. Thousands of employees contribute to these efforts. Billions of dollars of commerce depend on them. Many more billions of dollars are invested in the good will that prior efforts have created.

Yet with all this knowledge from the past, and all the tools of modern marketing at their disposal, food makers can never be sure that the next launch will fly off the shelf or sit unnoticed.[51] About all that can be predicted with some confidence is that without effective means to communicate with consumers, the next launch will fail and the products that have already achieved some success will gradually decline. Consumers need to learn about new products if they are going to buy them. And consumers will forget about products that have been made inconspicuous and unappealing. Indeed, these effects – fewer launches and declining consumption of products that don't meet the standards – appear to be the objectives of the IWG's proposal to suppress information about those products.

III. The Proposed Definition of Marketing Directed to Children and Adolescents Would Restrict a Vast Array of Economic Activity

The purpose and effect of the policy to suppress information is illustrated by the scope of activity covered by the restraints. The IWG seeks to transplant definitions used by the FTC for its 2006 survey of youth-directed food marketing expenditures and activities.[52] Those definitions began as instructions for subpoenas seeking expenditures that could *potentially* qualify as marketing directed to children or adolescents. They were instructions to companies on where to search for expenditures that might be related to marketing. The list was not put forth as a workable definition for regulation, but rather as a data collection tool. Now those same terms are proposed as regulations. Combined with the nutrition standards the IWG is proposing, the

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50 *See generally* Joan Schneider and Julie Hall, *Why Most Product Launches Fail*, Harv. Bus. Rev., April 2011, at 21 (discussing the difficulty of getting something new on shoppers' "radar"), available at http://hbr.org/product/why-most-product-launches-fail/an/F1104A-PDF-ENG.

51 *See generally* Susumu Ogawa, Frank T. Piller, *Reducing the Risks of New Product Development*, MIT Sloan Mtmt. Rev., Winter 2006, at 65 (finding that new products suffer from high failure rates "not because of technical shortcomings, but because they simply have no market"), available at http://hbr.org/product/reducing-the-risks-of-new-product-development/an/SMR196-PDF-ENG?Ntt=new%2520products%2520that%2520fail.

52 *Request for Comments*, at 16.

definitions reach activities never before considered marketing, and would declare them off limits for most products that Americans consume.

The scope of activities covered by the definitions is not limited to advertising and marketing directed at children. These activities range from traditional advertising on children's television, to making packages appealing to kids and their parents, to supporting athletic activities and charities for kids fall within the definitions.

Examples of Activities Deemed Marketing

- Television, radio, print advertising
- Product placements
- Company-sponsored websites and all other internet and digital advertising
- Character licensing, toy co-branding, and cross-promotions
- Packaging and labeling
- Movie theater/video/video game advertising
- In-store displays and promotions
- Celebrity endorsements
- Specialty item or premium distribution
- Promotion or sponsorship of public entertainment events
- Sponsorship of sports teams or individual athletes
- Word-of-mouth and viral marketing
- Advertising in conjunction with philanthropic endeavors

Source: Order to File a Special Report, FTC Matter No. P064504

There are twenty different categories of activity considered marketing that would be prohibited for disfavored products. Traditional advertising intended for children and teens is covered, of course. But so is a commercial that appears on a television show pulling a 20-percent adolescent or 30-percent child audience, even if adults make up the majority of the audience. So is a cartoon character or message on a box of cereal, even if it isn't kid-directed, if it might appeal to kids. So is an in-store display that attracts shoppers to special deals on lunch-box foods, as is a celebrity endorser if he or she appeals to youth.

Likewise, the sponsorship of a little league team, a donation to Cub Scouts and Brownies, and support for an organization that "encouraged children to engage in physical activities or promoted messages about healthy diets"[53] is covered. In short, any of these activities would be deemed marketing to kids. If a hint of a discouraged product can be found in the activity, it would be banned.

If an activity does not fit the terms of one of the twenty categories (the last of which is simply "other"), it still could qualify as marketing by virtue of triggering terms in the communication or in the files of the company that sponsored the communication. For example if a company website not directed toward children includes a word, "such as 'kid,' 'child,' 'tween,' or similar words" it could be swept into the definition.[54] Even if the communication contained no triggering words, but marketing materials in the files of a company contained them, then the

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53 Federal Trade Commission, *Marketing Food to Children and Adolescents, A Review of Industry Expenditures, Activities, and Self-Regulation, A Report to Congress*, at 51 (hereinafter *FTC Food Marketing Report*) (July 2008), available at http://www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf.

54 Federal Trade Commission, *Order to File a Special Report*, FTC Matter No. P064504, at B-4 (July 31, 2007) (defining what is considered marketing to children or adolescents on company-sponsored Internet sites), available at http://www.ftc.gov/os/6b_orders/foodmktg6b/index.shtm.

activity could still be deemed marketing to kids, tweens or teens. In other words, an activity need not fit within the twenty categories of activity to be deemed marketing to children. An indication that a company was aware that children would be in the audience that a communication reached could be enough.

The combination of activity categories and triggering terms led the Commission to report in 2008 that back-to-school block parties, scholarships, honors and cash prizes to children and teens based on success at school or in the community were all marketing. Sponsoring essay contests was another form of marketing. Philanthropic activities that encourage children to engage in physical activities or promoted messages about healthy diets was marketing. Supporting "Kids Day" events at games or "Kids Clubs" of athletic teams was marketing. These are the types of activities that the Commission is proposing to stop, if any sign of a discouraged product appears. A proposed regulation that treats all these activities as marketing is seriously flawed.

Another serious flaw in the Principles is that the definitions proposed by the IWG would capture marketing to adults as well as to children or teens. For example, the Commission set thresholds for teens and children in measured-media audiences to determine whether the advertising to those audiences would be deemed advertising targeting the young cohorts. GMA warned the Commission that "data generated [from the definitions] would reflect so much extraneous expenditures that it would shed little light on advertising and marketing that targets children and adolescents."[55]

As predicted, that occurred. Companies reported expenditures that could not sensibly be considered marketing to children or adolescents. Movies intended for adults, broadcasts of Major League Baseball, professional and college football, NASCAR, Christmas specials, PGA programming all would qualify as programs for kids or teens under the simple numerical calculations in the definitions. Thus, the definitions also would cover advertising that supports adult, all-family and parent-dominated audiences, as well as programs that reach an abnormally high percentage of children

Shows that have drawn 30% or more children:	Shows that have drawn 20% or more teens:
Classic Christmas Movies	Adult Comedy Acts
College Football	Drug-Culture Comedy Acts
Home Makeovers	Comedy Competitions
Science Fiction Movies	Indy car Coverage
Family Sitcoms	News Broadcasts
Pop Concert Broadcasts	Science Fiction Movies
NASCAR Race Coverage	MLB Broadcasts
National Lampoon Movies	NFL Broadcasts
NFL programming	PGA Programming
Sports News	Adult Sitcoms
Tournament of Roses Coverage	Action Movies
Travel Programming	WC Soccer
USA Soccer Programming	WNBA Broadcasts

[55] *Comments of GMA, FTC Request for Information and Comment on Food Industry Marketing to Children Report: Paperwork Comment*; FTC File No. P064504, at 8 (May 2007); *see also Comments of GMA, Food Marketing to Children and Adolescents Report to Congress*, Proj. No. P064504, at 3 (April 2006); *Comments of GMA, Food Marketing to Children and Adolescents Study: Paperwork Comment*, Proj. No. P094511, at 3 (Nov. 2009).

or adolescents – for example, if enough children or adolescents happen to be home on a snow day and see food marketing during a talk show.

The IWG justifies using the definitions as a basis for its Principles with the claim that they were "vetted" in an administrative proceeding,[56] but the proposal does not describe that vetting process or address the comments of GMA that warned how inaccurate the definitions would be. Thus the Commission does not report the only conclusion that should be drawn from the commentary on the definitions that were to be used in collecting data – that they would collect too much data and inaccurate data. Too much data would not be an insurmountable problem for an analyst capable of separating the extraneous from the relevant. When the definitions become regulations, however, a study that collected too much data becomes a restriction that stifles unintended activity.

Left unchanged, these definitions would misclassify vast amounts of business activity – much of it not marketing at all, much less marketing to youth – as marketing to children and adolescents. From offering products at ball parks and county fairs, to sponsoring charity events, to placing commercials during prime-time movies, the IWG Principles would declare any food that did not meet the standards as off limits. A preponderance of foods would still not comply, even after years of reformulating to the limit of technological capability and market acceptance. For these foods, the message from the IWG is: abandon the activity or run the risk of condemnation.

A rule restricting these activities is not just a regulation of marketing. The effort to restrict all these activities could affect billions of dollars of commerce. The Commission reported that 44 companies spent $1.6 billion on all these activities in 2006, and $60 million alone on donations to various causes. For all manufacturers, the numbers would of course be greater than that reported for 44.[57] And this estimate does not capture the cost of revamping communications for the vast majority of products covered.

The proposal covers more than efforts to communicate to consumers about food products. It also covers the products themselves and the packages that contain them. In a measure that goes beyond the ambition of the Children's Advertising rulemaking, the IWG proposes that many products be stripped of the identifying marks that have characterized them for decades. A small sample of the products that would lose their identities and sponsors appears below.

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[56] *Request for Comments*, at 17.

[57] *FTC Food Marketing Report*, at ES-1.

Some Endangered Packages Under the Guides

Under the proposal, packages would be stripped of long-recognized branding and traditional icons, leaving consumers with less ability to distinguish one product from another. Tony the Tiger®, the character identified with Kellogg's Frosted Flakes® cereal when today's grandparents were kids, would have to retire. So would Snap, Crackle and Pop®, who have represented Kellogg's® Rice Krispies® cereal since the early 1930s. Barnum's Animals®, the icons of Animal Crackers for over a century, would be seen in circuses and museums, but not on the product, even though it is marketed to adults, not children. Every one of these products fits within a healthy diet. All offer fewer calories than other choices consumers could make. All contribute important nutrients. Many display recently enhanced nutritional profiles. As demonstrated in GMA's comments on the Nutritional Principles, there is no reason to disguise these products or discourage consumers from buying them.

Neither the IOM nor any source cited by the IWG has found that recognizable packages and products cause obesity in children and adolescents. Nor has any evidence been offered as to

the effects of disguising packages and products. Indeed, the IWG's announcement is the first time that restrictions of this scale have been proposed.

Stripping the favorite features and characters from products that have used them for generations would deprive shoppers of means to find the foods and beverages they want and deprive children of the enjoyment that the characters have delivered. Because these characters are so familiar to the public, they are some of the most precious assets the food companies possess. By design, the proposed regulations would tell manufacturers to diminish and destroy the associations between these characters and the products they represent. The destruction of value and the burden on consumers would far outweigh the $1.6 billion dollars that the Commission reported in 2008 as expenditures on marketing to children and adolescents.

The fundamental purpose of the suppression of information is to make it less likely that kids will want certain products and more difficult for parents to find them. This is contrary to the policy that has informed federal policy for decades. In its renunciation of the last proposal to suppress advertising to children, the staff of the FTC stated, "Advertising informs consumers as to product availability, price and performance characteristics. Thus it facilitates consumer purchasing decisions. Moreover, it may stimulate competition among sellers of a product, resulting in lower prices for the consumer."[58]

The government has long advocated information as a tool for consumers to make better decisions. More than any agency, the FTC has decried efforts to reduce consumer satisfaction and abet shopper ignorance:

> Since 1980, the U.S. FTC has filed more than 750 comments [examining] the economic effects of marketing restrictions in areas as varied as health care, real estate, wine delivery, legal services. Quite often, the Commission has persuaded regulators that restrictions exceeded the scope necessary to protect customers, and likely raised prices and impeded entry. As early as 1989, the American Bar Association estimated that the Commission's comments have saved consumers more money annually than the agency's entire budget.[59]

Much of the evidence supporting the FTC's comments comes from the FTC's own economists,[60] and numerous other studies concur. One recent case study found that restricting

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58 FTC Final Staff Report and Recommendation (In the Matter of Children's Advertising, 43 Fed. Reg. 17967), at 5 (Mar. 31, 1981).

59 Directorate for Financial and Enterprise Affairs, Competition Committee, Global Forum on Competition, *The Interface Between Competition and Consumer Policies*, Contribution from BIAC (Feb. 13, 2008).

60 *See, e.g.*, FTC Staff, *Health Claims in Advertising and Labeling: A Study of the Cereal Market* (Aug. 1989), available at http://www.ftc.gov/be/econrpt/232187.pdf; remarks by Deborah Platt Majoras, Chairman, FTC, Keynote Address, Current Topics in Antitrust Economics and Competition Policy, Charles River Associates, "A Dose of our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program," at 15 (Feb. 8, 2005).

advertising directed at children demonstrated the effect the Commission has often predicted – higher prices overall and more difficulty for products with smaller shares to gain ground in the market place.[61] Unfortunately for parents and kids, the products subject to the ad restrictions were breakfast cereals in Montreal, Canada. Citizens who lived in Montreal, which restricts such advertising to children, pay the price of that restriction every time they buy breakfast cereal. This food, that is associated with lower body weights in children, is more expensive when ads are restricted. This study echoed others that have found advertising restrictions raised prices in industries ranging from toys to eyeglasses to legal services.[62]

Condemning all the economic activity described as "marketing" by the IWG's Principles would cause companies to shy away from undertaking far more activity than advertising, let alone advertising to children. Companies would have to fear the consequences of learning, long after the fact, that some activity, no matter how divorced from marketing to children, somehow fell into a covered category. Creative personnel would shy away from talking, thinking or writing about kids and what kids want. Commercials designed for all family entertainment could easily be misconstrued as advertising intended for kids, if kids showed up in the commercial, or the creators of the message tried to reach families with children. For products that fall below the standards – nearly ninety percent of the products most commonly consumed today as shown in Appendix C – companies would be encouraged to curtail communicating to adults rather than take the risk of "inappropriately" communicating to kids.

Even if the IWG agencies never enforced the rules, companies marketing foods that the IWG deemed not appropriate for marketing to children would run increased risks of governmental enforcement, regulation or litigation – even for marketing that was never intended for children or teens. The IWG's standards would provide ready authority for putative plaintiffs, regulators or interest groups to allege that some activity went too far into the youth audience, that some package was too attractive to kids, that some charitable contribution was tainted by an inappropriate product mention.[63] Likewise, drafters of tax laws, state regulations and local ordinances could piggyback upon the FTC's pronouncements that food not meeting the standard was of "little or no nutritional value," the marketing of which "supports" rather than "undermines" efforts to eat more healthfully.

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61 C. Robert Clark, *Advertising Restrictions And Competition in the Children's Breakfast Cereal Industry*, 50 J. Law & Econ. 757 (2007).

62 J. Howard Beales III, *Presentation Before the U.S. Chamber of Commerce Spring 2011 Regulatory Affairs Committee Meeting* (June 30, 2011) at 8, available at http://www.uschamber.com/sites/default/files/issues/environment/files/BEALES%20-%20interagency%20working%20group%20presentation%20%5BCompatibility%20Mode%5D.pdf.

63 *See, e.g.*, CBS/AP, "Kellogg Won't Market Sugary Cereal To Kids" ("In the face of a lawsuit, cereal-maker Kellogg … will increase the nutritional value of the cereals and snacks targeted at children or stop marketing those products to them altogether."), available at http://www.cbsnews.com/stories/2007/06/14/health/main2926923.shtml.

These reasons alone would be sufficient justification to withdraw the proposal. It would not accomplish any good public purpose. It is likely to do public harm. When considered against the economic costs the proposal would impose, the reasons to withdraw it multiply.

IV. The Potential Impact of the IWG's Proposal on the Marketplace and Food Supply Chain

Assessing the expected impact of adopting the IWG's Principles is essential to understanding the extent of the damage they could do. The IWG "recognizes that, if the proposed nutrition principles were fully implemented by industry as proposed, a large percentage of food products currently in the marketplace would not meet the principles."[64] Indeed, around 90 percent of products most commonly consumed in the U.S. would not qualify under the IWG's Principles.[65] Also, and equally important, under the IWG's expansive definitions of marketing, adult-targeted products would fall under the IWG's purview and their marketing would be curtailed as well. It is difficult to underestimate the practical consequences of displacing such a large percentage of food products in the marketplace.

As noted, the combination of the IWG's nutritional standards and use of food marketing definitions would mean the end of billions of dollars of marketing and other activities. For just forty-four companies in 2006, the Commission estimated expenditures in the twenty categories deemed marketing at $1.6 billion dollars, most directed towards advertising on TV.[66] Over fifteen hundred TV programs in 2009 met the quantitative criteria that the IWG would apply to deem programs as those for children and adolescents. These programs and the media that carry them face the loss of revenue that could spell the difference between viability and cancellation.

Just recently, the IWG agencies received instructions in the Executive Order of the Office of Management and Budget, which requires agencies to craft regulatory proposals in the least burdensome manner:

> each agency must ... (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs ... (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those

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64 *Request for Comments*, at 5.

65 Beth Johnson, *Presentation Before the U.S. Chamber of Commerce Spring 2011 Regulatory Affairs Committee Meeting* (June 30, 2011), available at http://www.uschamber.com/sites/default/files/issues/environment/files/Beth%20Johnson%20Presentation%20for%20USCC%20Event%20Final.pdf.

66 *FTC Food Marketing Report*, at ES-1.

> approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity)....[67]

Given the potential economic impact of the proposal, the regulatory approach that the IWG has taken here should have followed these instructions. There is no indication that the IWG did.

V. The Evidence Does Not Support the Proposition that Advertising Restrictions Would Affect Obesity

This comment already discussed the IOM's studies and its conclusion that "*current evidence is not sufficient* to arrive at any finding about a causal relationship from television advertising to adiposity."[68] One of the members of the IOM committee of experts conducted a more recent review of the literature. After looking at all available research that has been published since the IOM completed its study, he reached the same conclusion.[69]

The IWG fundamentally fails to justify its restriction of marketing activities by showing an expected improvement in health among children and adolescents, and the IWG does not comment on this failure. There is no prediction of what effect might be expected from restricting marketing directed toward children and adolescents that has declined for decades, no discussion of the effects of other government policies that adopted similar means, and no discussion of the likely consequences of shifts away from the foods that do not meet the proposed standards. The evidence on all these issues fails to support the proposal.

Just as a decline in advertising in the United States has failed to produce a decline of obesity, outright bans of advertising in other countries has not arrested the trends. A number of European countries have enacted restrictions or bans on advertising to children, including Sweden and Norway.[70] There has been no documented success in the approach. According to published reports, more than 20 percent of seven year old Swedish children are obese, a figure that has increased while the ban has been in effect and is greater than current estimates regarding

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67 "Improving Regulation and Regulatory Review," Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011); *see also* "Regulation and Independent Regulatory Agencies," Exec. Order No. Executive Order 13,579 (July 11, 2011).

68 *IOM Food Marketing Report*, at 379-80 (emphasis added). The IOM explained that a focus on television marketing, as opposed to all marketing, occurred in its analysis because "virtually all of the published scientific research has focused on advertising – and television advertising in particular." *Id.* at xiv.

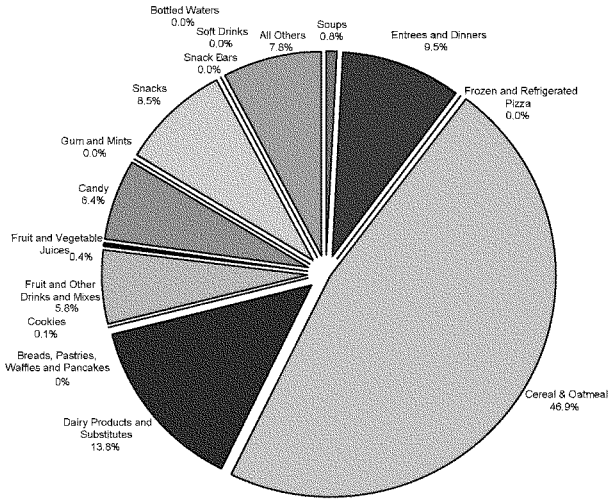
69 J. Howard Beales III, *Television Advertising and Childhood Obesity* (Oct. 2010) ("the state of the evidence concerning the relationship between television advertising and childhood adiposity remains much as it was at the time of the IOM [2006 *Food Marketing Report*] report").

70 *See generally* Sweden: Radio and Television Act of 1996, Ch. 7, § 4; Norway: Act No. 127 of 4 December 1992 Relating to Broadcasting, http://odin.dep.no/kkd/engelsk/media/018041-200005/index-dok000-b-n-a.html; *see also* Legislative Intervention to Address Obesity in Overseas Jurisdictions (2004), available at http://www.diabetes.org.nz/resources/files/ObesityLegislation.doc.

U.S. children.[71] Similarly, over a seven-year period ending in 2000, one study found that the obesity rates of Norwegian school children had increased dramatically, despite the existence of advertising restrictions.[72]

That the proposed Principles would be equally ineffective, and potentially counter productive, can be seen by assessing the advertising that the standards would disqualify. Nearly half of the advertising that children now see on their programming is advertising for breakfast cereals.

Children's TV Food & Beverage Advertising Impressions
2010 Percent of Total



Source: Nielsen Media Research, Monitor-Plus. The Monitor-Plus data contained herein are the property of The Nielsen Company, © 2011 The Nielsen Company. Unauthorized use of this copyrighted material is expressly prohibited.

The next largest category of affected advertising would be for dairy products, which are the main source of calcium for children. Smaller than Dairy are Entrees and Dinners (a combined category), and Snacks. Each is less than 10% of the ads that kids see on Children's

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71 *Child Obesity Threatens Life Expectancy*, The Local, at ES-1 (Apr. 13, 2005), available at http://www.thelocal.se/article.php?ID=1274&date=20050413.

72 LF Andersen, et al., *Overweight and Obesity Among Norwegian Schoolchildren: Changes from 1993-2000*, Scand J Public Health 33(2):99-106 (2005), available at http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=15823970&dopt=Citation.

TV. Candy is smaller still. Every category from large to small contains products that fit into healthy diets. Many of those products have been improved, and all the advertising of CFBAI members (which sponsor the vast majority of food and beverage ads directed to children) will comply with the standards of CFBAI. Quick-service restaurant ads feature apples, milk and juice. Many of these are among the messages that the IWG has proposed to restrict. Soft drinks, pizzas, pastries, gums and mints are nearly invisible on children's programs, so the restrictions would not be expected to change their status.

As for the products that are likely to be affected, numerous studies have shown that the consumption of breakfast cereals is associated with lower levels of BMI in children, a relationship that holds regardless of the amount of sugar in the cereal:

> Although lay myths suggesting sugar consumption is associated with weight status persist, it has been documented in the scientific literature that sugar consumption is not positively correlated with body weight and may, in fact, be correlated with improved BMI [31,32]. Supporting our hypothesis that BMI would not differ as a function of sugar content, the study findings indicated that cereal eaters, regardless of the type of cereal consumed, had a lower BMI than did children who did not eat cereal....[73]

The consumption of milk is of course related to the consumption of cereal. Discouraging the marketing of cereal to children could diminish the consumption of milk. If at the same time, the IWG were to discourage the marketing of yogurt as is indicated in the proposal, it would be discouraging the consumption of a second major source of dairy products and calcium.

Television remains the dominant medium for delivering food advertising to children, accounting for more than 90 percent of advertising purchased on media measured by syndicated tracking services,[74] and for the majority of expenses that the FTC identified in its 2008 Report to Congress. The mix of advertising to children on television is likely indicative of the mix of marketing to children generally. Thus, the likely effect of the restrictions would be to discourage aggregate marketing of foods and beverages that public policy should encourage for children. The prohibitions would fall predominantly on cereals and dairy products – foods that deliver essential nutrients and help children avoid excess weight.

If IOM could not find evidence that advertising to children caused obesity before changes in the marketing environment of the CFBAI era, it is inconceivable that the IWG could find evidence that shrinking marketing further would prevent obesity. Put in the terms of the Commission's own advertising enforcement policy, the IWG lacks a reasonable basis for representing that its proposal would deliver the benefits claimed. In order to substitute a new role for marketing, the IWG should provide Congress a balanced, data-backed study that considers the effect of marketing restrictions on the obesity of children and adolescents. The

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[73] Ann M. Albertson et al., Weight Indicators And Nutrient Intake In Children And Adolescents Do Not Vary By Sugar Content In Ready-To-Eat Cereal: Results From National Health And Nutrition Examination Survey 2001-2006, 31 Nutrition Research 229, 234 (2011).

[74] Georgetown Economic Services, 2010 GMA Health & Wellness Survey (Aug. 2010).

study should take into account the information about dietary guidance that consumers would miss as marketing communications decline.

VI. The IWG's Principles Violate the First Amendment

In its *Food Marketing Report*, the IOM acknowledged Constitutional issues with taking a regulatory approach such as the IWG has engaged.[75] The issue is particularly acute because the types of standards the IWG proposes would result in restricting commercial communications directed to adults which goes beyond the asserted government issue.[76] Here, the IWG presents its Principles as "voluntary," because of "the First Amendment constraints on the government's ability to regulate commercial speech."[77] The suggestion that these Principles would be voluntary does not avoid the problem.

Where the government has expressed its opinion about the propriety of commercial speech, even in an informal manner, courts have struck down the pronouncements as restrictions upon freedom of speech.[78] A set of suggested "voluntary guidelines" can be construed as a veiled threat that encroaches upon a company's constitutional protection of commercial speech if there is a clear nexus between the government suggestion and the "voluntary" action. Thus, an action of the food industry in restricting advertising in accordance with the Principles could be fairly treated as that of the government itself.[79]

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75 *IOM Food Marketing Report*, at 342-51.

76 *See generally* Martin H. Redish, *Childhood Obesity, Advertising and the First Amendment*, (White Paper June 8, 2011) available at http://www.uschamber.com/sites/default/files/issues/environment/files/CHILDHOOD%20OBESITY%2C%20ADVERTISING%20AND%20THE%20FIRST%20AMENDMENT%20PDF.pdf.

77 Statement of the Commission Concerning the Interagency Working Group on Food Marketed to Children Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts, at 1-2 ("The Commission also believes that the voluntary approach continues to be preferable to government-imposed restrictions on food marketing to children, especially given the First Amendment constraints on the government's ability to regulate commercial speech.") (Apr. 28, 2011), available at http://www.ftc.gov/os/2011/04/110428foodmarketstmt.pdf.

78 *See, e.g.*, *Bantam Books v. Sullivan*, 372 U.S. 58, 63, 66-67 (1963) (holding that by informing publishers that particular books were "completely objectionable," even without issuing "formal legal sanctions," the government had induced the publishers to change their speech behavior); *Rattner v. Netburn*, 930 F.2d 204, 209 (2d Cir. 1991) (by disapproving an advertisement, local official conveyed message that noncompliance would be met by punishment or other negative official consequences, in violation of First Amendment); *Rossignol v. Voorhaar*, 316 F.3d 516, 526 (4th Cir. 2003) (by mass-purchasing newspapers which had run story critical of police department, the police had intimidated business owners and curtailed their free speech rights).

79 *See generally Jackson v. Metro. Edison Comp.*, 419 U.S. 345, 351 (1974) (considering whether the state of Pennsylvania was sufficiently connected with the challenged utility service termination to make the utility's conduct attributable to the State for purposes of the Fourteenth Amendment required an inquiry of "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself"). That is not to say that all self-regulatory efforts trigger First

When the government announces regulations, they are not voluntary, even if officials insist they are. The context in which this proposal has been announced reveals the threat of coercion that is implicit in it. Advocates and authorities from across the political spectrum have called for compulsory regulation if the food industry declines the invitation to regulate itself. In 2005, the IOM recommended that FTC enforce industry's marketing efforts.[80] At an FTC Workshop in 2005, Senator Harkin, a co-author of the language that created the IWG, called for legislation if official recommendations weren't followed.[81] In its May 2010, Report to the President, the White House Task Force on Childhood Obesity made at least three compelling statements: (1) it called for uniform nutrition standards for "all forms of marketing across multiple platforms";[82] (2) it warned that "effective voluntary reform will only occur if companies are presented with sufficient reasons to comply [and] [t]he prospect of regulation or legislation has often served as a catalyst for driving meaningful reform in other industries and may do so in the context of food marketing as well";[83] and (3) it explicitly called for "promulgating laws and regulations when other methods prove insufficient."[84]

Under *Central Hudson Gas & Electric Corp.*, in order to regulate speech that is not false or misleading, the government regulation must prove that (1) the government's asserted interest is substantial; (2) the regulation directly advances that interest; and (3) the regulation is no more extensive than necessary to serve that interest.[85]

The IWG does not claim that the marketing they propose to restrict is false and misleading. The Principles would restrict truthful and non-misleading advertising, marketing and other communications.

Amendment issues, even if governmental agencies are part of the general conversation leading to self-regulation. *Writers Guild of Am., West v. FCC*, 423 F. Supp. 1064, 1150 (C.D. Cal. 1976), *vacated and remanded on jurisdictional grounds sub nom. Writers Guild of Am., West v. ABC*, 609 F.2d 355, 364 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

80 IOM, *Advertising, Marketing, and the Media: Improving Messages* ("Industry should implement the advertising and marketing guidelines. The Federal Trade Commission should have the authority and resources to monitor compliance by the food, beverage, and sedentary entertainment industry advertising practices") (Sept. 2004 Fact Sheet), available at http://www.iom.edu/~/media/Files/Report%20Files/2004/Preventing-Childhood-Obesity-Health-in-the-Balance/factsheetmarketingfinaBitticks.pdf.

81 Senator Tom Harkin (D-IA), *Remarks at the FTC/HHS Workshop On Marketing, Self-Regulation, And Childhood Obesity* (July 14, 2005), available at http://harkin.senate.gov/press/release.cfm?i=240635.

82 *White House Task Force Report*, at 31.

83 *Id.*

84 *Id.* at 32.

85 *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557, 566 (1980).

While nobody would dispute the government interest in public health, the IWG's proposal is an explicitly *indirect* effort to advance it. Public health officials have all recognized that the direct cause of obesity is an excess of calories consumed over calories expended. This proposal does not attempt to regulate either. Public health officials have identified numerous societal factors contributing to the obesity trends. This proposal does not address them. IOM examined thoroughly the activity that the IWG seeks to regulate here. The experts could not find sufficient evidence that advertising had caused obesity. The IWG has not offered any evidence that *regulating* advertising would prevent obesity. The lack of evidence connecting the means the IWG has chosen and the ends that it seeks to advance highlights the distance between the two. Even if there were some evidence that restrictions on marketing to children and adolescents could advance the public health, as discussed above, the marketing restrictions proposed by the IWG would clearly be "more extensive than necessary to serve the interest."

Courts have reminded the FTC that its regulations must pass Constitutional muster.[86] The consumer interest "which is in obtaining information on which to base the decision of whether to buy . . . coincides with the public interest served by the regulation" and this is particularly of concern when "health is involved."[87] FTC Chairs have long recognized these constraints.[88] Here, the IWG has offered no evidence that the Principles meet them. There is no evidence that benefits, if indeed there are any benefits, are likely to accrue, and there is no debate that the costs are likely to be tremendous.

Just two weeks ago, the Supreme Court rejected a restraint based on the same principles that motivate the IWG's proposal. California had enacted restrictions on the labeling and marketing of video games, in order to protect children from games deemed inappropriate for them. The Supreme Court found nothing in its prior cases to justify the restraint. The majority ruled:

> The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works *to adults* – and it is wise not to, since that is but a hair's breadth from the argument rejected [last year]. Instead, it wishes to create a

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86 *See, e.g., Standard Oil Co. v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978) (holding that "administrative agencies may not pursue rigorous enforcement to the extent of discouraging advertising with no concomitant gain in assuring accuracy and truthfulness").

87 *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 162 (7th Cir. 1977).

88 *See, e.g.*, Timothy Muris, *Don't Blame TV*, The Wall Street Journal (June 25, 2004) (declaring such restraints "impractical, illegal and ineffective"); Deborah Platt Majoras, *The Vital Role of Truthful Information in the Marketplace*, Roy H. Park Lecture, University of North Carolina School of Journalism and Mass Communication (Oct. 11, 2007) ("the Supreme Court clearly disfavors approaches that restrict speech"), available at http://www.ftc.gov/speeches/majoras/071011UNCSpeech_DK.pdf.

wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[89]

The IWG's Principles should be retracted as an infringement upon Constitutionally protected speech.

VII. Conclusion

The IWG has failed to demonstrate by any study or analysis a reason to expect that its proposed restrictions would have any effect on child and adolescent obesity. Instead, the IWG proposes an unconstitutional means to suppress valuable and truthful communications to consumers. The predicable outcome of these restrictions would be an impairment of companies' abilities to compete and consumers' ability to benefit from that competition. Issuing the Principles ignores Congress's mandate that the IWG conduct a study and make recommendations. Unless and until the evidence is adequate to reverse the findings of the IOM, the only recommendation that the evidence supports would be one that endorses the efforts that industry has undertaken to date. For the forgoing reasons, the IWG should retract the Principles, study the truly voluntary efforts that have already taken place, and report to Congress on the progress those efforts have achieved.

[89] *Brown v. Entm't Merchs. Ass'n*, 2011 WL 2518809, *5 (2011) (citations omitted) (emphasis in original).

Appendix B

Food & Beverages Most Commonly Consumed and the IWG Staudards

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet2021 target criteria***
All Family Cereal	Oat cereal	No	sodium, added sugar
AO Italian Dshs-Pasta/Macaroni/Noodles/Parmesan etc (Ex Can/Frz)	Lasagna	No	sat fat, sodium
Baby Food	*Too varied to assess*	N/A	N/A
Bacon	Bacon (pork, cooked)	No	sat fat, sodium
Bagels	Bagel, plain	No	sodium
Baked Beans & Pork n Beans	Baked beans, canned, with pork and Sweet sauce	No	sodium
Beef Burger	Beef burger, hamburger (95% lean, 1 patty cooked) + bun	No	sat fat
Biscuits	Biscuits (plain/buttermilk, commercially prep)	No	sat fat, sodium
Bottled Water Non-Carb	Bottled water	No	<50% of a food group
Bran+Natural Cereal	Raisin Bran	No	sodium
Bread: All Other Flavors	Bread (rye)	No	sodium
Bread: Pan Tostado	Bread (wheat, toasted)	No	sodium
Brkfst/Gran/Fruit/Cereal Bars	Strawberry Bar	No	<50% of a food group
Buns/Rolls	Hamburger bun, plain	No	sodium
Cakes	White cake (prepared from recipe without frosting-9" diameter)	No	sat fat, sodium, added sugar
Cheese (Ex Crm Cheese)	American cheese	No	sat fat, sodium
Chicken Breast: Bone-In (Default)	Chicken breast, bone in & skin on	No	sat fat, sodium (added in prep)
Chicken: Nuggets/Stick/Fingers	Chicken nugget, frozen-cooked	No	sat fat, sodium
Chips	Original Potato Chips	No	sat fat, sodium
Chocolate Candy Bars	Chocolate bar	No	sat fat, added sugar
Chocolate Covered Candy	Plain covered chocolate	No	sat fat, added sugar
Coffee	Coffee, Black	No	<50% of a food group
Commercial Frozen Novelties	Ice Cream Cone	No	sat fat
Cookies (Ex Rte Treat Bars)	Sandwich	No	sat fat, sodium, added sugar
Diet/Low-Cal Carbonated Soft Drink)	Diet cola (12 oz can)	No	<50% of a food group
Donuts	Donuts (yeast-leavened, glazed)	No	sat fat, sodium
Eggs:Fried	Egg, fried w/ added fat	No	sat fat/trans (added in prep)
Eggs:Scrambled	Eggs, scrambled (made w/ added fat & salt)	No	sat fat, sodium (added in prep)
Flavored Rice	Herb & Butter flavor	No	sat fat, trans, sodium
Frozen Dinners/ Entrees	Macaroni and Cheese (frozen meal)	No	sat fat, sodium
Fruit Drinks/Ades/Lemonade	Orange bkfst drink, RTD	No	added sugar
Fruit Juice	100% Apple Juice	Yes	MEETS
Fruit: Total Apples (fresh in most common)	Apple, raw w/ skin	Yes	MEETS
Fruit: Total Applesauce (canned is most common)	applesauce (sweetened)	Yes	MEETS

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet2021 target criteria***
Fruit: Total Bananas (fresh is most common)	Banana, medium raw	Yes	MEETS
Fruit: Total Grapes (fresh is most common)	Grapes, Red or Green, raw	Yes	MEETS
Fruit: Total Oranges (fresh is most common)	Orange, raw navel	Yes	MEETS
Fruit: Total Peaches (fresh is most common)	Peach, raw	Yes	MEETS
Fruit: Total Strawberries (fresh is most common)	Strawberries, raw	Yes	MEETS
Garlic Bread	Frozen, ready-to-heat garlic bread	No	sat fat, sodium
Ground Beef/Hamburger Dish	Cheeseburger Macaroni	No	sat fat, trans, sodium
Ham/Ham Lunchmeat	Ham/Ham lunchmeat (sliced, regular ~11% fat)	No	sat fat, sodium
Homemade/Mix Variety:AO Appl	Microwaveable Casserole	No	sat fat, sodium
Hot Cereal	Raisin spice instant oatmeal, prepared with water	No	sodium, added sugar
Hot Dog Sandwich	Hot dog (beef, pork) + bun	No	sat fat, sodium
Hot Dogs Not In Bun	Hot dog (beef, pork)	No	sat fat, sodium
Hot Tea	Brewed tea, prepared with water	No	<50% of a food group
Ice Cream	Vanilla	No	sat fat, added sugar
Iced Tea	Iced tea, with lemon flavor	No	added sugar
Leaf Salad	Iceberg lettuce (chopped) w/ salad dressing	No	sodium (from dressing)
Mac/Pasta/Noodles(Plain)	Spaghetti noodles, plain (boiled in salted water)	No	sodium (added in prep)
Macaroni & Cheese (Ex Frz)	Macaroni & Cheese (prepared)	No	sat fat, sodium
Meat/Fish/Poultry/Egg Salad	Egg salad: home prepared with eggs, Mayonnaise, onions, peppers, celery, salt	No	sodium
Mixed/Combination Vegetables (frozen is most common)	Mixed frozen vegetables (peas/corn/carrots/lima, boiled, drained, no additives)	Yes	MEETS
Nuts/Seeds	Mixed nuts/seeds (dry roasted, salted)	No	sodium
Other Legumes (canned is most common)	Beans, canned	No	sodium
Pancakes	Pancake (plain, frozen, ready-to-heat)	No	sodium
Pies	Apple pie, commercially prepared	No	sat fat, trans, sodium, added sugar
Pizza: Restaurant	Pizza (cheese, reg crust)	No	sat fat, sodium
Pizza:Peporoni (No Sausage)	Pizza (pepperoni, reg crust)	No	sat fat, sodium
Plain/Fluid Milk (Ex Alternatives)	2% Milk	No	sat fat
Popcorn	Microwavable Butter Popcorn, microwave	No	sat fat, sodium
Pork Cut:Chops	Pork, center loin (chops), bone-in, cooked, pan-fried	No	sat fat
Potatoes:AO/Unidentified Types	Potato salad, home prepared	No	sat fat, sodium
Potatoes:Baked	Baked potato, flesh w/ skin, margarine added	No	sat fat (from margarine)
Potatoes:Fried	French fries, frozen, oven prepared	No	sodium
Potatoes:Mashed/Creamed	Mashed potatoes w/ milk or water, margarine & salt	No	sat fat, sodium (added in prep)
Pre-Sweet Cereal	Oats and marshmallow	No	sodium, added sugar
Pretzels	Pretzels, salted	No	sodium
Pudding/Custard/Tapioca	RTE pudding Snacks, Chocolate	No	sodium

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet2021 target criteria***
Regular Carbonated Soft Drink	Cola (12oz can)	No	added sugar
Rice:Reg/White	Short grain white rice, made per instructions w/ salt	No	sodium (added in prep)
Saltines	Saltines, regular	No	sodium
Sandwich:Chicken	Chicken patty (frozen, cooked) + bun	No	sat fat, sodium
Sandwich:Chs/Crm Chs	Cheese (2 slices American) + wheat bread (2 slices)	No	sat fat, sodium
Sandwich:Ham	Ham & Cheese Sandwich (Quick Service)	No	sat fat, sodium
Sandwich:Pntbtr/PJ	2T PB + 1T jam + 2 slices bread (wheat)	No	sat fat, sodium, added sugar
Sandwich:Tuna/Salad	Tuna salad + wheat bread (2 slices)	No	sat fat, sodium
Sandwich:Turkey	Deli-Style Turkey (3 slices) + wheat bread (2 slices)	No	sodium
Sausage	Sausage (pork, cooked)	No	sat fat, sodium
Sndwch W/Proc Meat:Bologna	Bologna: chicken/pork/beef (2 slices) + wheat bread (2 slices)	No	sat fat, sodium
Spaghtti/Angl Hr (Ex Can/Frz)	Spaghetti noodles (boiled in salted water) + pasta sauce (RTS)	No	sodium
Steak	Beef, short loin, top loin, steak, all grades, cooked, broiled	No	sat fat
Sweet Muffins	Muffins (blueberry, commercially prep)	No	sat fat, sodium, added sugar
Sweet Rolls/Danish/Coffee Cake	Sweet rolls/danish/coffee (danish pastry, fruit)	No	sat fat, sodium, added sugar
Tacos/Burritos	Beef taco, prepared from kit (2 shells, 1 tbsp taco sauce, 2 tsp seasoning mix)	No	sat fat, sodium
Toaster Pastries	Strawberry unfrosted	No	sat fat, sodium, added sugar
Total Broccoli (fresh is most common)	Broccoli (cooked, boiled, drained, no additives)	Yes	MEETS
Total Carrots (fresh is most common)	Baby carrots (raw)	Yes	MEETS
Total Corn (canned is most common)	Whole Kernel Sweet Corn, canned	No	sodium
Total Green Beans (canned is most common)	Cut Green Beans, canned	No	sodium
Total Peas (canned is most common)	Young Tender Sweet Peas, canned	No	sodium
Total Wheat Breads	Bread (wheat)	No	sodium
Unspecified Type Of Bread	English muffin, plain	No	sodium
Waffles	Waffle (homestyle, frozen, ready-to-heat)	No	sat fat, sodium
White/Butter(Milk) Bread	Bread (white)	No	sodium
Yogurt: All Other/Not Rprtd Yogurt	Strawberry	No	added sugar
Yogurt: Non-Fat Yogurt	Light, strawberry	Yes	MEETS
Yogurt: Reduced/Low Fat Yogurt	Lowfat strawberry	No	added sugar

*Source: The NPD Group, Inc. National Eating Trends® (NET®) in-home food consumption for the two years ending February 2011. NET® classifies all base dish foods and beverages into 88 standard categories; e.g. Vegetables, Fruits, Sandwiches, etc. (Base dish is defined as the final dish consumed). For this study, further sub-classifications of foods were required (e.g. Carrots, Corn, Apples, Oranges, etc.), resulting in over 400 expanded categories. Alcoholic beverages not listed.

Note: Bolded terms indicate that the food product is one of NPD's standard 88 food categories. Remaining items are also based upon NPD data, but required more specific identification to facilitate nutritional and other analysis.

** Column B reflects the precise food (from within each food type) that was used for the IWG compliance analysis. Please note that these specific foods within Column B (often brand-name foods) were chosen as popular foods that well represent the most common form within the given food type (as determined from NPD data), but these specific foods and branded products were not specifically listed in the NPD data.

***Many foods are disqualified under the IWG guidelines for a variety of reasons. This list includes at least one reason that the specified food does not meet the guidelines, but is not exhaustive.

Mr. PITTS. The Chair thanks the gentlelady. I recognize Dr. Wootan for 5 minutes.

STATEMENT OF MARGO G. WOOTAN

Ms. WOOTAN. Good afternoon. I am Margo Wootan, the Director of Nutrition Policy At the Center for Science and the Public Interest. I know that I am supposed to say that I am happy to be here, but actually I am quite concerned about the focus of this hearing and the food advertising and entertainment industry's aggressive lobbying to prevent the Interagency Working Group from providing even voluntary suggestions for how they might improve upon self-regulation of food marketing to kids.

You have heard about some of the progress that has resulted from the Children's Food and Beverage Advertising Initiative, and we support self-regulation and have successfully urged many companies to join the CFBAI. But after 5 years of self-regulation, progress is very modest and insufficient given the huge effect that childhood obesity is having on our children and children's current diets.

From the time before self-regulation was in place until after, the percentage of food ads that are for unhealthy foods has decreased only a little bit, from about 90 percent of food ads to 80 percent.

Recently, the CFBAI announced a common set of nutrition standards for food marketing to children, and that is a positive step forward. But it is only a baby step. Unlike the Interagency Working Group, the industry standards were developed through a closed-door process, with no opportunity for parents, the public, and public health experts to provide input. Under the CFBAI's so-called groundbreaking new standards, Cocoa Puffs, some varieties of Kool-Aid, fake fruit snacks, sugary Popsicles, and many other food that nutrition professionals consider to be unhealthy are considered healthy by the industry.

I worked with Senators Brownback and Harkin on the bipartisan provision that required the formation of the Interagency Working Group, and I know firsthand that the intent was not to supplant self-regulation but simply to strengthen it. The Interagency Working Group guidelines would simply be suggestions for how companies could strengthen their food marketing policies to make them more effective.

In fact, the CDC, USDA, and FDA lack regulatory authority over food advertising to children; and Congress itself took away this authority from the FTC in 1980.

The Interagency Working Group's proposed guidelines are based on science and what is best for children. Those recommendations have overwhelming support from health groups and researchers and from the public. Out of the 29,000 comments that the agencies received, over 28,000 of them are in full support of the proposals by the agencies. The industry has proposed its own new marketing guidelines that are what business wants.

As much as we support the original IWG proposal, we know that there will be a compromise somewhere in between. Unfortunately, for children and families, industry doesn't even want a compromise. They want Congress to step in and kill the Interagency Working Group.

Few deny that childhood obesity and poor diets are national health concerns. We all agree on that. And of course there are multiple contributors to children's poor diets and obesity. But food marketing plays a key role. Industry representatives have been arguing that food marketing isn't effective. But if marketing doesn't work, why are companies concerned about these voluntary standards and why do they spend almost $2 billion a year marketing to children?

Marketing is effective. Studies show it. Companies and parents know it. The reason that marketing has a negative effect on children's diets and health is that the overwhelming majority of products marketed to children are still of poor nutritional value.

Now, of course, parents bear much of the responsibility for feeding their children healthfully. But parents are outgunned by industry that has psychologists, market researchers, great music, cartoon characters, and other sophisticated marketing techniques at its disposal.

A parent's job is hard enough. Companies should support parents by not encouraging our children to desire and to expect to be fed food that undermines their diets and health.

In closing, I ask you to let the Interagency Working Group finish its work; and I urge the food, entertainment, and advertising industries to work with the Interagency Working Group, not against it. The IWG is simply providing companies with much-needed advice on how they could continue to strengthen self-regulation. Then it will be up to the companies to decide what to do next.

Thank you.

[The prepared statement of Ms. Wootan follows:]

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Statement of Margo G. Wootan, D.Sc.
Director of Nutrition Policy
Center for Science in the Public Interest

Before the
House Energy and Commerce Committee
Subcommittee on Commerce, Manufacturing, and Trade
and the
Subcommittee on Health

October 12, 2011

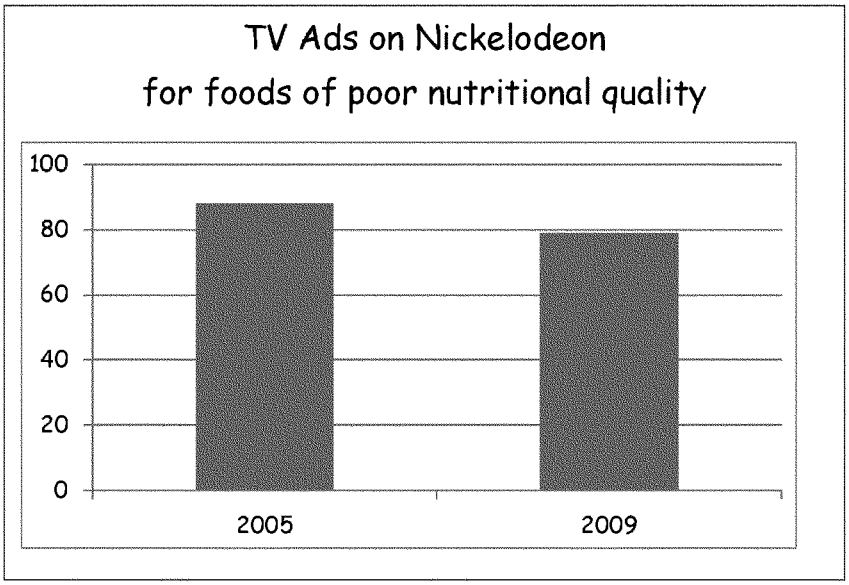
Good morning. I'm Margo Wootan, the director of nutrition policy at the Center for Science in the Public Interest. CSPI is a nonprofit organization that focuses on improving nutrition and food safety for all Americans. I'm supposed to say that I am happy to have the opportunity to testify, but truth is that as a nutrition professional and a mother, I'm troubled by the focus of this hearing and the food, advertising, and entertainment industries' aggressive lobbying to prevent the Interagency Working Group from providing even voluntary recommendations on how industry could strengthen self-regulation of food marketing to children.

Over the last year, I've often wondered, why are companies so afraid of voluntary suggestions on food marketing to children? Perhaps it's because the IWG process has revealed the weakness of the current self-regulatory system.

The Children's Food and Beverage Advertising Initiative has been in place since 2006. CSPI has worked closely with many companies on food marketing to children and has successfully encouraged many companies to join the CFBAI.

Yet, not withstanding those self-regulatory efforts, numerous studies show that the overwhelming majority of food marketed to children is still for foods of poor nutritional value. In a study of Nickelodeon, the most popular children's television station, ads for foods of poor nutritional quality decreased only slightly, from about 90% to 80% of food ads from 2005 and 2009, that is from before self-regulation was in place to after the CFBAI was implemented. A study by researchers at the University of Illinois at Chicago found that while the percentage of television advertisements for unhealthy packaged food products has decreased in recent

years, children's exposure to fast-food advertising increased during this time. They found that in 2009, 86% of food-related ads seen by children were for products high in saturated fat, sugar, or sodium, down from 94% in 2003. In addition, three-quarters of chain restaurants and 80% of entertainment companies that market to children are not addressing unhealthy food marketing to children at all. After five years of self-regulation, progress is modest and insufficient given the high rates of childhood obesity and children's poor diets.



I worked with Senators Harkin and Brownback on the bipartisan 2009 provision that required the formation of the Interagency Working Group on Food Marketed to Children. I know firsthand that the intent was *not to supplant self-*

regulation of food marketing to children, but to *strengthen it*. IWG guidelines would simply be suggestions for how companies could strengthen their food marketing policies to make them more effective. In fact, the Centers for Disease Control and Prevention, U.S. Department of Agriculture, and Food and Drug Administration lack regulatory authority over food advertising. And since 1980, Congress has explicitly forbidden the Federal Trade Commission from issuing regulations for food advertising to children.

The Interagency Working Group's proposed guidelines are based on science and what's best for children. Those recommendations have overwhelming support from health groups and researchers (see letter below in support of the Interagency Working Group from 75 of the nation's leading health researchers and nutrition experts and another letter in support from more than 80 health organizations. In addition, the IWG received 29,000 comments about its recommendations; 28,000 of those comments, from professionals to parents alike, were in full support of the voluntary guidelines.). Industry has proposed its own new marketing guidelines that are what business wants. As much as we support the IWG's proposal, we expect there will be compromise and that the final IWG recommendations will be somewhere in between. I urge Congress to support the work of the agencies to fulfill their congressional directive and finalize specific voluntary guidelines and provide advice to companies on ways to improve the current state of food marketing to children.

Unfortunately for children and families, the food, advertising, and entertainment industries have mounted an aggressive lobbying effort and misinformation campaign to kill the IWG and intimidate the federal agencies involved. Industry asserts that its self-regulation is so perfect that it isn't open to any outside advice on ways to improve the current system. It's disappointing to witness the extent of industry's political maneuvering, the misleading nature of its arguments, and just how far food and entertainment companies have been willing to go to put company's self-interests before the health of our nation's children.

Few deny that childhood obesity and children's poor diets are national health concerns. One-third of children are obese or overweight, increasing their lifetime risk of diabetes, cancer, heart disease, and other costly health problems. Obesity is costly for families, businesses, and governments, costing approximately $150 billion a year, half of which is paid for by taxpayers through Medicare and Medicaid.

Of course there are multiple contributors to those problems, and we and others are working on a number of possible solutions. However, food marketing plays a key role. A comprehensive review by the National Academies' Institute of Medicine and numerous other studies show that food marketing affects children's food preferences, food choices, diets, and health. And watching commercial television is associated with obesity.

More recent studies continue to build on and strengthen that evidence base. Studies show that marketing increases children's consumption of soda, snack foods, and other unhealthy foods. Research also shows that marketing causes children to

like the taste of marketed food more than they otherwise would and makes it harder for parents to feed their children healthfully. In a study published just last week, researchers found that 71% of children who saw a commercial for a fast-food meal including French fries chose the fries if their parents didn't try to influence their choice. When this group of children was encouraged by their parents to choose apples, 55% did. Among the children who saw a commercial for a fast-food meal including apples, 46% picked French fries when parents didn't try to influence their choice, and 33% chose the fries when their parents encouraged the more healthful selection.

Industry representatives have been arguing that food marketing isn't effective. If marketing doesn't work, why are companies so worried about these voluntary marketing standards and why spend $2 billion year on marketing their products to children? The reason marketing has a negative effect on children's diets is that the overwhelming majority of products marketed to children is of poor nutritional value.

Recently, the CFBAI announced a common set of nutrition standard for food marketing to children. That's a positive step forward. However, unlike the Interagency Working Group, the industry standards were developed through a closed-door process, totally by industry, and without any input from the public or public health experts.

Some of the proposed industry standards are reasonable, such as those for calories, saturated fat, and trans fat. Others are weak, including those for sodium,

sugars, and how the food provides a meaningful positive nutritional value. Under the CFBAI's new standards, Cocoa Puffs, some varieties of Kool-Aid, sugary imitation fruit snacks, and sugary Popsicles are considered healthy. Seems like companies could use a little advice.

Of course parents bear much of the responsibility for feeding their children healthfully. But we are outgunned by industry that has psychologists, market research, great music, cartoon characters, and other sophisticated marketing techniques at its disposal. Parents' job is hard enough. Companies should support parents by not encouraging our children to desire and expect to be fed food that undermines their diets and health.

In closing, I ask you to let the Interagency Working Group finish its work. And I urge the food, entertainment, and advertising industries to work with the Interagency Working Group, not against it. The IWG is simply giving companies some much-needed advice on how they could continue to strengthen self-regulation. Then, it will be up to companies what to do next.

Thank you for the opportunity to testify.

July 14, 2011

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Subject: Interagency Working Group on Food Marketed to Children: Proposed Nutrition Principles, General Comments, and Proposed Marketing Definitions: FTC Project No. P094513

Dear Secretary Vilsack, Chairman Leibowitz, Director Frieden, and Commissioner Hamburg:

We, the undersigned, strongly support the Interagency Working Group (IWG) on Food Marketed to Children's proposed nutrition principles and marketing definitions. This is an important time to address food marketing to children and youth. Our nation faces unprecedented rates of obesity and other nutrition-related diseases.

Food companies have taken steps to address food marketing, but the current self-regulatory program is flawed. Studies show that the overwhelming majority of foods marketed to children are still high in calories, saturated fat, sugars, or salt. The IWG's guidelines will provide a strong model for companies to develop or strengthen marketing policies and address current weaknesses in the self-regulation of food marketing to children.

In developing the standards, the IWG fulfilled the congressional directive set out in the 2009 Omnibus Appropriations Act (H.R. 1105). As directed by Congress, the IWG has carefully studied food and beverage marketing and developed a set of principles that are strongly based in science and consensus nutrition and marketing recommendations from authoritative sources.

We enthusiastically support the IWG's proposal to use a food-based approach to ensure that the foods marketed to children make a meaningful contribution to a healthful diet. That approach is essential given the basic premise of the *Dietary Guidelines for Americans (DGA)*: that nutrient needs be met primarily by

consuming nutrient-dense foods. To be consistent with the *Dietary Guidelines*, those recommendations should be based on serving sizes of foods (Principle A, option 2), except in the case of whole grains, for which the *Dietary Guidelines* makes a recommendation based on percentages (50% of grains should be whole grains; i.e., use Principle A, option 1 for grains).

While we strongly support the overall proposed nutrition principles, we offer several recommendations to clarify and strengthen them:

- Revise the suggested timeframe for implementation of the proposed nutrition principles to two-years, with a five-year timeframe for implementation of the final sodium standards. Allowing companies ten years to fully comply with the nutrition principles would mean that a whole generation of children would not be protected by the IWG recommendations.

- Clarify that the proposed nutrition principles apply to *all* foods marketed to children, not just those most heavily marketed to them. It would be unfair to companies, confusing to parents, and unhelpful to children to have the principles apply to some marketed foods and not others.

- Include calorie limits. The *DGA* stresses that obesity results from a caloric imbalance, not a nutrient imbalance.

- Combine fish, extra lean meat, poultry, eggs, nuts, and beans into a single food group, to be consistent with MyPlate and the *DGA*. Separating those groups overemphasizes protein, which is not a nutrient of public health concern for children.

- We strongly support the IWG's interim and long-term sodium benchmarks for individual foods. We suggest that the IWG adjust the standard for main dishes and add a separate standard for meals.

We support the IWG's comprehensive view of marketing to children and its proposal to define child-directed marketing according to the existing definitions developed by the FTC for its expenditures studies (*Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation,* Appendix B), with a few exceptions as noted below. However, we strongly recommend that the IWG adapt those to develop a set of clearly-stated model definitions that could be easily adopted by companies and incorporated, as is, into company marketing policies. This would make it easier for companies to apply the definitions and increase consistency between company marketing policies.

We applaud Congress and the IWG for considering marketing targeted to both children and adolescents. We strongly support the IWG's proposal to fully apply the nutrition principles to all marketing approaches aimed at children ages 2-11. Research shows that teens also are uniquely vulnerable to food marketing and

are aggressively targeted by food marketers. We urge companies to be responsible in how they market to teens and ask the IWG to include a section in the self-regulatory marketing principles on the unique vulnerabilities of adolescents to marketing, especially digital marketing.

We urge the IWG to make the following additions and clarifications to the final marketing definitions:

- Apply subjective criteria to *all* types of marketing approaches. Subjective criteria (such as whether the marketing includes child-oriented themes) should be applied not only to Internet, on-package, premiums, events, celebrities, and mobile devices, but also to television, radio, and print advertisements, as well as to movies, toys/premiums, and the use of licensed characters.

- Define brand marketing and require brand marketing to meet IWG nutrition principles. Many marketing efforts aimed at children do not promote individual products, but instead promote a line of products, one brand within a company, or a whole company.

- Provide a more detailed definition of in-school marketing to clearly delineate the wide variety of marketing techniques that are covered on the whole school campus for the extended school day. Include preschools, and elementary, middle, and high schools in that definition.

- Make clear that the definition of premiums includes toys used to promote restaurant meals; toy premiums make up more than half of fast-food marketing expenditures.

- Include PG-rated movies in the definitions of product placements and movie advertising. Child-directed movies have undergone a noticeable "ratings creep" over the past several years, with many child-directed movies now rated PG.

We urge the IWG to address the above issues and look forward to the release of the final recommendations by the end of 2011. We also urge the IWG to review and update the nutrition principles and marketing definitions every five years, given the changing nature of the media landscape and food environment for children.

Thank you for taking up this serious and important issue. As the Institute of Medicine and numerous researchers have demonstrated, marketing to children influences their food preferences, purchases, and ultimately what they eat. Right now, their environment is filled with marketing for unhealthy foods. We hope our nation's food marketers will make children's health a priority and adopt these voluntary principles.

Respectfully,

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American College of Preventive Medicine

American Dietetic Association

American Heart Association

American Institute for Cancer Research

American Public Health Association

American School Health Association

American Society of Bariatric Physicians

Association of State and Territorial Health Officials

Association of State and Territorial Public Health Nutrition Directors

Berkeley Media Studies Group, a project of the Public Health Institute

Black Women's Health Imperative

Boston Public Health Commission

California Association of Nutrition and Activity Programs

California Center for Public Health Advocacy

California Pan-Ethnic Health Network

Campaign for a Commercial-Free Childhood

CATCH - Coordinated Approach to Child Health

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Open Letter on the First Amendment and
the Interagency Working Group Principles

The undersigned professors of law write to convey our conclusion that the draft nutrition principles issued this spring by the federal Interagency Working Group on Food Marketed to Children (IWG) embody a constitutionally permissible set of government recommendations. Despite a number of comments submitted to the IWG claiming the contrary, the nutrition principles, in their current form, do not violate the First Amendment.

Simply put, voluntary principles that food and beverage businesses are free to ignore do not "abridg[e] the freedom of speech."[1] The draft nutrition principles pose no threat to any rights guaranteed by the First Amendment.

The Free Speech Clause applies only to government mandates restricting or compelling private speech.[2] The draft nutrition principles, which are designed "to guide industry self-regulatory efforts,"[3] do not restrain or compel anyone's speech. They are not, in fact, government regulation at all. Instead, they are the speech of the government itself.

The Supreme Court has made clear that "the Government's own speech . . . is exempt from First Amendment scrutiny."[4] The principles were issued in response to a congressional request for a "report" containing "findings and recommendations."[5] The agencies have now issued their draft report, and the principles constitute their draft recommendations.

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[1] 1 U.S. Const. amend. 1.
[2] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324 (2010).
[3] Interagency Working Group, Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts, Request for Comments, http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf.
[4] See Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 553 (2005); Donaggio v. Arlington Cty., Va., 880 F.Supp. 446, 453-54 (E.D.Va. 1995).
[5] Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84.

The report and recommended nutrition principles contain no mandates. None of the four agencies will seek to "enforce" the principles, which lack any legally binding effect under agency statutes or the Administrative Procedure Act. Accordingly, no federal agency can impose legal repercussions on a company for following the IWG principles in only a piecemeal fashion, for ignoring them entirely, or—for that matter—mounting a wide-ranging public relations campaign disparaging them, as the food and beverage industry has done.

Nonetheless, attorneys retained by industry have invoked a variety of First Amendment arguments, a tactic with the potential effect of diverting policymakers' attention from the substance of the draft nutrition principles. Nothing in the cases cited by these commenters bears on the IWG principles. The doctrines of "informal censorship," "unconstitutional conditions," and "de facto coercion" are completely inapt. The government is neither explicitly nor implicitly forcing industry to espouse any messages or to silence its expression. The IWG is not requiring loyalty oaths,[6] threatening criminal prosecution,[7] or confiscating real estate.[8] It is not establishing or invoking a legal regime. It is simply following a congressional mandate to issue a report with recommendations based on the agencies' expert analysis of the relevant facts.

The IWG is better characterized as a routine governmental advisory body than an oppressive censorship panel. The situation here is akin to the Environmental Protection Agency promoting the Energy Star guidelines for energy efficiency[9] or the Department of Agriculture announcing the new MyPlate recommendations.[10] The IWG is making suggestions regarding the content of food marketed to children in the same way the National Institutes of Health has called for a reduction in youth exposure to smoking in movies;[11] the Surgeon General has attempted to promote breastfeeding by encouraging hospitals to refuse infant formula advertisements; [12] and Congress has called on the entertainment industry to reduce the exposure of underage audiences to "programs with unsuitable alcohol content."[13]

The conclusion is straightforward. The principles proposed by the IWG do not violate the First Amendment.

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[6] Speiser v. Randall, 357 U.S. 513 (1958); but see Rust v. Sullivan, 500 U.S. 173 (1991).
[7] Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); but see Meese v. Keene, 481 U.S. 465 (1987).
[8] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), but see City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009).
[9] http://www.energystar.gov
[10] http://www.choosemyplate.gov.
[11] National Institutes of Health, Healthy People 2020 objectives, http://healthypeople.gov/2020/topicsobjectives2020/pdfs/tobaccouse.pdf, TU-18.
[12] The Surgeon General's Call to Action to Promote Breastfeeding (2011) at 43, http://www.surgeongeneral.gov/topics/breastfeeding/calltoactiontosupportbreastfeeding.pdf.
[13] The Sober Truth on Preventing Underage Drinking (STOP) Act, 42 USC § 290bb-25b, 120 Stat. 2890, Public Law 109-422 (2006).

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September 27, 2011

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Dear President Obama:

We, the undersigned researchers with expertise in nutrition, marketing, medicine, and public health, write to ask you to ensure that the Interagency Working Group (IWG) on Food Marketed to Children completes its congressionally required task to release a strong set of nutrition guidelines and marketing definitions for food marketed to children.

You and the First Lady have helped Americans understand that child nutrition and obesity are national health concerns, with 1 in 3 children either overweight or obese. While numerous factors contribute to obesity and children's poor diets, food marketing plays a key role. The Institute of Medicine's comprehensive study of 30 years of research concluded that food marketing affects children's food choices, food preferences, diets, and health.[i] The $2 billion a year that food companies spend marketing to children is testament to the fact that food marketing works.[ii]

Many major food companies are recognizing the deleterious consequences of their marketing. Seventeen companies participate in self-regulation through the Council of Better Business Bureaus' (CBBB) Children's Food and Beverage Advertising Initiative (CFBAI). While the CFBAI has prompted modest reductions in unhealthy food marketing to children and product reformulation, studies show that the vast majority of marketed products remain high in calories, saturated fat, sodium, or added sugars and/or are low in fruits, vegetables, and whole grains.[iii,iv,v] In 2009, with the industry's self-regulatory program in effect, 86% of food ads seen by children featured products high in saturated fat, sugar, or sodium, down from 94% in 2003 (before self-regulation).[vi] At that rate, children will not be fully protected from unhealthy food ads until 2033.[iv]

To make self-regulation more effective, the Federal Trade Commission and public health advocates have called on companies to 1) strengthen their nutrition standards for marketing to children, 2) adopt a consistent set of nutrition criteria for food marketing, and 3) expand the scope of marketing to cover all approaches aimed at children. An essential step toward helping companies address the key weaknesses in the current self-regulatory approach is for the IWG to finalize and release a clear set of marketing guidelines.

We understand that the CFBAI recently released a new set of food marketing standards. The adoption of a single set of nutrition guidelines is a positive step forward. However, the CFBAI guidelines permit many unhealthy foods to be marketed to children. For instance, though the *Dietary Guidelines for Americans* stresses that nutrient needs should be met primarily by consuming nutrient-dense foods, low-nutrition foods can meet the CFBAI standards if companies fortify them with small amounts of nutrients, including nutrients that are not lacking in children's diets.

While industry has urged the Administration to abandon the IWG, we strongly urge the federal agencies to complete the process to protect children and support parents' ability to feed them healthfully. And we are not alone in this request; we understand that the overwhelming majority of public comments submitted to the IWG support the proposed marketing principles.

We urge you and your Administration to finalize and release voluntary food marketing guidelines as the Congress requested and so many parents, health professionals, and researchers support. The nation's children are counting on you.

Respectfully,

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[i] McGinnis MJ, Gootman JA, Kraak IA. *Food Marketing to Children and Youth: Threat or Opportunity?* National Academies Press, 2006. Available from: http://www.nap.edu/catalog.php?record_id=11514.
[ii] Federal Trade Commission (FTC). *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation.* Washington, D.C.: FTC, 2008.
[iii] *Food and Beverage Marketing to Children and Adolescents: An Environment at Odds with Good Health.* Robert Wood Johnson Foundation; April 2011. Available from: http://www.rwjf.org/files.
[iv] Kunkel D, McKinley C, Wright P. *The Impact of Industry Self-regulation on the Nutritional Quality of Foods Advertised on Television to Children.* Children Now, December 2009. Available from http://www.childrennow.org/uploads/documents/adstudy_2009.pdf.
[v] Batada A and Wootan MG. *Better-For-Who? Revisiting Company Promises on Food Marketing to Children.* CSPI, 2009. Available from: http://cspinet.org/new/pdf/pledgereport.pdf.
[vi] Powell L, Schermbeck R, Szczypka G, Chaloupka F, Braunschweig C. *Trends in the Nutritional Content of TV Food Advertisements Seen by Children in the US: Analyses by Age, Food Categories and Companies. Archives of Pediatrics and Adolescent Medicine*, in press.

Mr. PITTS. The Chair thanks the gentlelady.

The ranking member has a unanimous consent request.

Mr. PALLONE. Thank you, Mr. Chairman.

Mr. Olson from Texas requested unanimous consent to submit an FTC document into the record during the questioning of the first panel. I just wanted to note a few things about this document. There was no signature on it, no time stamp, no evidence that this was a final document. My staff has asked for the origin of the document, and we have not heard anything yet. And, without further information, this isn't even an internal memo. It is a draft of an internal memo from staff to their chairman.

I am not really sure why the majority would want to enter it into the record. However, in the interests of full transparency, the FTC has no objection to entering it into the record. Therefore, I have no objection either. But, in doing so, I just want to make it clear that I don't believe the document merits a great deal of attention from the committee.

With that, I would withdraw my objection.

Mr. PITTS. The Chair thanks the gentleman. Without objection, it will be entered into the record.

And, Dr. Kunkel, welcome.

STATEMENT OF DALE KUNKEL

Mr. KUNKEL. Thank you.

Let me start by asking, why are we here today? Based upon much of the discussion so far, one might surmise it is to argue about where to draw the line in terms of defining foods as healthy, or maybe to debate the proper role of government in people's lives.

While both of those issues may be central to what we have discussed today, the fundamental reason why we are here is that the Nation faces a staggering epidemic of childhood obesity; and, contrary to assertions we have heard from some, there is compelling evidence that food marketing to children contributes significantly to the crisis.

There are many elements involved with the obesity epidemic. Fewer family meals, increased reliance on fast foods, less physical activity, and a host of other elements all contribute to the problem. But we now know with great confidence that children's exposure to advertising for unhealthy foods stands prominently among the factors that contribute to childhood obesity. That evidence-based conclusion should remain front and center in the discussion about the fate of the IWG guidelines.

In 2005, I served on an Institute of Medicine panel that produced this report, which has been referenced quite a bit today. More than a dozen of the Nation's leading scientists in nutrition, child development, marketing, and media effects systematically reviewed every scientific study that has been conducted on the topic, reaching back more than a quarter century.

Among our key findings that were unanimously reported: One, children are heavily exposed to food advertising; two, the vast majority of child-targeted food ads promote obesogenic products that are high in added fat, salt, and sugar; three, child-targeted food advertising is highly effective; and, four, children who see more food

advertising have a significantly higher risk of succumbing to obesity.

Based upon that overall body of evidence, the IOM report concluded that food and beverage marketing practices put children's health at risk. It is well-known that the IOM report had several recommendations. One was that food marketers should shift their children's product portfolios to healthier foods, and two is that they should similarly shift their advertising practices.

But the IOM issued yet another key recommendation that has largely been overlooked, and I want to draw your attention to that today. It explicitly recommended that if voluntary efforts failed to shift advertising during children's television to healthy foods, Congress should enact legislation mandating that shift on both broadcast and cable television.

That report was released more than 5 years ago. That is when the IOM rang the bell that this is a problem that is harming our Nation's children's health. That has certainly been ample time for the industry to respond effectively.

What we haven't heard anything about today is what does the evidence say regarding how well industry self-regulation is achieving the goal of shifting child-targeted food advertising to healthy foods? So on this point I have some evidence that—in fact, the evidence across a number of studies is strong and consistent. The large majority of child-targeted food ads still promote unhealthy products that should not be a part of a regular diet.

Prior to the advent of self-regulation, my research shows that 84 percent of all foods advertised on TV to children were for products in the poorest of three nutritional categories used by DHHS; and that consists mostly of highly sugared cereals, beverages, snacks, and fast foods. If self-regulation was achieving its goal perfectly, the percentage of foods that fall in that category now should come down from 84 percent to zero. If self-regulation was even moderately effective, that proportion should at least be below 50 percent. But my studies show that in 2007, following self-regulation, the proportion of foods marketed to children that remained unhealthy was 79 percent, and in 2009 it was still at 72 percent.

I will soon release some findings from research I have conducted this year that indicate more of this pattern of inching in tiny steps in the desired direction, while falling very far short of the actual goal.

In sum, industry self-regulation has not yet achieved any meaningful improvement in the nutritional quality of the foods marketed to children; and at the current rate of reform my data indicate it will take until the year 2033 for self-regulation to eliminate all child-targeted advertising for foods in the poorest nutritional category, all of which are products that should not be part of a child's regular diet.

But instead of pursuing the regulation that the IOM report recommends, this committee has called a hearing that questions the mere recommendations that industry should be more responsible in their billion-dollar campaigns to influence children's eating patterns. It seems to me that this committee has lost sight of the fundamental cause for concern in this realm, that the marketing of

unhealthy foods to children contributes to the epidemic of childhood obesity.

[The prepared statement of Mr. Kunkel follows:]

Statement of Dr. Dale Kunkel, Ph.D.
Professor of Communication
University of Arizona

Food Marketing: Can "Voluntary" Government Restrictions Improve Children's Health?

Hearing before the
House Energy and Commerce Committee
Subcommittee on Commerce, Manufacturing, and Trade
and
Subcommittee on Health

October 12, 2011

My name is Dale Kunkel. I am a Professor of Communication from the University of Arizona. I have studied the effects of media on children for more than 25 years, and this marks the 20th Congressional or federal agency hearing at which I have testified.

Why are we here today? Based upon much of the recent policy dialogue about food marketing to children, one might surmise it is to argue about where to draw the line in terms of defining foods as healthy, or to debate the proper role of government in people's lives. But both of those answers are off the mark. While such issues may be central to *what* we discuss today, the fundamental reason *why* we are here is that the nation faces an unprecedented epidemic of childhood obesity, and there is compelling evidence that food marketing to children contributes significantly to the crisis.

A few years ago, landmark reports from the U.S. Surgeon General[1] and the Institute of Medicine (IOM) of the National Academy of Sciences[2] first brought this epidemic to public attention. Medical researchers and other scientists have probed for the causes, and there certainly are many. Fewer family meals, increased reliance on fast foods as part of the American diet, less physical activity, and a host of other elements all contribute to the problem.

But we now know that children's exposure to advertising for unhealthy foods stands prominently among the factors that lead to childhood obesity. *That evidence-based conclusion must remain front and center in the discussion about the fate of the IWG guidelines.* Indeed, that base of evidence already argues strongly for much more stringent government action than merely issuing voluntary guidelines for

industry behavior, such as the IWG effort. Before explaining why that is so, let me first summarize what we know about how food marketing currently contributes to childhood obesity.

In 2004, when the Congress learned about the startling growth of childhood obesity, it commissioned a study to ascertain whether food advertising to children was contributing to the problem. That study was conducted by an IOM panel of more than a dozen leading scientists in nutrition, child development, marketing, and media effects.[3] I was honored to serve among that group, which systematically reviewed every scientific study conducted on the topic, reaching back more than a quarter-century.

Among the key findings of the unanimous report issued by the IOM committee are that:

1. *Children are heavily exposed to advertisements promoting food products.*

The FTC found that children see roughly 5,500 food ads annually on TV, or about 15 per day.[4] The Kaiser Family Foundation placed the estimate slightly lower for younger children, and substantially higher (7,709 annually) for older children.[5] Modest declines in these numbers have occurred recently, while at the same time advertisers have pioneered new marketing strategies in other media, such as using web-based advergames to promote products to children. Over half of all child-targeted food ads on TV now encourage children to visit their company's web site.[6]

2. *The vast majority of child-targeted food advertising promotes obesogenic products that are high in added fat, salt, and sugar.*

Most food commercials targeted at children promote products that nutritionists label as "low-nutrient, calorie-dense," or what the lay public generally terms "junk food."[7] Two out of every three (66%) cereals advertised to children fail to meet national nutrition standards, particularly with regard to added sugar.[8] Nearly all (98%) food advertisements viewed by children and 89% viewed by adolescents are for products high in fat, sugar, or sodium.[9] In contrast, genuinely healthy foods that should be a part of a regular diet are almost never advertised to children.[10] For example, less than 1% of a sample of more than 500 food ads aired on children's programs in 2009 featured products such as fruits, vegetables, whole grain breads, or other healthy items recommended for a child's daily diet.[11]

3. Child-targeted food advertising is highly effective.

More than 100 studies demonstrate that food marketing is largely successful at influencing children, which is hardly a surprising outcome given the billions of dollars the industry invests in such efforts. In summarizing the overall evidence, the IOM concluded there is strong evidence that advertising influences the short-term food consumption of children aged 2-11, and the regular diet of 2-5 year-olds.[12]

4. Children who see more food advertising have a significantly higher risk of succumbing to obesity.

The IOM report found that television exposure is significantly associated with adiposity in children of all ages as well as teens, and that advertising was the likely agent causing the relationship. Further evidence published since the IOM report strengthens the indictment against food marketing as the causal mechanism linking TV exposure and childhood obesity. For example, researchers at UCLA and

the University of Washington found that children's time spent watching commercial television was linked to overweight and obesity, but that the relationship did not hold for time spent with noncommercial content.[13] The conclusion that children's exposure to unhealthy food advertising contributes to their weight status is now widely drawn. The final report of the White House Task Force on Childhood Obesity incorporates this perspective, asserting that "new or revised rules to limit advertising during children's programming may be helpful or even necessary to fully address the childhood obesity epidemic."[14]

In sum, there are literally dozens of studies that support each of these key findings, and collectively hundreds of scientific publications that uphold these conclusions. Based upon that foundation of evidence, the IOM judged that "food and beverage marketing practices geared to children and youth are out of balance with healthful diets and contribute to an environment that puts their health at risk."[15]

The IOM report also offered recommendations for policy and industry practice. Two key recommendations targeted at industry have received plenty of attention. One called for food marketers to shift their child-oriented product portfolios to healthy foods, and the other asked the industry to similarly shift their advertising efforts.[16] But the IOM issued yet another key recommendation that has largely been overlooked, and I wish to draw your attention to it today. It explicitly recommended that:

> "If voluntary efforts related to advertising during children's television programming are unsuccessful in shifting the emphasis away from

high-calorie and low-nutrient foods and beverages to the advertising of healthful foods and beverages, Congress should enact legislation mandating the shift on both broadcast and cable television."[17]

That report was released more than *five* years ago. It clearly served as a catalyst for the food marketing industry to initiate its self-regulatory project in an effort to avoid government regulation. And as we have heard today, there is no shortage of rhetoric and promises about the industry's initiative. What we haven't heard about today is -- what does the evidence say regarding how well industry self-regulation is achieving the goal of shifting child-targeted food advertising to healthy products?

On this point, the evidence is strong and consistent across numerous studies. Despite widespread compliance with industry self-regulatory pledges, the large majority of child-targeted food ads still promote unhealthy products that should not be part of a regular diet. Here's a quick overview of some of the key findings.

Extensive research I have conducted since 2005 shows that prior to the advent of self-regulation, 84% of all foods advertised on television to children were for products in the poorest nutritional category, which consists mostly of highly sugared cereals, beverages, and snacks, along with fatty and salty fast foods.[18] The U.S. Department of Health and Human Services labels these items "Whoa" products as part of its nutritional education materials for parents, and recommends that they should be consumed only once in awhile, but not on a regular basis. If self-regulation was achieving its goal perfectly, the percentage of foods advertised to children that fall in this category should come down from 84% to zero. If self-

regulation was even moderately effective, that proportion should at least be below 50%.

But my studies show that in 2007, the proportion of foods marketed to children that remained unhealthy was 79%, and in 2009 it was still at 72%. I will soon release findings from research conducted in 2011 that indicate more of this pattern of inching in tiny steps in the desired direction, while falling far, far short of the actual goal.

Let me be clear about the implications of this evidence. The industry says *all* of the foods it advertises to children under its self-regulatory initiative are healthy; but my independent analysis, applying U.S. government nutritional standards, says more than two of every three advertised products fall in the poorest nutritional category. This disconnect underscores the deficient nature of the nutritional criteria the industry employs to define a healthy food for purposes of self-regulation. That's exactly why independent standards such as the IWG guidelines are essential to address this problem.

There are numerous other studies that examine the impact of self-regulation, but use alternative criteria to judge the nutritional quality of advertised foods. All found essentially the same result, and came to the identical conclusion as that offered by my research; that is, industry self-regulation has failed to accomplish any meaningful improvement in the nutritional quality of foods marketed to children.[19] Indeed, at the current rate of reform, my data indicate that it would take until the year 2033 for self-regulation to eliminate all child-targeted advertising for products in the poorest nutritional category, so-called "Whoa" foods.

Why isn't self-regulation working more effectively now, more than five years after the release of the IOM report? Part of the problem is that self-regulation applies only to companies that volunteer for it. The evidence shows that between one-quarter and one-third of televised advertising to children originates with companies that refuse to participate in the industry initiative. But the main reason self-regulation falls short is that to date, companies have relied upon inconsistent and inadequate definitions of what constitutes a "healthy food."

We've heard from the industry that the CFBAI is moving to establish uniform nutritional standards. It's good to hear that one company can no longer categorize a product as healthy when that same item would be considered unacceptable according to the standards for one of their competitors. But arguably the biggest reason why self-regulation is clearly failing to accomplish any meaningful improvement in the nutritional quality of foods marketed to children is that industry defines the standards for a "healthy" product in generous terms that favor its own economic interests, rather than in terms that protect child health.

That is exactly why strong IWG guidelines are essential. The fact that the IWG standards would exclude many foods currently marketed to children merely underscores the industry maneuver of creatively re-labeling foods that are fundamentally unhealthy as "better-for-you" because they have removed a small proportion of the undesirable ingredients. Taking 20 or 30% of the sugar out of an candy or snack may make it "better-for-you" than it used to be, but it surely doesn't make it good for you. Only products that are actually good for you to consume should qualify as genuinely healthy foods.

In his testimony today, Mr. Vladeck of the FTC observed that his agency seeks to find "balance between what is best for children's health and what is workable for industry." With all due respect, that places his position quite some distance from the scientific recommendations of the Institute of Medicine, which called upon Congress to restrict advertising of unhealthy food products to children if the industry could not achieve it voluntarily, and in short order. We've waited five years so far, and we are nowhere close to success in this effort. But instead of the Congress pursuing the regulation recommended by the IOM, this committee is conducting a hearing that calls into question federal efforts to devise mere recommendations for industry to be more responsible in their billion-dollar campaigns to influence children's eating patterns. It seems to me this committee has lost sight of the fundamental cause for concern in this realm: that the marketing of unhealthy foods to children contributes to the epidemic of childhood obesity. As I said earlier, I urge the committee to hold that concern front and center as it pursues deliberations on this topic.

Finally, let me set the record straight on the subject of caveats. Certain industry officials are claiming that the scientific evidence documenting the adverse effects of advertising unhealthy foods to children is equivocal. In a classic "deny-the-science" tactic, they quote an isolated passage of a 500-page document in misleading and irresponsible fashion. It doesn't require any scientific credentials to appreciate that an expert panel from the National Academy of Science would not unanimously recommend to Congress that it should ban or severely restrict televised food advertising to children on the basis of equivocal evidence. The

findings from the IOM report are clear, compelling, and warrant urgent action. The caveat to truly worry about in this issue area is the industry's current effort to soften the definition of what constitutes a healthy food under the IWG guidelines.

The nation's leading public health professionals have devised guidelines based on solid nutrition science, but the industry complains that following these recommendations would reduce its profits. Industry wants business as usual. If we pursue that path, let's be clear about the choice we are making, which would privilege food industry profits over child health. If that is the outcome of this debate, it is the nation's children that will suffer, and the nation's taxpayers who will be forced to shoulder the increased health care costs required to treat the growing number of obesity-related maladies.

REFERENCES

1. Office of the U.S. Surgeon General. (2001). *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity.* Rockville, MD: Public Health Service.
2. Institute of Medicine. (2005). *Preventing childhood obesity: Health in the balance*. Washington, DC: The National Academies Press.
3. Institute of Medicine. (2006). *Food marketing to children and youth: Threat or opportunity?* Washington, DC: National Academies Press.
4. Holt, D., Ippolito, P., Desrochers, D., & Kelley, C. (2007). *Children's exposure to TV advertising in 1977 and 2004: Information for the obesity debate.* Federal Trade Commission Bureau of Economics Staff Report. Retrieved from http://www.ftc.gov/os/2007/06/cabecolor.pdf
5. Gantz, W., Schwartz, N., Angelini, J., & Rideout, V. (2007). *Food for thought: Television food advertising to children in the United States.* Menlo Park, CA: Kaiser Family Foundation. Retrieved from http://www.kff.org/entmedia/7618.cfm
6. Kunkel, D., McKinley, C., & Wright, P. (2009). *The impact of industry self-regulation on the nutritional quality of foods advertised on television to children.* Oakland, CA: Children Now.
7. Larson, N., & Story, M. (2008). Food and beverage marketing to children and adolescents: What changes are needed to promote healthy eating habits? Princeton, NJ: Robert Wood Johnson Foundation.

   Palmer, E., & Carpenter, C. F. (2006). Food and beverage marketing to children and youth: Trends and issues. *Media Psychology, 8(2),* 165-190.

   Story, M., & French, S. (2004). Food advertising and marketing directed at children and adolescents in the US. *International Journal of Behavioral Nutrition and Physical Activity, 1(3)*, 1-17. doi:10.1186/1479-5868-1-3
8. Schwartz, M. B., Vartanian, L. R., Wharton, C. M., & Brownell, K. D. (2008). Examining the nutritional quality of breakfast cereals marketed to children. *Journal of the American Dietetic Association, 108(4),* 702-705. doi:10.1016/j.jada.2008.01.003
9. Powell, L., M., Szczypka, G., & Chaloupka, F. J. (2007). Adolescent exposure to food advertising on television. *American Journal of Preventive Medicine, 33(4,Suppl),* S251-S256.
10. Gantz, W., Schwartz, N., Angelini, J., & Rideout, V. (2007). *Food for thought: Television food advertising to children in the United States.* Menlo Park, CA: Kaiser Family Foundation. Retrieved from http://www.kff.org/entmedia/7618.cfm

    Powell, L., M., Szczypka, G., & Chaloupka, F. J. (2007). Adolescent exposure to food advertising on television. *American Journal of Preventive Medicine, 33(4,Suppl),* S251-S256.

    Stitt, C., & Kunkel, D. (2008). Food advertising during children's television programming on broadcast and cable channels. *Health Communication, 23,* 573-584.
11. Kunkel, D., McKinley, C., & Wright, P. (2009). *The impact of industry self-regulation on the nutritional quality of foods advertised on television to children.* Oakland, CA: Children Now.
12. Institute of Medicine. (2006). *Food marketing to children and youth: Threat or opportunity?* Washington, DC: National Academies Press.
13. Zimmerman, F. J., & Bell, J. F. (2010). Associations of television content type and obesity in children. *American Journal of Public Health, 100,* 334-340.
14. White House Task Force on Childhood Obesity. (2010). *Solving the problem of childhood obesity within a generation. Report to the President.* Washington, DC: Executive Office of the President of the United States, p. 31. Available at: http://www.letsmove.gov/tfco_fullreport_may2010.pdf
15. Institute of Medicine. (2006). *Food marketing to children and youth: Threat or opportunity?* Washington, DC: National Academies Press, p. 374.
16. Institute of Medicine. (2006). *Food marketing to children and youth: Threat or opportunity?* Washington, DC: National Academies Press.
17. Institute of Medicine. (2006). *Food marketing to children and youth: Threat or opportunity?* Washington, DC: National Academies Press, pp. 14-15.
18. Kunkel, D., McKinley, C., & Wright, P. (2009). *The impact of industry self-regulation on the nutritional quality of foods advertised on television to children.* Oakland, CA: Children Now.
19. Batada, A., Seitz, M. D., Wootan, M., & Story, M. (2008). Nine out of 10 food advertisements shown during Saturday morning children's programming are for foods high in fat, sodium, or added sugars, or low in nutrients. *Journal of the American Dietetic Association, 108,* 673-678.

    Harris, J. L., Weinberg, M. E., Schwartz, M. B., Ross, C., Ostroff, J., & Brownell, K. D. (2010). *Trends in television food advertising: Progress in reducing unhealthy marketing to young people?* New Haven, CT: Rudd Center for Food Policy and Obesity, Yale University.

    Powell, L.M., et al. (2011). Trends in the nutritional content of television food advertisements seen by children in the United States. *Archives of Pediatric and Adolescent Medicine,* doi:10.1001/archpediatrics.2011.131

Mr. PITTS. The Chair thanks the gentleman, and now recognizes Dr. Irons for 5 minutes for your opening statement.

STATEMENT OF JOHN S. IRONS

Mr. IRONS. Great. Thank you, and good afternoon. Thank you for the invitation to speak with you today about this very important topic.

My name is John Irons. I am the research director at the Economic Policy Institute. My organization, the Economic Policy Institute, has been a leading nongovernmental voice emphasizing the need for more jobs in this weak economy. As an economist, I am very concerned about the impact of high and prolonged levels of unemployment on families and on the long-term health of the economy.

With the current economic weakness in the labor market, it is important to assess the economic and employment effects of the voluntary marketing guidelines that are the subject of today's hearing. Let me briefly outline the prime impact of the proposed guidelines on employment. In my view, to the extent that companies follow these guidelines, the impact would be primarily a shift in advertising and a shift in product sales, not necessarily a reduction overall in these industries.

First, to restate the obvious, the IWG proposed guidelines are voluntary, and thus there is no automatic reduction in advertising as a result of these guidelines.

Second, if companies do choose to adopt the voluntary guidelines, a primary change that would result is a shift in consumption across food categories, for example, from foods with high levels of fats, sodium, and sugars towards foods lower in these nutrients. This shift in either advertising dollars or in sales could occur across product lines within a single firm or across firms within the industry. There might not be a net reduction in advertising, in sales, or employment even within the industry. It is also possible that advertising dollars would be shifted from marketing to children towards advertising on other products, or advertising on the same products to other people, such as their parents.

Over time, we can expect firms and industry to respond to the guidelines by establishing new, healthier products and product lines that could then be marketed to kids. In fact, a surge in advertising might result as companies seek to expand product recognition for new product lines amongst kids and their parents.

For example, as the FDA was considering adopting regulations requiring trans fat labeling, many companies reformulated their products to remove trans fats and invested in marketing those products. For example, Frito-Lay back in 2003 had an ad campaign that was placed in the top 25 newspapers around the country announcing zero grams of trans fat for their products that they had recently reformulated.

Further, industry advertising is often designed to compete with other brands, transferring market share across companies but resulting in little to no change in their final industry level sales.

A report by his Consulting has been cited widely, including in this hearing today, that claims to show that guidelines could result in a 20 percent reduction in ad sales and a loss of 74,000 jobs. My

submitted testimony includes a more detailed critique, but let me summarize that the assumed 20 percent reduction in ad sales would seem to be a significantly exaggerated response, given the existing advertising patterns, the voluntary nature of the guidelines, and the likely shifting of ad dollars to other products or to targeting other age groups.

Even if it still were the case that advertising reduction led to fewer sales in the food and beverage industry, consumers would simply shift some or all of those expenditures to products in other industries. A realistic assessment is that the proposed guidelines would have, at most, a modest impact on overall advertising levels and an even more modest impact on industry level sales and employment. Even if there were a job impact at the industry level, the shifts to other industries would likely yield job increases that would offset some or all of the impact on the food and beverage industry.

As I said earlier, I am an economist, and I am concerned with the health of the economy. However, as a father, I am primarily concerned with the health of my two daughters. I am well aware of the challenges of getting a 3-year-old to eat healthy. In my family, fruits and vegetables are sometimes ketchup and French fries. I realize that my girls will see thousands of ads while they grow up, but I would much prefer that the advertising that they do see be for healthier products.

As an economist, I think that the IWG guidelines would primarily result in a shift of ad dollars towards healthier products and not a reduction in overall industry advertising, sales, or jobs.

Thank you.

[The prepared statement of Mr. Irons follows:]

Written Testimony Submitted to

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Committee on Energy and Commerce

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"Food Marking: Can 'Voluntary' Government Restrictions Improve Children's Health?"

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Summary

The Interagency Working Group (IWG) on Food Marketed to Children is developing guidelines with the dual "goal of improving children's diets and addressing the high rates of childhood obesity."

- The proposed guidelines are voluntary, and thus there is no automatic reduction in advertising as a result of the guidelines.
- If companies choose to adopt the voluntary IWG guidelines, a primary change that could result is a *shift* in consumption across food categories; for example, from foods with high levels of fats, sodium, and sugars, toward foods lower in those nutrients.
  - This shift—in either advertising dollars and/or sales—could occur across product lines *within a single firm*, or across firms *within the industry*.
  - It is also possible that advertising dollars would be shifted from marketing to children, towards advertising on other products and/or towards advertising on the same products to other people, such as parents.
- Over time we can expect firms and the industry to respond to the guidelines by establishing new, healthier products and product lines that could be marketed to kids.
  - A surge in advertising might result as companies seek to expand product recognition for new product lines among kids and parents.
- Industry advertising is often designed to compete with other brands, transferring market share across companies, but resulting in little to no change in final sales.
- A 2008 analysis of food marketing by the Federal Trade Commission found that in 2006, $1.6 billion was spent by 44 large companies on food and beverage marketing to children and adolescents aged 2-17.

  - This represented just 17% of the companies' marketing budget *for just the brands that are, in part, marketed to kids*. The share of the overall marketing budget within those firms—which includes marketing for other products that are not marketed to kids—would be significantly smaller.
  - The 17% figure is for advertising on *all* foods marketed to kids, not just those that fail to meet the IWG criteria.
  - The final impact on *overall* food and beverage advertising would likely be far smaller than this amount.
- Even if it were the case that the advertising reduction led to fewer sales in the food and beverage industry, consumers would simply shift some or all of those expenditures to products in other industries.

A realistic assessment is that the proposed guidelines would have, at most, a modest impact on overall advertising levels, and an even more modest impact on industry-level sales and employment. Even if there were a job impact at the industry level, then shifts to other industries would yield job increases that would offset some or all of the impact on the food and beverage industry.

Remarks as Prepared for Delivery

Thank you for the invitation to speak with you today about this important topic.

My organization, the Economic Policy Institute, has been a leading nongovernmental voice emphasizing the need for more jobs in this weak economy. As an economist, I am very concerned about the impact of high and prolonged levels of unemployment on families and on the long-term health of the economy.

As you know, the Interagency Working Group on Food Marketed to Children is considering a set of voluntary guidelines to improve the nutrition quality of foods marketed to children.

With the current economic weakness in the labor market, it is important to assess the economic and employment effects of the voluntary marketing guidelines.

Let me briefly outline the prime impact of the proposed guidelines on employment. In my view, to the extent that companies follow the guidelines, the impact would be primarily a shift in advertising and a shift in product sales, not necessarily a reduction overall in these industries.

First, to restate the obvious, the IWG proposed guidelines are voluntary, and thus there is no automatic reduction in advertising as a result of the guidelines.

Second, if companies do choose to adopt the voluntary IWG guidelines, a primary change that would result is a **shift** in consumption across food categories; for example, from foods with high levels of fats, sodium, and sugars, toward foods lower in those nutrients.

This shift—in either advertising dollars and/or sales—could occur across product lines within a single firm, or across firms within the industry. There might not be a net reduction in advertising, in sales, or in employment even within the industry.

It is also possible that advertising dollars would be shifted from marketing to children, towards advertising on other products and/or to advertising on the same products to other people, such as parents.

Over time we can expect firms and the industry to respond to the guidelines by establishing new, healthier products and product lines that could be then marketed to kids.

In fact, a *surge* in advertising might result as companies seek to expand product recognition for new product lines among kids and parents. For example, as the FDA was considering adopting regulations to require trans-fat labeling, many companies reformulated products to remove trans-fat and invested in marketing those reformulated products.

For example, Frito-Lay launched an advertising campaign in 2003 placing print ads in top-25 newspapers announcing "zero grams of trans-fat" in their products.

Further, industry advertising is often designed to compete with other brands, transferring market share across companies, but resulting in little to no change in final industry sales.

A report by IHS Consulting has been cited widely that claims to show that the guidelines could result in a 20% reduction in ad sales and a loss of 74,000 jobs. My submitted testimony includes a more detailed critique, but let me summarize that the *assumed* 20% reduction in ad sales would seem to be a significantly exaggerated response given

existing advertising patterns, the voluntary nature of the guidelines, and the likely shifting of ad dollars to other products or to targeting other age groups.[1]

Even if it were the case that an advertising reduction led to fewer sales in the food and beverage industry, consumers would simply shift some or all of those expenditures to products in other industries.

A realistic assessment is that the proposed guidelines would have, at most, a modest impact on overall advertising levels, and an even more modest impact on industry-level sales and employment. Even if there were a job impact at the industry level, then shifts to other industries would yield job increases that would offset some or all of the impact on the food and beverage industry.

As I said earlier, as an economist, I am a concerned with the health of the economy.

However, as a father, I am primarily concerned with the health of my two daughters. I am well aware of the challenges of getting a 3 year old to eat healthy - in my house fruit and vegetables too often means ketchup and french fries.

I realize that my girls will see thousands of ads while they grow up, but I would much prefer that the advertising that they do see, be for healthier products.

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[1] How reasonable is the assumed 20% reduction? Consider a 2008 analysis of food marketing by the Federal Trade Commission, which found that in 2006, $1.6 billion was spent by 44 large companies on food and beverage marketing to children and adolescents aged 2-17. This represented just 17% of the companies' marketing budget *for just the brands that are, in part, marketed to kids*. The share of the overall marketing budget within those firms—which includes marketing for other products that are not marketed to kids—would be significantly smaller The 17% figure is for advertising on *all* foods marketed to kids, not just those that fail to meet the IWG criteria. Over time, as products and product lines change, we can expect the mix of products to move toward healthier foods—with a resulting reallocation of advertising toward marketing healthier products.

As an economist, I believe that the IWG guidelines would primarily result in a shift of ad dollars towards healthier products, and not a reduction in overall industry advertising, sales, or jobs.

Thank you.

Supplemental: Text of Economic Policy Institute Issue Brief #318

Assessing the job impact of guidelines for marketing food and beverage products to children

by John S. Irons, Ph.D.
Economic Policy Institute
October 11, 2011

The Interagency Working Group on Food Marketed to Children—consisting of the Federal Trade Commission, the Food and Drug Administration, the U.S. Department of Agriculture, and the Centers for Disease Control and Prevention—is proposing a set of voluntary guidelines to improve the nutrition quality of foods marketed to children.

A recent report by IHS Consulting (2011) has suggested that tens of thousands of jobs would be lost due to lower food and beverage advertising. The report analyzed a hypothetical 20% reduction in food and beverage advertising, finding the drop would "...result in a decrease in the total annual sales of $28.3 billion and eliminate 74,000 jobs in 2011."

With the current weakness in the labor market, it is laudable to assess the economic and employment effects of the voluntary marketing guidelines . However, the IHS report rests on shaky, unsupported assumptions and misses key considerations necessary to provide an adequate overall assessment of the job impact of the proposed guidelines.

In particular:

- The analysis only passingly refers to the main effect of any reduction in advertising for unhealthy foods (and consequently sales of such foods), which would be a shift in advertising funds and sales to other types of presumably healthier food and beverages either within firms or across firms within the industry. If the analysis had fully taken these shifts into account, the employment impacts would have been dramatically smaller, and potentially zero.
- The IHS report simply assumes an implausibly high 20% reduction in all food and beverage advertising, a figure that appears to be far higher than the amount of food and beverage advertising now dedicated to the targeted products.
- Even if a significant reduction did occur in food and beverage advertising and/or sales, there would be a shift to other industries, at least partially offsetting any job loss within the food and beverage industry.

The net result is an unreliable, grossly exaggerated measure of the job impact of the proposed guidelines.

Assessing the potential impact

The Interagency Working Group (IWG 2011) is developing guidelines with the dual "goal of improving children's diets and addressing the high rates of childhood obesity." The recommendations are "designed to encourage children, through advertising and marketing, to choose foods that make a meaningful contribution to a healthful diet (Principle A) and minimize consumption of foods with significant amounts of nutrients that could have a negative impact on health or weight—specifically, sodium, saturated fat, trans fat, and added sugars (Principle B)."

If companies choose to adopt the voluntary IWG guidelines, a primary change that could result is a shift in consumption across food categories; for example, a shift from foods with high levels of fats, sodium, and sugars, toward foods lower in those problem nutrients. This shift—in either advertising dollars and/or sales—could occur across product lines within a single firm, or across firms within the industry. In either case, there might not be a net reduction in advertising, in sales, or in employment at either the firm level or across the industry.

Furthermore, over time we can expect firms and the industry to respond to the guidelines by establishing new, healthier products and product lines that could be marketed to kids. In fact, a *surge* in advertising might result as companies seek to expand product recognition for new product lines among kids and parents. For example, as the FDA was considering and adopting regulations to require trans-fat labeling, many companies reformulated products to remove trans-fat and invested in marketing those reformulated products.[2]

Finally, industry advertising is often designed to compete with other brands. The IHS report notes that "most of the advertising simply transfers market share from one company to another." A reduction in advertising to children simultaneously by competing brands could thus result in little to no change in final sales.

Despite good theoretical reasons to expect little or no change in food and beverage industry advertising or sales, IHS models the impact of a hypothetical 20% decline in advertising on the food and beverage industry.

Is a 20% decline in ad sales plausible?

The IHS report analyzes a "potential 20% reduction" in advertising expenses. The IHS report provides no justification for why 20% is a reasonable expectation, either in theory or empirically. Is this a reasonable scenario?

First, it should be noted that the proposed guidelines are *voluntory*, and thus there is no automatic reduction in advertising as a result of the guidelines. Companies might react by shifting or reducing ad spending, but there is no requirement they do so.

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[2] For example, Frito-Lay launched an advertising campaign in 2003 placing print ads in top-25 newspapers announcing "zero grams of trans-fat" in their products. See the Frito-Lay Press Release from September 23, 2003 titled "Frito-Lay Launches Print Ad Campaign Declaring America's Favorite Snacks Have Zero Trans Fats", at http://www fritolay.com/about-us/press-release-20030923.html

Second, it is likely that advertising dollars would be shifted from marketing to children to advertising on other products and/or to advertising on the same products to other people, such as parents. The expected effect on overall advertising and industry sales should thus be small, since ad spending would be shifted to whatever use a firm determines would have the next largest impact.

Third, an analysis of food marketing by the Federal Trade Commission (2008) found that in 2006, $1.6 billion was spent by 44 large companies on food and beverage marketing to children and adolescents aged 2-17.[3] While large in total dollars, this represented just 17% of the companies' marketing budget *for just the brands that are, in part, marketed to kids.*[4] The share of the *overall* marketing budget within those firms—which includes marketing for other products that are not marketed to kids—would be significantly smaller. Thus the share of marketing on food and beverage industry *overall* would be significantly smaller than the 20% assumed in the report.

Furthermore, the 17% figure is for advertising on *all* foods marketed to kids, not just those that fail to meet the IWG criteria.[5] As noted above, over time, as products and product lines change, we can expect the mix of products to move toward healthier foods—with a resulting reallocation of advertising, within the 17% of expenditures, toward marketing healthier products.

Thus, assuming a 20% reduction would seem to be a significantly exaggerated response given existing advertising patterns, the voluntary nature of the guidelines, and the likely shifting of ad dollars to other products or to targeting other age groups.

Macroeconomic impact: shifts across industries

The report also suggests (with no supporting information) that "every advertising dollar stimulates $5 in additional industry sales." The assumed 20% drop in advertising would, according to the report, lead to a drop of over $10 billion in sales (as well as other, large ripple effects), and a resulting loss in industry jobs. But, as noted above, a reduction in advertising expenditures does not necessarily translate into lower sales, since most of the advertising is aimed at shifting within-industry market share between companies. However, in practice there could still be some impact on industry-wide demand.

Even if it were the case that the advertising reduction led to fewer sales in the food and beverage industry, consumers would simply shift some or all of those expenditures to products in other industries. The net economy-wide employment impact would depend on the size of the shift, the domestic production content, and the relative labor intensity of the industries that would see the resulting

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[3] If toys included in childrens' meals were included, the food marketing total would be about $2 billion.

[4] The FTC (2008) report states (emphasis added): "For those food and beverage brands promoted to children and adolescents, the overall expenditures for promotional activities directed to all audiences, including additional adult oriented marketing, was more than $9.6 billion. Therefore, the expenditures directed to those between the ages of 2 and 17 represented 17% of the total 2006 marketing budget ***for those brands***."

[5] It does appear that a large share of advertising to children promotes products that do not meet various health criteria See for example, Center for Science in the Public Interest (2011).

increase in sales.[6] There might not be any job loss economy-wide, and there could even be job increases as the food industry develops and markets healthier products for children.

In short, the headline "job-loss" number should *not* be interpreted as an economy-wide impact, since there would be job creation elsewhere in the economy.

Conclusion

In these economic times people are understandably concerned about the economic effects, and especially the employment effects, of any recommendation. Still, a full analysis of these effects must use reasonable assumptions to derive impacts on relevant industries and the economy as a whole. Unfortunately the IHS report did not use reasonable assumptions. It assumes an implausibly high level of impact on a particular sector and then fails to examine the offsetting effects in other parts of the economy.

A more realistic assessment is that the proposed guidelines would have, at most, a modest impact on overall advertising levels, and an even more modest impact on industry-level sales and employment. Even if there were a job impact at the industry level, then shifts to other industries would yield job increases that would offset some or all of the impact on the food and beverage industry.

References

Center for Science in the Public Interest. 2011. "Putting Nutrition into Nutrition Standards for Marketing to Kids." Washington, D.C.: Center for Science in the Public Interest.

Council of Better Business Bureaus. 2010. "The Childrens' Food and Bevereage initiative in action." http://www.bbb.org/us/storage/0/Shared%20Documents/BBBwithlinks.pdf.

Federal Trade Commission. 2008. "Marketing Food to Children and Adolescents." http://www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf.

IHS Consulting. 2011. "Assessing the Economic Impact of Restricting Advertising for Products That Target Young Americans." http://www.ana.net/getfile/16535.

Interagency Working Group on Food Marketed to Children. 2011. "Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts." http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf.

[6] The labor intensity of food manufacturing is generally similar to other industries.

Mr. PITTS. The Chair thanks the gentleman, thanks the panel for your prepared testimony.

We will now begin questioning, and I will recognize myself for 5 minutes for that purpose.

Mr. Baughman, should the IWG withdraw its recommendations and start over? If you believe that, why?

Mr. BAUGHMAN. Well, yes, I do believe that. As I said in my prepared statement, IWG has really focused on idealized foods. And I was heartened to hear that in fact they are looking at the precedent that we set as part of the CFBAI to look at different foods differently, because they play a different role in the diet, and they offer different plusses and minuses, if you will, in the diet. Even within categories of foods, there are differences in how much—for instance, how much whole grain you can put in something, how much salt it may need to be palatable. So, yes, the approach that they have taken has really been not a productive one.

Mr. PITTS. Mr. Jaffe, should the IWG withdraw its recommendations and start over? If you believe that, tell us why.

Mr. JAFFE. Yes, I do. And as I said in my testimony earlier, we believe these are very radical proposals. There is nothing in the proposals that answers the key question that the Congress has asked, which is how these proposals, if acceded to by industry, would affect obesity. We think they would have extremely significant economic impacts. So, across the board, we think that the proposal as it now stands is so flawed it should be withdrawn.

If it is not going to be withdrawn, at the very least the agency should answer the 10 questions that came out of this committee and also the specific questions that were in the report before they ever file it. And I believe that, because they missed the target so dramatically and they have admitted that they have to substantially change their report, that there should be a chance for comment from the industry once again before they finalize it.

Mr. PITTS. Ms. Kolish, would you respond to that question as well?

Ms. KOLISH. I believe that the IWG's proposal was very unrealistic and unworkable, but I am very heartened to hear they are taking our new criteria into account and will be using them in their report to Congress. I think that is a very good solution.

Mr. PITTS. Ms. Johnson, please respond.

Ms. JOHNSON. Yes. I do think that the guidelines, in particular how they have put them out at this point, should be withdrawn. I think that they need to focus on conducting a study, as they were told to do. And, also, as they are putting this together, make sure they address the confusion that they have added to instead of helped to clarify on the nutrition front.

Mr. PITTS. All right. Mr. Baughman, has your company conducted any type of economic analysis for implementing the IWG recommendations? What type of impact would this have on your company's ability to hire new workers or retain current ones? Can you talk about the economic impact of these recommendations on your company and others?

Mr. BAUGHMAN. We have not done a study on the economic impact. What I can say is that following the nutrition criteria and the guidelines would mean that we would not be able to promote these

foods to children. None of our soups—even our low-sodium soups would fail to comply because of—you know, you need a little bit of something to make things, you know, something you want to eat. And also with soups, of course, because there is a great deal of water in a soup, it doesn't comply with the positive food group requirements.

But I think the misconception often is that food companies can control what people eat. In fact, we don't control what people eat. They control what we can sell to them, and we have to be very conscious of that. And certainly the criteria that have been set out here in their proposal are ones that would make it impossible for us to comply.

Mr. PITTS. Mr. Jaffe, what is the most serious problem with the IWG proposal, in your opinion?

Mr. JAFFE. Well, at least—we represent marketers. The most serious problem from the marketing side is that, as it specifically states, it makes it impossible, if people are going to accede to the command of the IWG, that a large percentage of food products currently in the marketplace would not meet the principles and not be able to be advertised.

And we heard earlier in the hearing that the numbers that were being used for the economic analysis were too high. What was ignored is the fact that this would not just impact kids, but they have now expanded the number to those under 18 and then said that if there is 20 percent of the marketplace that includes those between 12 and 17, or 30 percent of the marketplace between 2 and 11, that that would mean that the advertisers would be treated as if they were directed just to kids.

So this sweeps in an enormous amount of adult programming as well. We estimate that more than 1,700 programs on broadcast and cable would be affected.

We can't understand how anybody can claim that this is not going to have very, very significant economic impacts if most of the foods that are advertised in this country are suddenly verboten for anybody under 17, and in many programs with a substantial adult audience, as much as 80 percent of the audience adult, not be allowed to be advertised and still meet these criteria. So we think that this is a very radical proposal. We don't think that that is hype. We just think that is the fact.

Mr. PITTS. The Chair thanks the gentleman.

The time has expired. Recognize the ranking member for 5 minutes for questions.

Mr. PALLONE. Thank you, Mr. Chairman.

I have my own questions that I wanted to ask, but I did want to give one of the three other panelists—Dr. Wootan, Kunkel, or Irons—an opportunity to respond to Mr. Pitts's question, if you want to, you know, whether or not the working group recommendations should be thrown out. I don't want all three of you, because I have my own questions. Would any of you like to respond to that?

Mr. KUNKEL. My response is going to be stronger than likely my colleagues.

My response is that I wouldn't withdraw the IWG guidelines. I would table them. And I would table them while the Congress considers the recommendation of the Institute of Medicine. And that

is, if the industry could not move significantly to reduce marketing of unhealthy food products to children in the short term, that this Congress should regulate to accomplish that. And it has been 5 years, and we haven't seen any significant improvement.

What we have seen—and I will agree with Ms. Kolish. She said there has been steady improvement. There has. We are inching to success. But we can't afford to wait 30 years to get there.

Mr. PALLONE. OK. Let me go back to Mr. Baughman. I am always happy to see somebody from a New Jersey corporation testify. So thanks for being here.

Mr. BAUGHMAN. Thank you.

Mr. PALLONE. I was glad to hear from your testimony that Campbell Soup agrees with Congress, the IWG, and the IOM that addresses the prevalence of childhood obesity, that that should be a national priority. And we recognize that childhood obesity is simply a problem that we can't ignore. But, you know, I think you have to have partnerships with the private sector and that we have to find realistic and workable guidelines for food marketing to children. So I wanted to say I think we all agree that the IWG proposal needs some reshaping, but I still believe it is an important step towards this kind of partnership, if you will.

You are clearly opposed to any type of Federal guidelines and suggest the proposal be eliminated altogether. So how do you instead propose that the food industry work with the Federal Government to address childhood obesity? What would you have us do?

Mr. BAUGHMAN. I do think that discussion and dialogue are important in any major public issue, and certainly I think we as Campbell are always interested in sitting down with anyone to talk about those kinds of issues. We have in fact, as I believe you know, have been working with obesity experts locally in our home city of Camden in tackling hunger and obesity, and there we are working with a great number of NGOs and so forth to tackle this issue.

Mr. PALLONE. Let me ask you about the sodium, because I know you mentioned the sodium levels, and I know that CPSI also spoke about their concern with the sodium level requirements. Instead of the IWG, how would you propose addressing sodium levels in food products marketed to kids? Let's just talk about that. How would you propose to do it?

Mr. BAUGHMAN. I would propose taking the approach we have taken as one of the members of CFBAI, which is to look at specific product categories and looking at what sort of sodium or salt is required in a particular product category to meet consumer expectations in terms of texture—obviously, there is food safety issues but, very importantly, taste and not have a one-size-fits-all standard.

You may know that, for instance, a soup does require a lot more sodium to taste good than a yogurt. It is a savory product. If you mix up chicken meat and water with some carrots and celery and so forth, you do need some salt in order to make that a good food. And our concern is that by applying one standard for sodium across the board that we are under the delusion that every food that we eat has to have the same exact profile.

We should be eating a variety of foods, and each of those foods has its unique contributions in terms of food groups and positive nutrients, as well as the nutrients to limit. That is putting the en-

tire diet together with a mixture of foods that compose a healthy diet.

Mr. PALLONE. Mr. Chairman, I just wanted to make clear that I fully expect that the IWG is going to take these comments into account when finalizing their guidelines. It is my hope that we can work in tandem to address this. I mean, it is a national epidemic, and it has to be addressed.

Thank you.

Mrs. BONO MACK [presiding]. I thank the gentleman and note that I am Madam, not Mr. Chairman.

Mr. PALLONE. I didn't see you came back, Mary. I apologize. I certainly didn't want to think that I saw you instead of Joe there.

Mrs. BONO MACK. Thank you. And thank you for your time. I will recognize myself for 5 minutes for questioning.

I just want to start with an observation to all of you, and that is often in the political debate here you are either the pessimists or the optimists. We have been told this is the health of our children versus jobs and our struggling economy. If you are an optimist, the glass is half full. If you are a pessimist, it is half empty. Our job is to design the perfect glass, and I just don't think we have done it yet. I really don't. I am not hearing from all of the witnesses today that we have got it perfect.

Dr. Kunkel, you mentioned that we should regulate the Institute of Medicine and that you think we should get out there and regulate. I will just point out that today or yesterday there was a study released, not relative to this point but still in the health care debate. It was a study released by the Archives of Internal Medicine that now says multivitamins for women causes a decreased life span. That is a brand new study.

So you regulate yet in an area that changes, and data changes so quickly. What was healthy today might not be healthy tomorrow. I mean, we created hydrogenated oils because butter was unhealthy suddenly. And so I don't think we are there yet.

And, Dr. Wootan, you said that Congress wants to kill the working group. No, we don't. But we want common sense. We want to know that the FDA and the FTC and the working group are actually collaborating, working together, so that we are not constantly reinventing the problems and the unintended consequences that are created out of this mess.

So, Dr. Irons, to you, though, as the economist and to the father, the crux of the matter here is the jobs. And have you really analyzed the jobs? You know, we are talking about the advertising industry, we are talking about the food industry, and we are talking about content. Each of you critics have pretty much taken a lot of shots at the content providers. Can you talk about the hundreds of thousands of jobs that are created?

You know, certainly what I care about is southern California, but it will impact those people, those jobs, the seamstresses, the grips, all the people who work in that industry. And I don't know how many of you are actually focused on those people who are trying put food on the table for their children. So if you can speak briefly to that, that would be great.

Mr. IRONS. Yes, I am very concerned about those people, too. Let me just kind of throw out an example.

If you look at the advertising industry, they employ about a half a million people, plus or minus, in any given year. The food and beverage industry is about a million and a half people per year. I think a good case study is the impact of the CFBAI regulations—not regulations, but guidelines. If you look at employment in those industries from 2005, before the initiative, to 2008, after the initiative was started, you find that for the economy as a whole employment grew by about 2.3 percent. For the advertising industry, it grew by faster than that, by 3.5 percent.

Mrs. BONO MACK. And this is the frustration that somebody like I have with the fact that the agencies don't talk to one another. You just cited years that are even long before the digital explosion being what it is now. Content providers are struggling in an everyday world to provide content because it is all moving to the digital world, and it is out there for free. So you are looking at studies that are 6 years old, 7 years old, about the way it used to be. I mean, so for us to say, wait a minute, you don't have it right yet, is it that hard to recognize that we need to talk about today and tomorrow and going forward and what it means for jobs, not what it meant 6 years ago?

Mr. IRONS. I think that is right. But the way we assess the impact in the future is to look at past experiences with these kinds of guidelines, and it looks as though there has been no major impact in the past. So like I said in my testimony, my view is that there is a shift within the industry and that, if not a reduction in advertising, it will be a shift in the kinds of products that are advertised, with at least the possibility that there could be a surge.

So, you know, I do want to recognize it is important to assess the consequences. Absolutely. But from my perspective I don't see in the data, I don't see in the studies any major impact this would have on jobs.

Mrs. BONO MACK. But then again I think that those of us say that we just don't yet see a major impact on the childhood obesity rate by what we are trying to do here. And I think it is very reasonable to say when, Dr. Kunkel, you said table it, I was excited, thinking, oh, you did mean let's talk about this a little bit further and figure out how to do something that is good for the economy and good for our children, design that perfect glass.

Mr. Baughman, how have your soups changed over all the years? And when would everybody—when would you say the obesity epidemic really started? And have your soups changed over those years?

Mr. BAUGHMAN. Well, that is a complex question.

Mrs. BONO MACK. You have 10 seconds. You are lucky.

Mr. BAUGHMAN. Yes. While I think I am well informed on obesity, saying when the obesity epidemic began, you know, I believe that it began, you know, a couple of decades ago. But our soups have not really become more caloric. The difference in our soups has been really in thinking of those condensed soups that everyone is especially familiar with. The major change there has been having about a thousand milligrams of sodium per serving not that many years ago and gradual decreases in sodium over that time.

Mrs. BONO MACK. Just briefly, and I am sorry because your time is up, and I would just like to end with one point. By sodium, it would be good—you also do mean MSG, right?

Mr. BAUGHMAN. I am sorry?

Mrs. BONO MACK. MSG is really what you mean by sodium?

Mr. BAUGHMAN. No, sodium, I mean salt. I mean sodium bicarbonate in a baked product, other sodium-containing compounds.

Mrs. BONO MACK. My time has expired. So thank you very much.

And the Chair is happy to recognize Dr. Burgess for 5 minutes for questioning.

Mr. BURGESS. Thank you, and I appreciate the opportunity. I appreciate you all staying with us for so long.

Mr. Jaffe, let me just ask you a couple of things. Now, in your testimony, of course we are told these are voluntary guidelines, compliance is voluntary. But you actually imply in your testimony that there may be more to the voluntary than meets the eye, the ability during the research of the working group to actually subpoena information and to get specific information from marketers. Do I understand your testimony correctly in that regard?

Mr. JAFFE. You are absolutely correct.

And, by the way, the focus cannot be just on the Federal Trade Commission. The White House did a report on obesity. And in the course of that report they said if the industry does not carry out adequate self-regulation that the Federal Communications Commission should step in and limit the amount of children's advertising.

And, also, as you are, I am sure, aware, for a broadcast licensing you have to operate in the public interest. If you have four agencies who are supposedly the experts both on marketing and on health in this country, all come together and make a proposal to the Congress saying that all of this type of advertising is unhealthy for our children, do you not think that we are going to start seeing that when people come up for their licenses, if they are continuing to run those types of ads, that they would be under challenge?

There is a great deal of more compulsion here than has been expressed in this hearing, and this is not just our view. As I said, Martin Redish, who is one of the top constitutional experts in this country, has said so.

Mr. BURGESS. Let me just ask you a question about that. Was there in fact intimidation involved in questioning the industry?

Mr. JAFFE. Well, all I can say is that, you know, the fact that the industry has been as exercised as this I think gives you a clear sense that they did not think that this was something people could just ignore or walk away.

Mr. BURGESS. We saw this during the health care debates. The phrase that was frequently used with the administration was you are either at the table or on the menu. Since this is a food hearing, that is an appropriate analogy. But was that same principle at work here with this working group?

Mr. JAFFE. Well, certainly we felt that if this went forward that the Congress would now be on record as saying that the vast majority of all of the advertising that all of these companies—the restaurant industry, the beverage industry, the food industry—was doing was inappropriate and unhealthy for children. That is what

these four agencies were claiming. And that clearly was going to put all sorts of different pressures on us, whether they came from government, whether it came from stockholders, whether it came from consumer groups. And to act as if there wasn't any pressure I think is very unreasonable to expect. I think the fact that 150 Congress and Senate representatives have spoken out against this report suggests that they think this is more than something that is a mere voluntary proposal.

Mr. BURGESS. Let me ask you something. Because Mr. Pompeo, who is not here with us, asked a question of the previous panel, what is going on in other countries? I mean, are there other countries that actually restrict this type of advertising? And what has their experience been? Are any of you aware of countries that restrict this type of advertising?

Mr. JAFFE. I can at least start that answer, and I am sure there are others here who could build on it. Sweden has basically banned all children's advertising across the board, not just for food advertising.

Mr. BURGESS. Over what period of time now has that occurred?

Mr. JAFFE. Certainly a decade, but I think it is more than that now.

Mr. BURGESS. Are they able to point to any difference in rates of childhood obesity?

Mr. JAFFE. Their obesity rates are worse than a number of other European countries that have no restrictions. Same case for Quebec.

Mr. BURGESS. What are those advertising minutes—what are they filled with? Do they advertise BB guns? What are they advertising during those minutes that are no longer sold to——

Mr. JAFFE. I think I have to defer to others on that. All I can say is they certainly are not advertising food, beverage, restaurant products during that time frame. And yet the obesity rates have not gone down.

And that was—Quebec is another place which has tried to do the same thing. They do not have better obesity rates than the rest of the Canadian commonwealth. So it is just not provable.

And if you go look at the IOM report itself, despite the fact that people would want to dismiss it, they say that they couldn't find causation. And in fact for 12 to 17-year-olds, it was the opposite, that they found a negative association between advertising and the consumption patterns for those groups.

Mr. BURGESS. I thank you for that.

And, Dr. Kunkel, I will just share with you that sometimes I do share in your frustration. And if I ran the world, things could be better. But we do live in a free society. If I had my way, I would ban tobacco and alcohol as well as high fructose corn syrup. But we do live in a free society.

And honestly, Dr. Irons, it puts the responsibility of parents in a free society are even higher than if the government exerts complete control, complete regulatory control.

It would be great if we lived in a perfect world, but we don't. And we all know that those things that are severely regulated we don't always get the desired behavior that we want. So before we give

up more of our freedom to something, perhaps we ought to evaluate the risks and benefits what the trade-off is.

And I will just offer that as an observation. You are both free to respond to that.

Mr. KUNKEL. I respect your point of view, but what——

Mr. BURGESS. Ironically, I am way on the left to you, but, to me, I am way on the right. So it is a difference in perspective.

Mr. KUNKEL. I appreciate your point. But what we are trying to suggest is that there isn't a level playing field here, that the industry is investing nearly $2 billion annually to try to influence children's eating patterns. And it is working, and the foods that they promote are contributing to childhood obesity. So therefore——

Mrs. BONO MACK. The gentleman's time has expired. I am sorry, but we have other people waiting to ask the panel some questions.

So the gentleman's time has expired, and the gentlelady from Tennessee is recognized for 5 minutes.

Mrs. BLACKBURN. Thank you, Madam Chairman.

I have got a series of eight questions. They are basically yes or no, and then someone may want to give a quick response. But let's work through these.

Before I do, Mr. Jaffe, I just want to say to you that last week my colleagues on the Congressional International Anti-Piracy Caucus sent you a letter regarding advertising placed on pirate Web sites, and I wanted to highlight your comment. You told C–NET Daily that the issue is of very, very high importance. It is of high importance to us and to many of the musicians and songwriters and individuals that we represent that don't get paid if there is advertising on Web sites.

All right. Now to my questions.

OK, this first one is a yes or no for all of you. Just raise your hand. OK, yes or no, do you think the IWG guidelines can be accurately described as a new regulation? No? Raise your hand if you say no.

OK. So that is three of you. Four of you. So we have got four noes.

How many you say, yes, they are new regulations? One. And we have two that can't make up their mind. OK. So there is one yes.

If no—let me tell you what I think about new regulations. When I look at something to see if it is a new regulation, I say, is it going to cost businesses money? Is it going to have an impact on jobs? Have we looked at the cost of the new guidelines? So those are things that go into regulation.

So if you said no, why would this—how is this not going to cost money or cost jobs or be an expense to businesses to implement? Anybody have 15 seconds to offer on that?

Ms. KOLISH. Ms. Blackburn, I said no, but when I said no, I didn't think it was regulation. I did think it had the feel and impact of back-door regulation, which is equally troublesome. And I am really gratified that they have noticed that we have taken a significant step in our new criteria and will take it into account in their report to Congress. I think that is very important.

Mrs. BLACKBURN. OK. And, you know, the FTC—we got a letter from USDA, HHS, and FTC describing these rules as, quote, unquote, nonregulatory recommendations. That is always of concern.

OK. Question number two. We see that these are voluntary, supposedly. But how many of you think that these could end up being government standards or being used as the basis of NGO attacks? Could form the basis for shareholder actions? Could be used to initiate private litigation? How many of you fear that these regulations——

OK, so we have got four of you that think it could form that kind of basis. Anyone want to comment?

Ms. WOOTAN. I mean, that is where a lot of different questions certainly will encourage companies to follow those standards. But you can't sue a company for not following a voluntary suggestion. You can only sue——

Mrs. BLACKBURN. That was not the question.

Ms. WOOTAN (continuing). For breaking the law.

Mrs. BLACKBURN. That wasn't the question.

Number three. To see if this is needed or not, do you think this is duplicative of the FCC guidelines for marketing to children? Anyone see this as a duplication of efforts?

No? OK.

All right, number four. Do you find it alarming that food currently sold through the WIC program, which is designed by USDA experts to provide a healthy diet for young children, could no longer be marketed under your proposal? Does that cause you concern? Any hands?

Ms. WOOTAN. The WIC standards——

Mrs. BLACKBURN. We have got four.

Ms. WOOTAN. I like the stronger WIC standards that they proposed.

Mrs. BLACKBURN. OK. Question number five then. Do you think that IWG guidelines raise any free speech concerns and have you determined the likely impact on advertising revenues?

So how many of you think that it would cause free speech concerns? May I see your hands?

So we have got four that are there.

And do you think it is going to have an impact on advertising revenues?

We have got two.

OK. How many think these guidelines will actually do something to reduce obesity?

We have got two.

OK. How many support or sponsor exercise programs in your companies or your organizations?

We have got three that believe in exercise, which is a big part of reducing childhood obesity.

OK. How many favor regulating Web sites, mobile devices, or point of purchase access to children? Would you go in and regulate what is on a Web site, what is on a mobile device like a mobile TV? Would you regulate access at point of purchase, like when a child is in the grocery store with their parents? How many of you would extend your guidelines, your marketing guidelines to that?

Ms. WOOTAN. These aren't regulations. They are suggestions.

Mrs. BLACKBURN. And we know where regulations get their genesis.

Thank you all so much. I yield back.

Mrs. BONO MACK. Thank the gentlelady, and the Chair is pleased to recognize Dr. Cassidy for 5 minutes for questions.

Mr. CASSIDY. Thank you all.

This is kind of a confusing hearing for me, because there is really a kind of disagreement on questions of fact. I mean, the gentleman from FTC said, Mr. Vladeck, said he could not think of a single time when principles have led to litigation or to rules, and here we have folks putting their hand on a Bible raising them and saying, heck, this is our existential anxiety that this is what it will lead to.

So, Mr. Jaffe, just to pick you, if Mr. Vladeck were here, if I were channeling Mr. Vladeck right to you and you had a chance to reply to him saying there has never been an example and he gave the example of principles regarding violence in video games and et cetera, what would you say? I mean, he says there is never an example. But for you it is an anxiety.

Mr. JAFFE. Well, that is clearly wrong. There is the Bantam Book case where the Supreme Court clearly acted before there had been any overt regulation. And I would then quote to him Professor Sullivan, who was, as I mentioned earlier, a former dean of the Stanford law school, who is a chair at the school still, and it said, Professor Sullivan further notes that government action undertaken with the purpose and predictable effect of curbing truthful speech is de facto regulation.

Mr. CASSIDY. But they would reply that this is not to curb speech. It is just going to be like me telling my son, boy, when you are out on the tennis court don't behave in a certain way, and he goes out and behaves as he wishes. You follow what I am saying?

Mr. JAFFE. But what she says is, even where the mode of censorship is informal and even where the acceptance of the speech restrictive conditions is nominally voluntary, the Supreme Court has long held that such efforts are unconstitutional.

Mr. CASSIDY. Dr. Kunkel, what would you say to that man? Or Dr. Irons or anybody who would disagree with Mr. Jaffe.

Ms. WOOTAN. There is a letter from 38 very esteemed legal scholars that have a very different opinion than the industry's hired attorneys.

Mr. CASSIDY. This guy is from Stanford. The person who they quoted is at Stanford.

Ms. WOOTAN. And ours are from Yale and Harvard and all over the globe.

Mr. CASSIDY. But what I am saying is, in a sense, you deprecate him by saying he is hired. But I mean theoretically——

Ms. WOOTAN. He has two. We have 40. I don't know. I don't think it is—it is not the common opinion.

Mr. CASSIDY. I have limited time. I don't mean to interrupt. I apologize.

So I am looking here, Institute of Medicine—because you quoted him. I am thinking IOM, and they have a thing here using litigation to change policies and practices regarding childhood obesity—and so I have to admit I am in a sense thinking, wow—litigation can raise public awareness of an issue, result in disclosure of important documents. And it goes through strategies, advantages, disadvantages of litigation. That would seem to support, though, what

these folks are saying, that there are actually people out there who think how can I use a lawsuit to push the envelope? You see what I am saying?

Mr. KUNKEL. The litigation that is being referenced, the litigation that they are talking about is existing legal standards, for example, misleading information. So there are organizations and there are government agencies that have litigated against the food marketing industry when they claim that their products are healthy by putting, let's say, a Smart Choice check on it, when in fact it has significant evidence that the product contains elements that make it unhealthy.

Mr. CASSIDY. So I have something which is a high fiber sugar-coated something.

Mr. KUNKEL. How much? Sugar coated can be a thin veneer. It can be loaded and loaded.

Mr. CASSIDY. So I think what we just agreed upon is there is a level of subjectivity here. Now, high fiber may be what sends you to the restroom after eating breakfast——

Mr. KUNKEL. The subjectivity is where do you drawn the line?

Mr. CASSIDY. Yes.

Mr. KUNKEL. No one would disagree that excess amounts of sugar is healthy—I am sorry, is not.

Mr. CASSIDY. But they may disagree as to what is excess.

Mr. KUNKEL. Yes. Where to draw the line.

Mr. CASSIDY. So you could say it is healthy based upon fiber content but then get dinged because of sugar?

Mr. KUNKEL. We know many foods are so far over the line in the unhealthy side of the equation that they are contributing to childhood obesity.

Mr. CASSIDY. Let me stop you right there. I have got your point.

Ms. Kolish, I will throw it to you, but this is a different question. I mean, there are articles in the medical literature that our children will have a shorter life span than we because of obesity. If not this remedy for obesity, what?

Ms. KOLISH. I think self-regulation—advertising self-regulation alone is not going to cure the obesity problem. We need the joint efforts of everyone. But self-regulation is doing an outstanding job of reducing sugars, fats——

Mr. CASSIDY. But is it reducing childhood obesity?

Ms. KOLISH. It is a multifaceted problem, and I don't think you can take that factor alone and say it by itself is reducing obesity or causing obesity. So I can't answer that. I don't think anyone could.

Mr. CASSIDY. I am out of time. I wish we were sitting around drinking Diet Coke discussing this further.

I yield back.

Mrs. BONO MACK. I thank the good doctor. I am not sure about Diet Coke being healthy for you.

So I would like to begin wrapping up and to thank all of our witnesses today and to assure you that, again, I am happy to work with you. I know our subcommittee, until we get this right, to continue visiting it.

I would like to thank the Health Subcommittee, their staff, for their hard work with today, as well as the subcommittee and members of the CMT Subcommittee.

So I will remind Members they have 10 business days to submit questions for the record. I ask the witnesses to please respond promptly to those questions. Members should submit those questions by the close of business on October 26.

And the subcommittees are now adjourned.

[Whereupon, at 1:50 p.m., the subcommittees were adjourned.]

[Material submitted for inclusion in the record follows:]

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

September 12, 2011

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
The Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Tom Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D.C. 20250

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Secretary Sebelius, Secretary Vilsack, and Chairman Leibowitz:

Some two and a half years ago, Congress directed you to establish an Interagency Working Group on Food Marketed to Children (IWG) to "conduct a study" and to develop recommendations for standards for the marketing of food to children and teenagers.[1] The IWG was to report the findings of its study and its recommendations to Congress no later than July 15, 2010.

Instead of conducting the prescribed study or providing timely recommendations to Congress, the IWG has produced a document entitled "Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts." The IWG describes the development of these Nutrition Principles—recommendations addressed not to Congress, but to industry—as the "first

[1] Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84.

phase of preparing a report to Congress." *Nutrition Principles* at 2. Nowhere, however, does the IWG set forth any plan for conducting the requested study. It appears, therefore, that the IWG has settled on its course and intends nothing more than to review the public comments, adjust the Nutrition Principles as it deems necessary, and send them to Congress.

The Nutrition Principles, produced without the benefit of the study that was to inform IWG's recommendations, are little better than a shot in the dark. The IWG admits that if they were fully implemented as proposed, "a large percentage of food products currently in the marketplace" would not comply. *Nutrition Principles* at 5. Foods that do not comply with the Nutrition Principles are disapproved equally, whether they are nutritionally disastrous or can appropriately be labeled "healthy" under current federal regulations. According to the IWG, it "*may* be feasible to reformulate some food products to meet [the Nutrition Principles]," but "in many cases reformulation would require substantial changes in the nutritional profile of the food," and such substantial changes "may present *both* technical difficulties and challenges in maintaining the palatability and consumer acceptance of the product." *Id.* (emphasis added). In short, implementation of the proposed Nutritional Principles would have an enormous, immediate impact, and the IWG has no idea whether it is actually possible to make foods that would qualify, much less to make them enjoyable to eat.

As to the many foods that could *not* be reformulated to meet the ambitious guidelines, they could not be marketed, under the IWG proposal, either to children or teenagers. But the IWG's definition of "marketing" sweeps in far more than just advertising targeted directly at children. It would ban the advertisement of noncomplying foods on television even when adults are known to make up the vast majority (70-80 percent) of viewers. For such foods, in-store displays and familiar packaging would likewise have to be modified or abandoned. Even charitable sponsorships of youth sports teams would be disallowed, despite the undoubted benefits of physical exercise for children's health. The economic impacts of the proposal would clearly be substantial, but there is no indication that the IWG intends to evaluate such effects before finalizing the Nutrition Principles.

Significantly, the IWG offers no scientific support for the notion that restricting advertising will actually help reduce childhood obesity. In its most recent study, the Institute of Medicine found that "current evidence is *not* sufficient" to demonstrate a causal relationship between television advertising and obesity.[2] Other nations have tried food advertising bans in recent years without documented success. What *has* been documented from experiments elsewhere is an increase in prices for foods that are not allowed to be advertised.

The real causes of childhood obesity have more to do with inadequate physical activity and excess calorie consumption than with the advertising and packaging of food. Many of the foods that are threatened by the IWG's proposal, such as breakfast cereals, have been shown to be associated with lower body mass index in children. The IWG's "one size fits all" approach also ignores the substantial progress that has already been made by some firms in recent years to improve the nutrition profile of foods marketed to children.

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[2] *Food Marketing to Children and Youth: Threat or Opportunity?*, at 9 (Institute of Medicine, Committee of Food Marketing and the Diets of Children and Youth, J. Michael McGinnis, Jennifer Appleton Gootman, Vivica I. Kraak, eds 2006)(emphasis added).

Given these and many other defects, the Nutrition Principles would never pass muster if they were adopted as regulations. Because compliance with the Nutrition Principles is deemed "voluntary," however, the IWG apparently does not feel the same sense of responsibility for them as its constituent agencies would for binding regulations. Yet that attitude underestimates (some would say "exploits") the impact of government recommendations in an arena as closely watched as this. In the real world, there will be many forces at work driving compliance, particularly for brand-conscious companies that try to be responsible. Normally, we applaud the companies who go the extra mile to do good things for society, but here there has been no research or study that their adherence to the Nutrition Principles will benefit society, far less that any benefits justify the immense costs of doing so.

Under the circumstances, we believe that the IWG should withdraw the current proposal and start afresh. Conducting the study Congress asked for should be the first step in the process, not an afterthought or post hoc rationalization. The IWG should base its recommendations to Congress on sound science, and should explicitly evaluate the benefits and cost of different approaches Congress could take. The IWG should scrupulously avoid making recommendations in the form of a black and white quasi-regulation (like the proposed Nutrition Principles) that others can use to bludgeon companies into compliance.

To inform our oversight efforts, we request that you provide answers to the following questions no later than September 27, 2011:

1. When does the IWG intend to complete the study called for by Congress? How will the IWG take account of the study in formulating its recommendations to Congress?

2. How did the IWG derive the precise levels of the nutrients to limit per Principle B? Why did the IWG deviate from existing federal nutrition standards?

3. What evidence exists to show that the proposed Nutrition Principles are achievable for most types of food? What evidence exists to show the proposed phase-in periods are adequate?

4. What evidence exists to show that childhood obesity is related to advertising of food that doesn't comply with the proposed Nutrition Principles? Are there examples of advertising restrictions elsewhere that have led to reductions in childhood obesity?

5. What costs would be involved in reformulating food on a widespread scale to meet the proposed Nutrition Principles? How would such costs affect the price of food?

6. If manufacturers cannot successfully reformulate foods to comply with the proposed Nutrition Principles and comply instead with the "voluntary" marketing restrictions, how would the economy be affected? Has the IWG determined the likely impact on advertising revenues? What is the likely impact on television programming, particularly programming intended for children and families? What impact on employment do you expect the proposed Nutrition Principles to have?

7. What alternatives to the current proposal has the IWG considered? In particular, what does the IWG expect would happen if the industry is allowed to continue its self-regulatory efforts without "voluntary" government guidelines?

8. Has the IWG determined the secondary economic impacts of the proposed marketing restrictions on American communities and schools, such as reduced financial sponsorships for athletic teams?

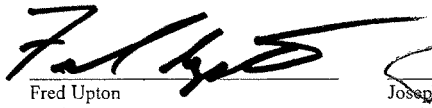
9. How does the IWG reach consensus on its recommendations? How does it address differences of opinion?

10. Does the IWG interpret its mandate as giving it the flexibility to recommend against adopting food standards or food marketing restrictions, either for children generally or for some age groups, if it concludes that is the best course? Or does it interpret the mandate as requiring it to recommend some type of standards and restrictions, even if the costs substantially outweigh the benefits?

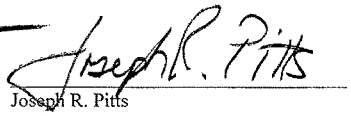
* * *

In closing, we reiterate our strong objection to the proposed Nutrition Principles and the associated marketing restrictions. We urge you to follow Congress's direction to conduct a study *before* formulating your recommendations and to ensure that whatever recommendations you make are addressed to Congress for its plenary consideration, not in the form of a regulatory fait accompli. Should you have any question concerning this matter, please contact Ryan Long or Gib Mullan of the Majority staff at (202) 225-2927.

Sincerely,

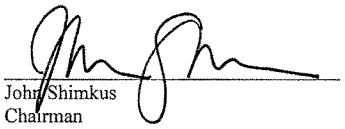


Fred Upton
Chairman



Joseph R. Pitts
Chairman
Subcommittee on Health

Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing, and Trade



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Marsha Blackburn
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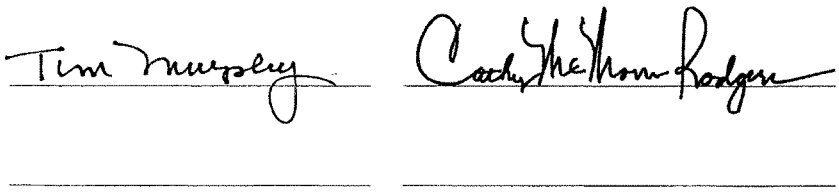

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Frank Pallone, Jr., Ranking Member
Subcommittee on Health

The Honorable G.K. Butterfield, Ranking Member
Subcommittee on Commerce, Manufacturing, and Trade

The Honorable Gene Green, Ranking Member
Subcommittee on Environment and the Economy

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection

MEMORANDUM

TO: David Vladeck, Director, Bureau of Consumer Protection

FROM: Michelle Rusk, Attorney
Carol Jennings, Attorney
Division of Advertising Practices

DATE: July 15, 2010

RE: Interagency Working Group on Food Marketed to Children: USDA Alternative Approach for Nutritional Standards

At your request, we have reviewed the USDA's July 8, 2010 draft proposal for nutrition standards for foods marketed to children. At the outset, we note that USDA's general proposal to set nutritional standards for those specific categories of foods most heavily marketed to children is a workable approach that could reduce marketing of many of the least nutritious foods – particularly sweetened beverages and sweet snacks. To the extent this approach is more palatable to industry, and more likely to be voluntarily implemented, it might have a greater impact on the marketplace. Below is a brief summary of our analysis and the main concerns that we have about the USDA proposal in the context of current industry self-regulatory initiatives.

USDA's approach is a significant departure from the proposed recommendations set out in the Interagency Working Group's draft Federal Register Notice forwarded to the Commission last February. The Working Group's recommendations were designed to encourage the industry to market only the healthiest, most nutritious foods to children and therefore set rigorous standards for all foods in all categories. The Working Group has recommended that the industry only market to children foods that both provide a meaningful contribution to the diet in the form of whole grain, fruit, vegetable, low-fat dairy or lean protein sources and, in addition, meet certain strict limits on saturated fat, trans fat, added sugar, and sodium. Based on food runs conducted by USDA, it appears that a substantial majority of the foods currently marketed to children would not qualify under the Working Group's proposal unless the industry reformulated. Although the proposal admittedly sets the bar high for the industry, the Working Group was guided by existing federal nutrition policy and a goal of sending a strong signal to industry that only those foods likely to improve children's diets and health should be marketed directly to children. The proposal was intended to provide a set of goals that would push industry to adopt more meaningful and uniform nutrition standards than those in existing self-regulatory pledges.

The USDA proposal was developed by the staff of USDA's Center for Nutrition Policy and Promotion as an alternative to the tentative proposed recommendations that were presented

by the Interagency Working Group on Food Marketed to Children at the FTC's December 15 Workshop. As a general matter, the USDA proposal represents a less restrictive set of standards that, if implemented by industry, would serve to reduce the marketing of the least nutritious foods within five general categories of foods most heavily marketed to children.[1]

The staff has two key concerns about the USDA alternative proposal. First, the staff is concerned that the standards do not set a level playing field for all foods and, in fact, seem to be significantly more lenient for some food categories than others. Obviously, certain categories of foods would not be covered at all under the USDA proposal, and thus would not be subject to any nutritional goals.[2] In addition, there are major differences in the standards applied from one food group to another. Thus, for example, pizza or chicken nuggets sold by fast food restaurants would be subject to a different set of criteria than those same items sold in a grocery store. In the case of fast food, the chicken nuggets could be advertised, regardless of sodium and saturated fat content, as long as they were depicted as part of a meal with fat-free milk and apple slices. In the grocery store context, chicken nuggets would fall in the snack food/prepared meal category, and would need to meet limits on saturated fat and sodium. In some ways, therefore the standards for fast food are less restrictive than for other categories. In other respects, however, they are more restrictive. For example, rather than applying a standard to the overall nutritional quality of fast food kids' meals, the USDA proposal specifies exactly what must be depicted in advertising, requiring that 2 of the 3 meal components depicted in any kids' meal ad must be healthy offerings such as apples or fat-free milk.

The problem of disparate treatment is most evident in the comparison of the sweet snack and savory snack categories. Foods in the sweet snacks and candy category must provide a meaningful contribution of a food group, such as fruit, dairy, or whole grain and must also meet standards for added sugars and saturated fat. Foods in the savory snack and prepared meals category, in contrast, do not need to contribute to a food group. These products only need to meet limits for saturated fat and sodium. In other words, a fruit roll-up snack would need to be 50% by weight real fruit, but a bag of pretzels would not need to contain whole grain or make any other meaningful contribution to the diet. The standards are thus more lenient for savory snacks than for sweet snacks. The breakfast cereal category is also more restrictive than other categories like savory snacks, requiring limits on both sugar and sodium and a meaningful contribution of whole grain or fiber.

The staff's second concern about the USDA proposal is that it is more permissive in several respects than many of the current food and beverage company self-regulatory pledges. The proposal therefore does not achieve the basic goal of advancing more meaningful self-regulation. The USDA proposals for both saturated fat and sodium thresholds are more than

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[1]The staff recommends that, if the Interagency Working Group chooses to go with a category-specific approach to nutrition standards, it would be better to define the foods groups based on standard industry classifications, like those applied in the FTC's food marketing studies. This would provide greater clarity for both industry and government about what specific foods would be included in the identified groups.

[2]Based on data from the FTC's Food Marketing Study, the five USDA food categories appear to reach 90% or more of the foods most heavily marketed to children

double the self-regulatory thresholds already implemented by several major food companies. USDA suggests a threshold of 4.5 grams of saturated fat, based on its definition of "lean" foods. This threshold is several times more than the Working Group proposal of less than 1 gram/15% of calories, which is based on the federal labeling regulations for "low saturated fat" and "healthy" claims. More importantly, it is also more than double that of many industry self-regulatory pledges, which apply a standard of 2 grams of saturated fat or even less.[3] The 4.5 g saturated fat standard would allow the marketing of foods to children that most parents would not consider to be healthier choices and that many companies already refrain from marketing. USDA's food run tables, for example, indicate that even Breyer's full fat vanilla ice cream would meet USDA's proposal for saturated fat.

Similarly, USDA's proposed sodium threshold of 480 mg, based on the current threshold for "healthy" is substantially higher than the Working Group's interim goal of 200 mg and ultimate goal of 140 mg (or "low" sodium). It is also more than double that set for industry pledges from larger companies[4] including many food categories of the Smart Choices Program. This is of particular concern in light of the recent Institute of Medicine report recommending that FDA should invoke its food safety powers to restrict sodium content of processed foods and that Americans should lower their daily intake goals from 2300 mg to 1500 mg. It also seems contrary to similar recommendations of the just released Report of the Dietary Guidelines Advisory Committee (DGAC) to reduce sodium intake by choosing or preparing foods with little or no sodium.[5] Importantly, the DGAC specifically highlighted the association between sodium intake and blood pressure in children.[6]

Finally, the USDA proposal drops the Working Group's proposal to set a limit for trans fat. The Working Group proposal, like most industry self-regulatory pledges, set a standard of 0

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[3]For example, Kellogg Company and General Mills both apply a standard of 2 g saturated fat; Nestlé USA applies a standard ranging from 1.5 g to 2 g, depending on the category; Pepsico, Inc. applies a 1 g standard; Campbell Soup Company applies a 1 g standard for its soup; and the Smart Choices Program, which was discontinued last year after concerns were raised by both FDA and USDA, applied a standard that was 2 g or even lower to categories like cheese, dairy, meat and poultry, snack foods and sweets.

[4] General Mills and Kellogg both apply a 230 mg sodium standard to cereals. Dannon also applies the 230 mg standard. Kraft applies a 290 mg for cookie and cracker products, 360 mg for cereal. The Smart Choices general benchmark for sodium was 480 mg, but was set at 240 mg for several food categories, including breads, cereals, cheese, snacks, and desserts.

[5]*See* IOM, Food and Nutrition Board, *Strategies to Reduce Sodium Intake in the United States* (April 2010); *Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans* (May 2010) at B2-10.

[6]*Id.* at D6-2 to D6-10. There are other issues that staff believes the full Working Group should discuss in considering the USDA proposal. As just one example, the fact that the same thresholds apply to snacks and to packaged meals means that limits on things like sodium may be too lenient for a snack product and, at the same time, too restrictive for a main dish or meal product.

g trans fat.[7] This is, again, consistent with current federal dietary guidance to keep trans fat intake as low as possible. The staff does not see a justification for eliminating this standard and is concerned that doing so might have the unintended consequence of encouraging food companies to substitute trans fat for saturated fat in reformulating products.

The staff would be happy to meet with USDA to discuss some of these issues further, and, for example, to provide information on the standards used by the industry pledge programs to see how they compare with the USDA proposal. In addition, the staff recommends that the Working Group convene as soon as possible to attempt to reconcile the two proposals and issue its proposed recommendations for comment.

APPROVED:

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[7]Burger King, Campbell Soup Company, Conagra, Dannon, General Mills, Kellogg, and Pepsico, all apply a standard of 0 g trans fat for their children's marketing pledges. Other companies, like Kraft, set a limit for the amount of saturated fat and trans fat combined.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Bureau of Consumer Protection

November 22, 2011

Chairman Mary Bono Mack
Subcommittee on Commerce,
Manufacturing, and Trade
Committee on Energy and Commerce

Chairman Joseph R. Pitts
Subcommittee on Health
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Dear Chairmen Bono Mack and Pitts:

Thank you for your October 31, 2011 letter setting out additional questions for the record on the October 12, 2011 joint hearing on the Interagency Working Group on Food Marketed to Children ("IWG"). My specific responses to the questions are set out below. At the outset, however, I would like to clarify a few points about the nature of the IWG report to Congress and about the IWG's process.

First, I think it is important to stress again that the IWG's report to Congress will lay out recommendations for voluntary action – not legislation or regulations. The FTC has always been an advocate of a self-regulatory approach to food marketing to children. As I stated in my testimony, the FTC and the other IWG agencies are committed to finding an approach that plays a role in improving children's health and is workable for industry. The IWG recognizes that it cannot ask more of food marketers than they can reasonably deliver if it expects their continued cooperation in this effort. As with past reports to Congress from the FTC and the Department of Health and Human Services ("HHS") on this topic, industry may choose to embrace some recommendations and decline to adopt others.

Second, it seems that some in the food industry may have misinterpreted the IWG's April 28, 2011 "Request for Comments" as the issuance of standards directly to industry or as an effort to circumvent the requested report to Congress. In fact, the April 28, 2011 release was not the IWG's final product, but an interim step in developing and refining recommendations for the report to Congress. The FTC felt that it was important to solicit formal input from industry and other stakeholders on the feasibility and impact of the proposal before finalizing the report, as we often do when we intend to issue a report or make recommendations.

Third, and perhaps most importantly, many of the questions posed in your letter relate to the IWG's preliminary proposal, but not to the IWG's revised recommendations. In response to stakeholder comments, and in recognition of a new and significant self-regulatory initiative by the Children's Food and Beverage Advertising Initiative ("CFBAI"), the FTC is substantially reworking the structure and substance of its recommendations with respect to the scope of children's marketing to which the nutrition principles would apply. In fact, the FTC is using the uniform principles issued in July 2011 by the CFBAI as the template for its revised recommendations. As a result, we anticipate that our final recommendations will be much closer to the marketing definitions that the food companies have already determined are reasonable and attainable goals for self-regulation.

I appreciate that members of the Committee and Subcommittee have a number of concerns about the IWG's actions and I have tried to respond to the enumerated questions as fully and specifically as possible. To the extent that some questions relate to nutrition science and policy falling outside the FTC's expertise, I defer to other IWG agencies to provide more detailed responses.

Questions from the Honorable Joseph R. Pitts

1. Will you commit to providing answers to the following questions before finalizing your next submission to Congress?

Yes. The IWG has not yet submitted its report to Congress.

2. On September 12, 2011, members of the Energy and Commerce Committee sent you a letter asking ten questions about the work of the IWG (attached). Your response to that letter did not answer these questions. Therefore we restate them as follows:

The IWG's initial response to the September 12, 2011 letter was not meant to be our only response to the specific questions. The letter was a preliminary response to give the Committee basic information about the status and direction of the IWG's efforts; the FTC's Office of Congressional Relations simultaneously offered to provide an in-person briefing on the specific questions. The FTC staff provided a briefing for committee and subcommittee staff on October 6, 2011. I apologize for any misunderstanding about our intent to respond fully to the Committee's earlier letter.

a. When does the IWG intend to complete the study called for by Congress? How will the IWG take account of the study in formulating its recommendations?

The IWG has completed a deliberate and thorough study of relevant marketing research, nutrition research, and self-regulatory programs governing food marketed to children. The sources reviewed are detailed in the IWG's April 28, 2011 Request for Comments on the preliminary proposed principles. On marketing issues, key sources included the Institute of Medicine's (IOM) 2006 report on food marketing to children and youth, the FTC's 2008 study on food marketing expenditures and activities directed to children, and data compiled by the

FTC for a follow-up study.[1] On the nutrition side, the IWG relied primarily on the most current nutrition research supporting the 2010 Dietary Guidelines for Americans ("2010 DGA"). In addition, the IWG solicited public comment on its preliminary proposal, including 30 specific questions on marketing, nutrition, and economic impact (costs and benefits). The IWG is considering the 29,000 comments submitted by stakeholders as it revises its recommendations.

Based on an initial meeting in 2009 with the staff of both Senator Harkin and then Senator Brownback, the authors of the Congressional mandate creating the IWG, and based on subsequent meetings with Senator Harkin's staff, the IWG believes it has fully met the directive to conduct the study called for by Congress.

b. How did the IWG derive the precise levels of the nutrients to limit per Principle B? Why did the IWG deviate from existing federal nutrition standards?

The basis for each of the precise nutrient levels in the preliminary principles was set out in the IWG's April 28, 2011 Request for Comments. The FTC staff defers to the U.S. Department of Agriculture ("USDA") on whether and how the IWG revised recommendations may differ from other federal nutrition standards.

c. What evidence exists to show that the proposed Nutrition Principles are achievable for most types of food? What evidence exists to show the proposed phase-in periods are adequate?

The FTC staff defers to the USDA on the revised nutrition recommendations. However, to the extent the IWG's revised recommendations are much closer to the CFBAI approach, they should be achievable for most foods. In addition, because they are voluntary, companies can choose to embrace all, some, or none of the IWG recommendations.

d. What evidence exists to show that childhood obesity is related to advertising of food that doesn't comply with the proposed Nutrition Principles? Are there examples of advertising restrictions elsewhere that have led to reductions in childhood obesity?

In its 2006 report, the IOM found strong evidence that television advertising influences the food and beverage preferences, purchase requests, and short-term consumption of children 2 to 11 years. The IOM also concluded that, even if the extent of the influence of advertising on obesity proves to be small, the health consequences aggregated for the entire population of

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[1] Institute of Medicine, *Food Marketing to Children and Youth: Threat or Opportunity?* (National Academies Press 2006) (2006 IOM Report); Federal Trade Commission, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, A Report to Congress (July 2008) (2008 FTC Report), *available at* http://www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf.

American children and youth would be "consequential."[2] Ultimately, the panel of experts that prepared the IOM report decided the evidence was sufficient to form the basis for strong recommendations related to food marketing to children.

Given the complexity of the obesity issue and the many efforts simultaneously underway to combat it, it may never be possible to definitively attribute reductions in obesity rates to any one specific effort.

Regardless of whether and to what extent food marketing has contributed to the problem of childhood obesity, however, it can still be part of the solution. The FTC has long been an advocate of encouraging food marketers to harness their tremendous marketing power and creative know-how to persuade children to make better food choices.

e. What costs would be involved in reformulating food on a widespread scale to meet the proposed Nutrition Principles? How would such costs affect the price of food?

The FTC staff defers to the USDA on the question of costs involved in reformulating foods.

f. If manufacturers cannot successfully reformulate foods to comply with the proposed Nutrition Principles and comply instead with the 'voluntary' marketing restrictions, how would the economy be affected? Has the IWG determined the likely impact on advertising revenues? What is the likely impact on television programming, particularly programming intended for children and families? What impact on employment do you expect the proposed Nutrition Principles to have?

Manufacturers do not necessarily need to reformulate foods to comply. The IWG's revised recommendations more closely track the new CFBAI principles; thus, there are many foods currently marketed to children that would not require reformulation or would require only minor reformulation. Companies also have the option of substituting healthier products from their portfolio in children's advertising or continuing to market a food in general audience media, thus minimizing the impact on advertising revenues overall. Even if industry chose to discontinue children's advertising for all foods that did not meet the IWG revised recommendations, the impact on children's programming should be relatively small.[3]

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[2] *See* 2006 IOM Report at 307-8. The report looked only at television advertising and did not take into account the additional impact of the many other ways food is marketed to children, such as on the Internet, by cell phone and other digital means, and through tie-ins with popular children's movies.

[3] As one example, Nickelodeon has indicated in previous testimony before Congress that only 20 percent of its ad revenue is for food products and that nearly all of those ads (80 to 90 percent) are placed by companies that have already pledged to comply with the new CFBAI principles. That means that, at most, only 2 to 4 percent of ads currently on Nickelodeon would potentially be affected.

The FTC staff does not believe that the dire economic reports submitted during the comment period withstand scrutiny. One study in particular, issued by IHS Consulting, predicts a loss of 74,000 jobs, but provides no explanation of methodology or supporting analysis. The IHS estimate on job impact is based on a particularly implausible starting supposition that advertising spending would drop by $1.9 billion in the first year alone. That figure represents an amount larger than the FTC's own estimates of the entire amount spent annually on food marketing to children and adolescents.[4]

g. What alternatives to the current proposal has the IWG considered? In particular, what does the IWG expect would happen if the industry is allowed to continue its self-regulatory efforts without "voluntary" government guidelines?

As indicated above, based on the progress the CFBAI has made in developing a stronger uniform set of principles, the IWG is substantially revising its recommendations to more closely follow the new CFBAI approach.

h. Has the IWG determined the secondary economic impacts of the proposed marketing restrictions on American communities and schools, such as reduced financial sponsorships for athletic teams?

The FTC staff is sensitive to the funding needs of community and athletic programs and, as indicated in my written testimony, the FTC has recommended that the IWG revised recommendations exempt these activities from the scope of covered media.

i. How does the IWG reach consensus on its recommendations? How does it address differences of opinion?

The four agencies have been able to work successfully through any differences of views by discussion and debate to reach a consensus.

j. Does the IWG interpret its mandate as giving it flexibility to recommend against adopting food standards or marketing restrictions, either for children generally or for some age groups, if it concludes that is the best course? Or does it interpret the mandate as requiring it to recommend some types of standards and restrictions, even if the costs substantially outweigh the benefits?

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[4] *See* 2008 FTC Report at 7. The IHS study was fully critiqued in testimony before the House Energy and Commerce Committee by Dr. John Irons of the Economic Policy Institute. Dr. Irons' detailed analysis concludes that the IHS report "rests on shaky, unsupported assumptions and misses key considerations necessary to provide an adequate overall assessment of the job impact of the proposed guidelines."

The IWG has viewed its mandate as developing recommendations that will promote children's health and also be feasible for industry to implement. The agencies are, in fact, making a number of recommendations to narrow the scope of covered marketing to achieve that balance. For instance, the revised recommendations now contemplate that, with the exception of certain in-school marketing activities, marketing to adolescents ages 12 to 17 would not be covered.

3. I am concerned with the IWG's proposal's potential impact on the confectionery industry, a major manufacturing presence and employer in Pennsylvania, as it relates to seasonal shaped and seasonally wrapped products. By limiting the ability to use packaging and point of purchase displays, the current guidelines would impact the ability of candy companies to use traditional as well as innovative shapes, figures, and packaging. Specifically, the proposal would prohibit seasonal products related to every major holiday including Valentine's Day, Halloween, Easter, and the winter holidays. Products that could be restricted include chocolate and candy bunnies, chicks, pumpkins, cats, hearts, snowmen, Santas, and angels. As you know, seasonal shapes and seasonal packaging are traditions currently enjoyed by the entire family, not just children and adolescents. Considering almost half of all candy is sold around the holiday seasons, limits on the way these products are shaped, packaged, and displayed in stores would severely impact confectionery businesses. Does the FTC agree that such seasonally shaped and seasonally packaged products should not be a prohibited marketing practice under the IWG proposal?

As I indicated in my testimony, the FTC has recommended to the IWG that in-store displays and packaging of seasonal or holiday confections not fall within the scope of covered media because they are not marketing directed primarily to children, but rather are marketing to parents or other adults. We expect that the IWG's final report will make clear that such packaging and in-store displays are not covered.

4. In your testimony, you stated that the FTC wants kids to eat "healthier" food, like "yogurt, peanut butter, [and] Cheerios," which would seem to suggest that these foods all meet the nutrition standards set out in the IWG's proposal. Yet, comments submitted on the IWG's proposal suggest that these foods do not meet IWG's nutrition standards. Please explain your basis for asserting that these foods fit within IWG's proposal, including an assessment of how these foods stack up against the IWG's proposed 2021 standards. Because yogurts and peanut butter have variations from product to product, please conduct your analyses using five to ten market-leading products advertised to kids for each product type.

The FTC does not have the nutritional data to conduct this analysis and will defer to the USDA for a more detailed response to this question. My statement at the hearing was based on a series of detailed nutritional analyses or "food runs" conducted for the IWG by USDA staff during the development of the IWG's initial proposal and its revised recommendations. Those food runs indicate that Cheerios as well as some brands of peanut butter and yogurt will meet the IWG's revised recommendations.

5. In its memorandum accompanying the release of the IWG's proposed standards in April 2011, the FTC described the goal of the effort as steering children away from "foods of little or no nutritional value." With respect to the products in the preceding question that fail the IWG's 2021 standards proposed last April, which products in the FTC's opinion constitute foods of "little or no nutritional value?" What evidence do you have that cereal and foods the FDA has deemed "healthy" are foods of "little or no nutritional value?"

As indicated above, the IWG initial proposal and its revised recommendations would permit the marketing of many brands of the products in the preceding question. There are many foods currently marketed to children that contain meaningful amounts of the food groups that the 2010 DGA encourage, such as whole grain, fruits, vegetables, and low-fat dairy. There are also some foods, such as soft drinks, candy, and cookies, that contain little or no meaningful positive contribution from any of these food groups. These same foods are sometimes high in added sugars, saturated fat, or sodium. These are the types of products the FTC was referring to in its statement.

6. If a competitor of a manufacturer of a breakfast cereal (like Cheerios or Special K) or a yogurt (such as Stonyfield Farm 0% Fat Yogurt) or a whole-wheat bread (such as Arnold 100% whole wheat bread) claimed, in an advertisement, that these products (all of which would appear to fail the IWG's proposed 2021 standards) are "foods of little or no nutritional value" and that their consumption would contribute to obesity or poor nutrition intakes, could such statement by a competitor be deemed to be false or misleading advertising in violation of the FTC Act? Could such a statement legally be made without evidence to substantiate it? If so, is the FTC justified in making essentially the same statements in its memorandum? On what basis?

The FTC's statement was not intended to suggest that all foods currently marketed to children are of little or no nutritional value, or that the foods your question refers to are of little or no nutritional value. The FTC defers to the USDA to confirm that the products you refer to would meet the IWG's revised recommendations.

7. You stated that many cereals are "healthy foods that make meaningful contributions to the diet." How do you explain the fact that virtually all ready-to-eat cereals, including those that meet the FDA's "healthy" definition, actually do not meet the IWG's proposed 2021 nutrition standards.

The only 2021 nutrient level that the IWG suggested in its preliminary proposal was for further sodium reductions. The IWG is making substantial revisions to its recommendations, including to proposed sodium levels. The FTC defers to the USDA to respond with respect to whether ready-to-eat cereals marketed to children meet the IWG's revised recommendations.

8. Throughout your testimony, you repeatedly stated that the FTC's focus has been on "marketing, not nutrition," deferring nutrition-related questions to "my colleagues who work for the nutrition agencies"; "How the FDA and USDA categorize foods, that's not the

FTC's expertise, and I would defer to my colleagues; "[Health analysis of foods] is not our area of expertise." The record shows, however, that in at least one memorandum (July 15, 2010 Memorandum from Michelle Rusk and Carol Jennings to David Vladeck ("FTC Memorandum"), which is attached and was called to your attention at the hearing), the FTC staff specifically questioned the USDA on its proposed nutrition standards. Please detail exactly what role the FTC played in determining the nutritional standards in the IWG's proposal, specifically commenting on whether or not the FTC considered or commented on what foods should or should not fit within those standards.

This memo is not inconsistent with my characterization of the FTC's primarily role. The FTC's primary role in the IWG effort has been to coordinate meetings, discussion, and drafting of documents among the IWG participants and also to share its substantive expertise on marketing and industry self-regulatory efforts. The FTC took the lead on drafting the revised recommendations related to marketing, and the USDA, with assistance from FDA and CDC, took the lead on drafting the revised recommendations related to nutrition. The FTC has deferred to the other member agencies on recommended levels of nutrients. The issues raised in the FTC staff memo relate to the scope of foods that would be covered by the USDA alternative proposal and how the proposal compared to existing industry self-regulatory pledges. The discussion is based on FTC's knowledge of the CFBAI self-regulatory initiative and individual member pledges, and on the Commission's knowledge of the types of foods marketed to children from its 2008 marketing study.

9. Regarding the FTC Memorandum, referred to above, you testified at the hearing that you were not certain that this memorandum was ever shared outside of the FTC. Have you now been able to determine that this document was, in fact, shared with USDA?

At the time of the hearing, I did not recall that this unsigned draft had been shared with anyone outside this agency; however, I am now able to confirm that this unsigned draft memo was, in fact, shared with USDA and the other IWG agencies.

10. In explaining the IWG's delay in issuing its final report, you mentioned that "part of the delay has been occasioned by our effort to engage closely with stakeholders." Please expand on what specific efforts the FTC has undertaken to work with stakeholders, and how those efforts occasioned the delay that you describe. What stakeholders are these?

The FTC has made it a point to listen to all interested parties who requested meetings and has met with stakeholders from industry and the public health community on a number of occasions. These included meetings with CFBAI pledge companies and other food manufacturers, media companies, consumer and public health advocates, and Congressional staff. In addition, the IWG provided a formal comment period for all interested parties to provide their input. The IWG issued its preliminary proposal with a Request for Comments on April 28, 2011. The IWG extended that comment period from 45 days to 75 days at the request of the CFBAI and other industry groups. Finally, the IWG held a public forum on May 24, 2011 to provide additional opportunity for interested parties to make oral statements.

11. When asked the question of whether FTC considered the impact of the food and marketing restrictions on the price of food, you stated that that was the "kind[] of issue[] that we tried to discuss" but that "[t]his was not an issue that was raised by any of the 29,000 commenters that commented on the preliminary draft." In its Comment, the Chamber of Commerce submitted a detailed report by Georgetown Economic Services entitled "An Analysis of the Economic Impact of the Dietary Specifications of the Interagency Working Group on Food Marketed to Children" that comprehensively addressed this issue. This report concluded that a full adoption of the IWG diet (i.e., a diet consisting solely of foods that meet the IWG's proposed 2021 standards) would conservatively result in a 60.3% increase in the cost of a 2,000 calorie daily diet. Has the FTC fully considered this report? Who conducted this review and when? If the FTC disagrees with any of the conclusions drawn in this report, please present the FTC's contrary analysis, including all documents addressing this report.

I should correct my statement to acknowledge that, although the vast majority of comments (over 28,000 of the 29,000) were supportive of the IWG proposal, some industry comments raised concerns about the cost to industry and consumers. As I have noted, however, these are only voluntary recommendations and, given the substantial revisions the IWG is making to its proposal, I believe any concerns about the economic impact should be alleviated.

The Georgetown Economic Services (GES) report was submitted during the IWG's comment period, and reviewed by the FTC staff and other IWG member agency staff as part of their comment review. The FTC has not done a formal written analysis and believes that the GES report is flawed on its face. The report, for instance, reflects a fundamental misunderstanding of the scope and purpose of the IWG recommendations. The IWG recommendations address only those food products marketed directly to children and make recommendations only as to the marketing of those products, not their sale or consumption. Rather than basing its analysis on foods most commonly marketed directly to children, however, the GES analysis is based on the 100 foods most consumed by the general population, including coffee, tea, beer, and other items that are never marketed directly to children. In addition, the GES cost estimates are premised on an assumption that all Americans would switch from their current diet to a diet only of foods meeting the IWG principles. It is completely implausible that this would be the effect of voluntary recommendations related only to marketing activities directed to children.

12. In January, President Obama issued an Executive Order cautioning that regulations must be "consistent" with each other and "promote predictability." Do you believe that it is consistent to have a set of FDA regulations that encourages certain foods to be labeled as "healthy," have the U.S. Dietary Guidelines (published by HHS and USDA) promote foods like whole grain products as foods that should be eaten more often, at the same time propose marketing standards that seek to restrict the consumption of these same foods?

With respect to the Executive Order, the FTC staff believes that the order governs regulatory actions and does not extend to agency reports requested by Congress. The IWG report to Congress will provide recommendations to guide voluntary industry action and is not a

regulatory proposal. The staff does, however, agree with the underlying premise that nutrition policy should be consistent. The IWG's earlier proposal and the revised recommendations, as already noted, were based primarily on the most recent nutrition policy and research that was the basis for the 2010 DGA. The IWG tailored its recommendations to fit the specific concerns behind the Congressional directive – improving the nutritional profile of foods marketed directly to children in an effort to improve children's diets and reduce childhood obesity.

I defer to USDA to respond to your question about whether the IWG revised voluntary recommendations are consistent with nutrition labeling regulations and the 2010 DGA.

13. How is it "consistent" to publish marketing standards that declare many foods – including foods that the FDA defines as "healthy" – as foods "of little or no nutritional value" as the FTC has done here in its memo accompanying the release of the guidelines?

The April 28 Request for Comments on the IWG preliminary proposal was a solicitation of stakeholder input to help the IWG refine its recommendations and prepare its report to Congress. It was not the publication of marketing standards. As noted in my response to question 5 above, the FTC statement was referring to foods, such as soft drinks, candy, and cookies, that would not be consistent with recommendations in the 2010 DGA.

14. How does the IWG proposal promote "economic growth, innovation, and job creation," as the President directed in his Executive Order? Did you assess the impact of your proposal on jobs? Where is your assessment of the impact of your proposal on jobs?

Congress directed the IWG to submit a report making only recommendations to Congress. It did not direct the agencies to issue a regulatory proposal or to take any action that would be within the scope of the Executive Order. The IWG was not asked to assess the impact of its proposal on jobs. That said, the IWG did seek public comment on the impact of its proposal on industry members. The IWG is now revising its recommendations in response to the comments received, and it is making them closer to the new CFBAI standards. Because the IWG recommendations will be voluntary and industry response is not yet known, it is very difficult to assess the overall impact of the recommendations.

15. Dr. Dietz testified that IWG has not yet analyzed the impact of your food marketing restrictions on charitable organizations, including food banks. Any such effects would clearly weigh in the costs and benefits of the proposal. When you have finished evaluating the impact would you please provide the Committee with the analysis?

As I indicated in my testimony, the FTC is recommending that the current draft proposal not cover philanthropic activities, charitable events, or community programs. Thus, there should be no impact on charitable organizations, including food banks.

16. Dr. Dietz testified that IWG has not yet analyzed the impact of your food marketing restrictions on jobs in the food industry. Any such effects would clearly weigh in the costs

and benefits of the proposal. When you have finished evaluating the impact, would you please provide the Committee with the analysis?

The IWG is not issuing restrictions on food marketing but recommendations for voluntary self-regulatory principles. As detailed above, the IWG could not reliably do such an analysis given the voluntary nature of its recommendations and the variety of approaches industry could take to implement them. The IWG sought comment on the impact of its proposal on industry and is making changes in response to the comments received. The IWG's revised recommendations will be much closer to the food industry's CFBAI program standards. Given that many members of the food industry have already agreed to the new CFBAI standards, the IWG does not believe its recommendations will have a negative impact on the industry.

17. Dr. Dietz testified that IWG has not yet analyzed the impact of your food marketing restrictions on jobs in the cable and broadcasting industry. Any such effects would clearly weigh in the costs and benefits of the proposal. When you have finished evaluating the impact would you please provide the Committee with the analysis.

Please refer to the response to Question 16.

18. Dr. Dietz testified that the proposal would result in no lost jobs in the advertising industry. Please provide us with the analysis that forms the basis for Dr. Dietz conclusion, as well as any additional analysis on job effects the IWG has performed.

The FTC cannot respond as to the specific basis for Dr. Dietz's statement.

19. Your proposal would prevent food retailers from using certain kinds of in-store displays. Why? What evidence have you presented that links in-store displays to obesity? What evidence have you presented that restricting such marketing would reduce obesity?

As I indicated in my testimony, the FTC staff has recommended a number of revisions to the scope of marketing activities that would be covered by the IWG's recommendations and anticipates that there will be revisions related to in-store displays in the final Report to Congress.

20. Have you been able to review the purported impact of advertising over the past 50 years as Rep. Latta suggested, and to contrast those purported impacts with changes in the amount of physical activity?

The IWG has not reviewed the impact of advertising in contrast with the impact of physical activity over the past 50 years. The IWG recognizes that obesity is a complex issue involving many factors and that any solution to this problem will need to include efforts on many different fronts, including both physical activity and improving children's diets. The Congressional mandate establishing the IWG did not ask the IWG to isolate the causes, or assess the relative contributions of various factors to, childhood obesity.

21. What consideration was given, in formulating the IWG's proposal, to the FTC Bureau of Economics report from 2007 establishing that child-directed television food advertising had declined by around 9% between 1977 and 2004? How precisely was the IWG able to conclude, despite that analysis, that the rise in obesity (which was pronounced in the same period) was attributable to advertising?

The IWG was directed by Congress to develop nutritional standards for the marketing of foods to children and that has been the focus of its efforts. The IWG has not made any specific conclusions about the causal relationship between advertising and obesity. The IOM conducted a thorough review of the evidence on the relationship between advertising and childhood obesity as part of its 2006 report. The FTC staff also notes that the Bureau of Economics study considered only television advertising and not other forms of marketing.

22. In an article you posted on the FTC website on July 1, 2011 entitled "What's On The Table," you stated that "it doesn't really matter whether you're convinced food marketing has played a role in childhood obesity," that the IWG proposal can still be a solution to the problem. You echoed this remark in your opening statement at the hearing. Did Congress not instruct the IWG to conduct a "study" of the impact of food marketing on childhood obesity? Does this really not matter? Why not? What evidence do you have, if any, that marketing does or does not play a role in childhood obesity?

Congress did not direct the IWG to conduct a study on the impact of food marketing on childhood obesity. The Congressional directive was founded on the recommendations made by the IOM in December 2005 as set out in its 2006 report.

As Senator Harkin, the co-author of the IWG's congressional mandate, noted in his July 13, 2011 letter to the IWG agencies, the IOM panel of experts concluded that "food and beverage marketing influences the diets and health prospects of children and youth" and that "food and beverage marketing practices geared to children and youth are out of balance with healthful diets and contribute to an environment that puts their health at risk." It was the IOM recommendations that led directly to the 2009 Omnibus Appropriations Act language establishing the IWG. That language directed the IWG to specifically consider two issues in conducting its study: "1) the positive and negative contributions of nutrients, ingredients, and foods ... to the diets of children; and 2) evidence concerning the role of consumption of nutrients, ingredients, and food in preventing or promoting the development of obesity among children." Congress did not direct the IWG to conduct any other study and there is no indication that Senator Harkin or others intended the IWG to revisit the conclusions of the IOM. In fact, Senator Harkin's letter confirms that the IWG did what was intended. He states that "in response to this clear Congressional intent, the IWG has produced voluntary standards that are scientifically sound and support existing nutrition guidelines."[5]

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[5] Letter from Senator Tom Harkin and Representative Rosa L. DeLauro to FTC Chairman Jon Leibowitz, USDA Secretary Tom Vilsack, CDC Director Thomas Frieden, and FDA Commissioner Margaret Hamburg (July 13, 2011)(Harkin/DeLauro Letter).

My statement in the July 1 web site posting, and in my opening remarks, reflects the long-standing position of the FTC. For example, in 2005 then-FTC Chairman Deborah Majoras noted that, although "we might not ever have the studies that will definitively answer" the questions about the many factors that contribute to childhood obesity, everyone "should still be able to agree that advertising can be part of the solution. Advertising and marketing of healthier foods to both kids and parents can be part of the effort to address the problem of overweight and poor nutrition among our nation's children."[6]

Questions from the Honorable Mike Pompeo

1. Where specifically in the FY2009 report language did Congress direct the Interagency Working Group to develop and issue "preliminary proposed nutrition principles to guide industry self-regulatory efforts" directly to the food and beverage industry, advertisers and marketers, broadcast and cable providers, and the general public?

2. Did the FY2009 report language include Congressional direction for this activity to occur before submitting the findings of the study in a report to Congress? If so, where?

The directive from Congress, as set forth in the accompanying statement to the 2009 Omnibus Appropriations Act (H.R. 1105), reads as follows:

> The FTC, together with the Commissioner of the Food and Drug Administration, the Director of the Centers for Disease Control and Prevention, and the Secretary of Agriculture, who have expertise and experience in child nutrition, child health, psychology, education, marketing, and other fields relevant to food and beverage marketing and child nutrition standards shall establish the Interagency Working Group on Food Marketed to Children (Working Group). The Working Group is directed to conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children. In developing such standards, the Working Group is directed to consider (1) positive and negative contributions of nutrients, ingredients, and food (including calories, portion size, saturated fat, *trans* fat, sodium, added sugars, and the presence of nutrients, fruits, vegetables, and whole grains) to the diets of such children; and (2) evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children. The Working Group will determine the scope of the media to which such standards should apply. The Working Group shall submit to

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[6] *See* Remarks of Chairman Deborah Platt Majoras, "The FTC: Fostering Positive Marketing Initiatives to Combat Obesity," Obesity Liability Conference, Chicago, IL (May 11, 2005) *available at* http://www.ftc.gov/speeches/majoras/050511obesityliability.pdf.

> Congress, not later than July 15, 2010, a report containing the findings and recommendations of the Working Group.

The language was not specific with respect to the type of "recommendations for standards for the marketing of food" that was contemplated – that is, whether the recommendations should be for legislative or regulatory action or not. In subsequent briefing sessions with staff members from the offices of both Senator Harkin and then Senator Brownback, Senate staff confirmed that the directive would be satisfied by recommendations for self-regulation, rather than for regulation or legislation. Senate staff briefing sessions occurred periodically, at their request, as the IWG moved forward with its task.

Early in their discussions, the members of the IWG concluded that public input was important to the process of developing recommendations. Input from all stakeholders, including food and media industry members, as well as members of the nutrition science and medical communities, would help to ensure that the recommendations ultimately developed would be both scientifically sound and feasible to implement. Therefore, the preliminary proposal was published as a request for comment on April 28, 2011. This step was not required by the Congressional directive. The IWG members assumed, correctly, that the preliminary proposal would undergo revisions, based on the public comments, before being finalized into a report to Congress. During that comment period, Senator Harkin and Congresswoman Rosa DeLauro submitted a letter commending the collective work of the IWG.[7]

3. Where specifically in the FY2009 report language did Congress direct the Interagency Working Group to develop a proposal directed at industry with very precise nutrition standards accompanied by specific implementation dates for compliance?

The accompanying statement to the 2009 Omnibus Appropriations Act charged the IWG as follows:

> The Working Group is directed to conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children. In developing such standards, the Working Group is directed to consider (1) positive and negative contributions of nutrients, ingredients, and food (including calories, portion size, saturated fat, *trans* fat, sodium, added sugars, and the presence of nutrients, fruits, vegetables, and whole grains) to the diets of such children; and (2) evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children.

The IWG interpreted this language as a mandate to recommend a set of specific nutrition standards that could be applied by members of the food and media industries in selecting those

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[7] Harkin/DeLauro Letter, *supra* note 5.

foods to be promoted directly to children. Members of the Children's Food and Beverage Advertising Initiative had expressed some concerns about the time that would be needed to implement the recommendations of the IWG, pointing out that the reformulation of foods can take a considerable amount of time. Therefore, the IWG concluded that it would be appropriate to suggest a timetable for implementation of the recommended principles. The IWG wished to make it clear that industry members that chose to reformulate certain foods marketed to children could phase in the changes over time.

* * *

I appreciate your interest in this important endeavor. The FTC and IWG will carefully weigh the concerns raised by members of the Committee and Subcommittees as we work to finalize our report to Congress. Please let us know if we can be of further assistance.

Sincerely,

David C. Vladeck
Director
Bureau of Consumer Protection

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