



July 14, 2011

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

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

Dear Sir or Madam:

The National Yogurt Association (“NYA”) is pleased to submit these comments to the Federal Trade Commission (“FTC” or “Commission”), Centers for Disease Control and Prevention (“CDC”), Food and Drug Administration (“FDA”), and the Department of Agriculture (“USDA”) in response to the “Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts” (“Proposed Principles”) issued by the Interagency Working Group on Food Marketed to Children (“IWG”).¹

NYA is the national nonprofit trade association representing producers of live and active culture (“LAC”) yogurt products as well as suppliers to the yogurt industry. NYA’s member companies are among the largest yogurt manufacturers in the United States. NYA sponsors scientific research regarding the health benefits associated with the consumption of yogurt with LAC and serves as an information resource for the American public about these attributes.

NYA member companies applaud the goal of improving childhood nutrition and reducing childhood obesity. We firmly support voluntary industry efforts to improve child-directed advertising and support voluntary industry self-regulation. The food and beverage industry has already made progress, both by reformulating products and by changing advertising during children’s programming. Many of these changes can be attributed to the Children’s Food and Beverage Advertising Initiative (“CFBAI”), a self-regulatory program that is administered by the Council of Better Business Bureau and in which several of NYA’s member companies participate. NYA, however, has very strong concerns about the proposed principles. The IWG’s flawed approach is unsound and Constitutionally questionable, and will be unlikely to achieve its intended goals. Specifically, and as discussed in greater detail below, this proposal:

¹ Available at: <http://ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>.



- Is overly broad and inconsistent with FDA regulations and the Dietary Guidelines for Americans 2010 (“Dietary Guidelines”);²
- Will prevent many nutritious foods – including many yogurts – from being advertised to children;
- Is likely to create confusion for both consumers and industry;
- Will effectively create a mandatory regime, despite IWG’s characterization of the proposal as “voluntary”;
- Raises significant free speech concerns; and
- Is overly paternalistic and unnecessary.

NYA respectfully urges IWG to withdraw its proposal in favor of continued voluntary, industry-implemented approaches, in order to allow the continued advertising to children of nutritious and desirable food options, including yogurt.

I. Overview of the Proposed Principles

On April 28, 2011, the IWG – composed of the FTC, FDA, USDA and CDC – released a proposal that sets forth a preliminary set of “voluntary principles to guide industry self-regulatory efforts to improve the nutritional profile of foods marketed to children.”³ The proposal recommends that industry focus its self-regulatory efforts on ten food categories deemed “most heavily marketed to children”⁴ and sets forth the IWG’s goal that all foods within these categories meet two nutrition principles by 2016. Under Principle A, foods marketed to children must “make a meaningful contribution to a healthful diet,” either by containing at least 50 percent by weight of one or more listed food groups (“Option 1”) or by containing specific minimum amounts of each of one or more listed food groups per Reference Amount Customarily Consumed (“RACC”) (“Option 2”).⁵ Under Principle B, foods marketed to children must not exceed target limits for nutrients that “could have a negative impact on health and weight” including sodium, saturated fat, *trans* fat, and added sugars.⁶

² Department of Health and Human Services and USDA, *Dietary Guidelines for Americans* (2010), available at <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/PolicyDoc.pdf> (last accessed April 6, 2011).

³ Proposed Principles at 1.

⁴ These categories include breakfast cereals; snack foods; candy; dairy products; baked goods; carbonated beverages; fruit juice and non-carbonated beverages; prepared foods and meals; frozen and chilled desserts; and restaurant food. Proposed Principles at 6-8, n. 17.

⁵ Proposed Principles at 8-10. Listed food groups include fruit, vegetable, whole grain, fat free or low fat milk products, fish, extra lean meat or poultry, eggs, nuts and seeds, or beans.

⁶ Proposed Principles at 11.

II. The Proposed Principles Will Prevent the Advertising of Many Nutritious Foods, Including Most Yogurt, to Children

We have significant concerns that the proposed principles are overly broad, unnecessarily restrictive, and inconsistent with both FDA regulations and the Dietary Guidelines. As a result, they will prevent many nutritious and desirable foods – including many yogurt products – from being advertised to children despite the recognized dietary benefits these products offer and the recommendation by the Dietary Guidelines that individuals – and, in particular, young children – increase consumption of low fat and nonfat dairy products.

In seeking to improve overall health and nutrition, significant consideration should be given to the overall composition of an individual's diet, with less focus on the specific foods a person may choose to eat. More importantly, if the goal of the proposal is to reduce childhood obesity, the key consideration should be the over-arching concept of calorie balance, which the IWG's proposal does not address. Consumers should be provided with information and options that allow them to choose a healthy, well-balanced overall diet.

Importantly, the food industry, including the yogurt industry, already responds to consumer demands by offering multiple choices and a variety of foods. Many foods are offered, for example, in full fat, low fat, or nonfat varieties, with regular or low-sodium content, and low-sugar or sugar substitutes. Yogurt, in particular, is available in a number of varieties, including those with low or no fat and with or without added fruit, flavor or sugar.

Unfortunately, however, the IWG's proposal fails to adopt a broad, common-sense approach that focuses on the importance of calories and the overall diet; instead it creates a granular, government-mandated scheme that divides the world into "good" and "bad" foods based on extremely precise nutrient requirements and limitations. Under this scheme, companies may only advertise to children those foods that the government has narrowly defined as "good." This proposal is inherently flawed and does not provide an effective strategy for combating childhood obesity. Rather, the practical effect of this scheme is to prohibit advertising to children many foods – including canned tuna, most soups, low fat and nonfat dairy, most ready-to-eat cereals, some whole wheat breads, most vegetable juices, most peanut butter, and even bottled water – that can be appropriate, and even desirable, components of a healthy, well-balanced child's diet. In fact, many of these foods are included in the USDA's "Special Supplemental Nutrition Program for Women, Infants, and Children" ("WIC"), which is intended to improve the health of women and children by providing nutritious foods to supplement diets.⁷ A blanket prohibition on the advertising of any of these foods to children does little to promote good nutrition and defies common sense.

In particular, we have serious concerns that the proposed principles would prevent the advertising of many yogurts to children, despite the fact that yogurt offers a meaningful contribution to a healthful diet. Such a result is directly at odds with the 2010 Dietary Guidelines' recommendation for increased consumption of nonfat and low fat dairy products.

⁷ WIC foods include, among other items, iron-fortified cereal, vitamin C-rich fruit or vegetable juice, eggs, milk, cheese, peanut butter, dried and canned beans/peas, canned fish, soy-based beverages, tofu, fruits and vegetables, whole wheat bread, and other whole-grain options. See "WIC Fact Sheet," USDA Food and Nutrition Service, Women, Infants and Children Program Facts Sheet, available at <http://www.fns.usda/wic/factsheets.htm> (last accessed July 3, 2011).

A. Yogurt Offers a Meaningful Contribution to a Healthful Diet

The nutritional benefits of yogurt are well-recognized. And, in fact, yogurt plays a prominent role in the Dietary Guidelines. Specifically, yogurt is a standardized,⁸ nutrient-rich dairy food that contains many essential nutrients including protein, calcium, riboflavin (Vitamin B2), Vitamin B12, phosphorus, and potassium. Additionally, many commercially available yogurts are fortified with Vitamin D. Yogurt is a good source of protein. It is also commonly known as an excellent source of calcium – which, along with Vitamin D and protein -- is critical in developing and maintaining strong, healthy bones.⁹ Indeed, many yogurts provide more than 20 percent of the Daily Value of both calcium and Vitamin D, and 10 percent of the Daily Value of potassium, three out of the four essential nutrients identified by the Dietary Guidelines as “nutrients of concern” – *i.e.*, nutrients for which typical intakes fall below recommended levels. Specifically, NHANES research estimates that over 90 percent of American children aged 6-12 years do not consume enough Vitamin D and about 55 percent do not consume enough calcium.¹⁰ And, in fact, some yogurts contain up to 50 percent of the Daily Value of calcium in a single serving.

In addition, the New England Journal of Medicine recently reported the results of a study that showed yogurt consumption is associated with less weight gain.¹¹ At a minimum, this study illustrates the fallacy in an approach that classifies foods as “good” or “bad” solely on the basis of nutrient content, rather than considering the role individual foods may play in contributing to a healthful diet. Moreover, to the extent the study is validated, it provides additional support for the argument that yogurt is a “good for you” food.

For children, yogurt can be an excellent choice. It comes in a variety of delicious flavors, and is available in convenient single servings. As highlighted in the attached Appendix, in comparison to other snacks commonly consumed by children, yogurt tends to be higher in essential nutrients like protein, calcium, and Vitamin D, and lower in fat, saturated fat and sodium content. Importantly, as compared to other snacks, yogurt provides these nutrient contributions at similar or lower

⁸ FDA’s standards of identity for yogurt are found in 21 C.F.R. §§ 131.200, 131.203, and 131.206.

⁹ The Dietary Guidelines express concern about inadequate calcium intake, generally, and note that children aged 9 and older, as well as adolescent girls, are of particular concern with regard to low bone mass due to low calcium intake from food. Dietary Guidelines, *supra* note 2, at 41.

¹⁰ NHANES 2007-08 (Day 1&2), NCI Usual Intake Method (pregnant & lactating women excluded) from foods only, Data analysis by Bell Institute of Health and Nutrition. NHANES is a survey and major program of the National Center for Health Statistics (“NCHS”) that is designed to assess the health and nutritional status of adults and children in the United States. The survey - recognized as the gold standard dietary intake survey in the United States - examines a nationally representative sample of about 5,000 people each year, and collects food intake data, in addition to nutrition, demographic, and other health information. NHANES is administered in different locations in the United States over a 2-year period, and involves interviews, a physical exam, and laboratory tests. CDC, “National Health and Nutrition Examination Survey,” available at <http://www.cdc.gov/nchs/nhanes.htm> (last accessed July 3, 2011).

¹¹ D.Mozaffarian, et al., *Changes in Diet and Lifestyle and Long-Term Weight Gain in Women and Men*, 364 NEW ENG. J. MED. 25 (June 23, 2011).

calories.¹² And, nearly 90 percent of children who eat yogurt meet their recommended intake for calcium.

The Dietary Guidelines recommend 2 to 3 cups of fat free or low fat dairy for children 2-12 years of age.¹³ For children aged 4 to 8, the Dietary Guidelines increase the recommended intake of milk and milk products – including yogurt – from 2 to 2.5 cups per day.¹⁴ Yogurt can play a key role in helping children meet these recommendations:¹⁵

- Dairy foods, including yogurt, are the leading source of calcium for 2-8 year old children, providing 63 percent of their daily calcium.¹⁶
- Dairy foods provide almost one-third (31 percent) of protein, slightly more than the amount provided by meat, poultry and fish, in the diets of 2-8 year olds.¹⁷
- Dairy is by far the largest contributor of vitamin D in young children’s diets, supplying 77% of their overall consumption of Vitamin D.¹⁸

In addition to the high nutritional value offered by yogurt, yogurt also contains live and active cultures (“LACs”).¹⁹ Research indicates that LACs play an active role in breaking down lactose in milk, thus – as mentioned in the Dietary Guidelines – providing a good dairy alternative to those who are lactose intolerant.²⁰ Yogurt is also a desirable alternative for those who avoid milk for cultural or other reasons.

¹² For example, a 4 oz serving of Yoplait Trix yogurt provides 3 grams of protein and 10% of the Daily Value of calcium and Vitamin D, while containing 100 calories and .5 grams each of fat and saturated fat. In contrast, a serving of microwave popcorn provides 2 grams of protein and no calcium or Vitamin D, while containing 149 calories, 8.5 grams of fat and 2 grams of saturated fat.

¹³ Dietary Guidelines, *supra* note 2, at 38.

¹⁴ *Id.*

¹⁵ Most yogurts consumed by children provide ¼ cup (2 oz) – ¾ cup (6 oz) of dairy per serving.

¹⁶ Nutrient Contributions of Dairy Foods for Children:
http://www.usdairy.com/DairyResearchInstitute/NHanes/Documents/Dairy_nutrient%20contributions%202008%20yrs_FINAL%2003%2031%2011.pdf

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ As required under the current yogurt standards of identity, yogurt must be cultured with *Lactobacillus bulgaricus* and *Streptococcus thermophilus*, although yogurt products may and often do contain other LACs in addition to the standard cultures.

²⁰ Oskar Adolfsson et. al, “Yogurt and Gut Function” *American Journal of Clinical Nutrition*, 80(2):245-56 (Aug. 2004). In fact, the Institute of Medicine (“IOM”) has explicitly recognized that individuals with lactose maldigestion are able to tolerate yogurt better than milk. IOM, “WIC Food Packages: Time for a Change,” at 119, *available at* [http://www.fns.usda.gov/oane/MENU/Published/WIC/FILES/Time4AChange\(mainrpt\).pdf](http://www.fns.usda.gov/oane/MENU/Published/WIC/FILES/Time4AChange(mainrpt).pdf) (last accessed July 12, 2011).

Additionally, for consumers who are concerned about fat, calories, or sugar, yogurt is available in fat free and low fat, as well as calorie- and sugar-reduced varieties. Most yogurt sold in the United States is either fat free or low fat and contains little or no saturated fat and cholesterol.

Based on the above, it is clear that yogurt offers a meaningful contribution to a healthful diet. And, in fact, as consumers have become increasingly aware of yogurt's nutritional and other health benefits, this unique dairy food has become a popular and integral part of the American diet.

B. Most Yogurt, However, Cannot Meet The Proposal's Stringent Nutrient Limitations, Which Are Inconsistent With FDA Regulations and the Dietary Guidelines

Despite the clear nutritional benefits yogurt offers, the nutrient restrictions in proposed Principle B for fat and added sugar content would eliminate many yogurts, except a select few plain, nonfat or low fat yogurts, and flavored, nonfat yogurts with non-nutritive sweeteners from the list of "good" foods that may be advertised to children.

1. The proposal's treatment of "low fat" and "naturally occurring" saturated fat would prevent some low fat yogurts from being advertised to children

As written, IWG's restriction on fat content and the confusing wording of the provisions related to "naturally occurring" saturated fat in low fat dairy foods contradict FDA regulations and the Dietary Guidelines, despite the IWG's assertion 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, nor do [they] signal any departure from the 2010 [Dietary Guidelines for Americans]."²¹ As a result, the proposal would preclude the advertising of many yogurts to children.

First, the IWG's definition of "low fat" conflicts with FDA's definition of that term and would preclude some low fat yogurt from being advertised to children under both Principles A and B. Specifically, FDA regulations define a "low fat" food as ≤ 3 g fat / Reference Amount Customarily Consumed ("RACC"). Under this definition, a low fat yogurt (RACC = 225 g) may contain up to 1.33 percent of fat.²² IWG, however, repeatedly defines "low fat" dairy, for purposes of Principle A, Option 2, as "1%."²³ Therefore, a yogurt recognized as low fat by FDA may contain more than 1 percent fat and thus may not always meet the requirements of Principle A.

Similarly, under proposed Principle B, foods marketed to children should not contain more than 1 g of saturated fat per RACC. As milkfat contains approximately 65 percent saturated fat, a yogurt that meets FDA's definition of "low fat" (i.e., contains ≤ 3 g fat / RACC) will contain approximately

²¹ Proposed Principles at 5.

²² Were FDA to update the yogurt RACC to 170 (g) to reflect current market conditions, as it has been asked to do, a low fat yogurt would have 1.76 percent fat. *See* Citizen Petition filed by NYA, Docket No. FDA-2011-P-0440-0001 (filed June 2, 2011).

²³ Proposed Principles at 15.

1.95 g of saturated fat. This saturated fat is naturally occurring; however, the exclusion from IWG's proposed nutrient limits for "naturally occurring" nutrients is ambiguously worded and would not appear to apply to saturated fat present in low fat yogurt because, as noted above, low fat yogurt may not always meet the 1 percent fat requirement described in Principle A.²⁴ As a result, a yogurt recognized as low fat by FDA may exceed saturated fat limits and be unable to meet the requirements of Principle B. Similarly, if the low fat yogurt is made with reduced fat milk rather than low fat milk, as is permissible under FDA's standard of identify for yogurt, it is possible that the yogurt would also fail to meet Principle B's nutrient limits because the exception for "naturally occurring" saturated fat can be read to apply only to ingredients that make a meaningful contribution to health, not to finished foods that meet that standard.

There is no justification – and the IWG has offered no rationale – for the creation of a new definition of "low fat" in lieu of FDA's clearly established and long-standing definition. Moreover, it is important to recognize that the recently released Dietary Guidelines for Americans 2010 recommend an increase in the "intake of fat free or low fat milk and milk products, such as milk, yogurt, cheese, or fortified soy beverages."²⁵ Yet, in light of the overly restrictive limitations on fat and saturated fat, the proposed principles contradict the Dietary Guidelines and would prohibit the advertising to children of many low fat and nonfat yogurts.

2. The proposal's focus on RACC values will further limit the advertising of yogurt to children.

The nutrient limitations imposed under Principle B are set on a per RACC basis. The existing RACC value for yogurt for persons 4 years of age or older (225 g),²⁶ assumes a portion size of 8 ounces of yogurt. However, this RACC value is outdated and no longer reflects customary consumption amounts, as NYA made clear in a Citizen Petition recently filed with FDA.²⁷ More recent consumption data show that the amount of yogurt customarily consumed per single eating occasion has significantly declined, and is well below 8 oz. Importantly, most children would have trouble eating an entire 8 oz serving.

It simply makes no sense to base nutrition standards for yogurt on a 8 oz RACC, since yogurt advertised to children (as well as adults) is typically consumed and is available in serving sizes smaller than the RACC. More recent data from 2005-06 NHANES show that the mean, median and mode-amount of yogurt customarily consumed per single eating occasion is closer to 6 oz (170 g). Marketing sales data also demonstrate that serving sizes of 6 oz or less are more consistent with the individual servings in retail outlets. For yogurts marketed to children, common serving sizes are 3-4 ounces in cups, 2.3 ounces in squeezable tubes, and 3-5 fluid ounces in bottles.

Furthermore, yogurt is commonly available in individual servings, which aids in portion and calorie control. If the goal of the proposed nutrition principles is to reduce childhood obesity, a key

²⁴ Proposed Principles at 14.

²⁵ Dietary Guidelines, *supra* note 2, at 34.

²⁶ 21 C.F.R. § 101.12(b), Table 2.

²⁷ See Citizen Petition filed by NYA, Docket No. FDA-2011-P-0440-0001 (filed June 2, 2011).

consideration should be the over-arching concept of calorie balance. This can be aided by foods packaged in individual servings that contain moderate levels of calories, such as yogurt.

It is not acceptable to use as the standard a serving size (8 oz RACC) that not only exceeds the amount of yogurt customarily consumed per eating occasion but is also larger than serving sizes typically found in the market.

III. The Proposed Principles Will Create Confusion for Retailers and Marketers, Consumers and Industry

Several elements in IWG’s proposal are drafted in a manner that may create confusion for retailers and marketers, consumers and industry members.

For example, as drafted, the sugar content limit in Principle B is inconsistent with FDA labeling requirements. It is therefore unlikely to be meaningful to – and may, in fact, create confusion for – consumers who are familiar with Nutrition Facts labeling on food products. Specifically, under Principle B, the proposed limit for added sugars in foods marketed to children is no more than 13 grams of added sugars per RACC for individual foods. The focus on added sugars is inconsistent with FDA Nutrition Facts labeling requirements, which include a declaration of total sugars and do not reference “added sugars.” Moreover, this approach is also inconsistent with the Institute of Medicine’s 2007 report on competitive foods in schools, which – to ensure that dairy products were not eliminated from school menus on the basis of their sugars content – recognized a total sugars limit for flavored yogurt of 30 grams per 8-ounce serving.²⁸ There is simply no scientific evidence to suggest that reducing the intake of added sugars will have a different or more positive effect on health than a reduction in consumption of total sugars.

Of particular concern, because the Nutrition Facts panel requires labeling of total sugars, compliance testing yields a value for total sugars. For most foods, analytical methods do not permit differentiation between added and naturally occurring sugars. Therefore, if companies are required to restrict advertising based on added sugars content, it would appear that the only way they can demonstrate compliance may be to make proprietary product information available for review. Certainly, industry should not be required to divulge trade secret information in order to prove compliance with a nutrient restriction that is at odds with existing federal labeling requirements.

Moreover, the “added sugar” benchmark may cause confusion for retailers and marketers who must determine the amount of added sugar in a food in order to decide whether that food may be advertised to children. In addition, the proposal will deprive consumers of information – in the form of advertising– about familiar products on the basis of a criterion that does not appear on product labeling. Eliminating information on the basis of a “secret” attribute will leave consumers unable to discern why certain products are no longer advertised and limit their ability to make healthy choices.

²⁸ See Institute of Medicine, Committee on Nutrition Standards for Foods in Schools, Food and Nutrition Board, *Nutrition Standards for Foods In Schools: Leading the Way Toward Healthier Youth* at 127 (Virginia A. Stallings and Ann L. Yaktine eds., 2007). This limit was set to account for approximately 12 grams of added sugars and 18 grams of naturally occurring sugars in nonfat and low fat yogurt.

Importantly, in focusing on total sugars, NYA maintains that, as noted above, the existing yogurt RACC does not reflect current customary consumption amounts. As a more accurate value for the yogurt RACC is 170 g (6 oz), NYA considers that any science-based nutrient limitations should be applied to yogurt and yogurt-type products (in both liquid and cup form) based on a 6 oz (170 g) serving size. Using the IOM's total sugar limit for an 8-ounce serving as a reference point, an appropriate total sugar content limitation for a 6-ounce serving could be 23 grams of total sugars (*i.e.*, 23 g/170 g (6 oz)).

IV. The Proposed Principles Are Not Truly Voluntary

NYA believes strongly that industry has a role to play in promoting healthy diets, improving childhood nutrition and combating childhood obesity. We firmly support voluntary industry efforts to use meaningful, science-based nutrition standards to govern child-directed advertising. To that end, as noted above, several NYA member companies are participants in the CFBAI.

We are very concerned, however, that although the IWG's proposal is described as "voluntary," in practice, it may be voluntary in name only. The proposed standards were developed not by industry, but by multiple government agencies that have extensive enforcement powers. These agencies have already established – without industry input – an arbitrary line between "good" and "bad" foods based on extremely precise nutrient requirements and limitations.

In fact, the only aspect of this proposal that is ostensibly "voluntary" is the decision to comply with the proposed standards in the first place, either by reformulating foods or by ceasing to advertise to children those foods characterized by the government as "bad." It is clearly understood, however, that it is the government's goal to ensure that these standards are applied. Government officials have indicated, for example, that they expect the food industry to comply with these principles and have suggested that, in the absence of such compliance, mandatory participation may become necessary.²⁹ We therefore have significant concerns that companies will be forced to self-censor under this proposal.

We also anticipate that the implicit threat of government enforcement may incentivize media outlets to refuse advertising that could, even potentially, be accused of violating these standards. This will potentially suppress industry's ability to advertise foods that are appropriate for children, but that may not meet the rigid technical standards the government has established.

V. IWG's Proposal Will Unlawfully Restrict Free Speech

We have very strong concerns about the impact of the IWG's proposal on free speech. First Amendment precedent clearly disfavors restrictions on speech. As such, any restriction needs to be narrowly tailored to a legitimate government purpose. Yet, as noted above, a logical consequence of this ostensibly neutral proposal may be that both industry and media outlets will censor themselves

²⁹ For example, upon announcement of the initial principles during a 2009 public forum, David C. Vladeck, director of the FTC's Bureau of Consumer Protection, stated: "To be clear, these standards will not be regulations. They will not be binding. But we expect the food industry to make great strides in limiting children-directed marketing to foods that meet these standards. If not, I suspect that Congress may decide for all of us what additional steps are required." See Teresa Esquivel, "Standardizing Food Marketed to Children," *Food Product Design* (Jan. 15, 2010), available at: <http://www.foodproductdesign.com/articles/2010/01/standardizing-food-marketed-to-children.aspx>.

to avoid official pressure and that media outlets will refuse advertising they believe may not fully comply with the proposed principles. This alone could have a chilling effect on lawful commercial speech. Judicial precedent specifically forbids such an outcome.³⁰

In addition, we are concerned that efforts to restrict advertising to children may have the unintended – and impermissible – consequence of infringing lawful advertising to adults. For example:

- The proposal expressly seeks to target advertising to “children” broadly defined as “children and adolescents ages 2-17.”³¹ This is an extremely broad age range that encompasses individuals with extremely different viewing habits, comprehension, and purchasing ability, as well as very diverse nutritional needs. Moreover, the IWG also indicates that marketing is “targeted” to children when the audience share is 30 percent children ages 2-11 or 20 percent adolescents ages 12-17.³² NYA questions the basis for these very low audience thresholds, particularly for adolescents. If implemented, these proposed principles would have an extreme reach into programming directed at adult audiences as well as other adult-oriented venues (e.g. sporting events).
- The proposal prohibits companies from using words such as “child” and “adolescent” and from featuring children or adolescents on product packaging, even in communications directed at parents. As a result, simple messaging to parents about child-focused activities (such as birthday parties) would be prohibited.
- The proposal would prohibit advertising of products not meeting the nutrition principles on any TV program, regardless of audience composition, if the ad happens to run within a “programming block” or “daypart” that contains primarily children’s/adolescents’ programming.
- The proposal would generally prevent companies from engaging in “all family” marketing efforts – such as booth sponsorship at a state fair – because these types of efforts inherently seek child/adolescent participation.
- The proposal would prohibit companies from sponsoring charities that support children (such as the Special Olympics) or from using athletes or celebrities that are popular with children in any form of marketing, even if that marketing was clearly directed at adults.

³⁰ See, e.g., *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 594 F.2d 1102, 1116 (D.C. Cir. 1978) (en banc) (rejecting “sub silencio pressures and ‘raised eyebrow’ regulations under the First Amendment.”); see also, e.g., *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, 1098, 1105, 1117 (C.D. Cal. 1976), vacated and remanded on jurisdictional grounds sub. nom. *Writers Guild of America, West v. ABC*, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980) (invalidating FCC policy intended to drive voluntary self-regulation of television content by the broadcast industry, and holding that “the existence of threats, and the attempted securing of commitments coupled with the promise to publicize noncompliance . . . constituted per se violations of the First Amendment.”).

³¹ Proposed Principles at 16.

³² Proposed Principles at 18.

The Supreme Court has made clear that “governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech in adults.”³³ Rather, restrictions on speech that are aimed at shielding children from certain messages must be narrowly tailored to prevent improper restrictions on appropriate communications to adults.³⁴

In light of clear judicial precedent, an initiative that effectively curtails the majority of food advertising to the adult population, rather than advertising aimed at children, cannot pass Constitutional muster.

VI. The Proposal Is Overly Paternalistic and Unnecessary In Light of Industry Self-Regulatory Efforts

Finally, we are very concerned that this misguided proposal seeks to substitute the judgment of government agencies for that of parents. It has historically been the role of parents to make purchasing decisions for their families – and particularly for younger children. By narrowing the scope of what advertising can be shown, the proposal seems to presume that parents cannot make well-informed decisions about which foods are appropriate for their children. As noted above, companies already provide consumers with a wide range of food options that make it possible for them to easily make healthy choices. There is significant market-based incentive that will drive companies to continue to offer multiple, healthful options. Consumers should be entrusted to weigh these options and take personal responsibility for their own health.

Moreover, we question why the IWG does not embrace truly voluntary industry self-regulation. Through efforts like the Children’s Food and Beverage Advertising Initiative, companies are already pledging to better-regulate the nutritional content of their products and the manner in which they market such products to children. There is ample evidence that these efforts are working; for example, companies are offering a greater number of foods in low and no fat, sugar, and sodium varieties; making calorie counts more prominent on packages and at the point of sale; and voluntarily restricting marketing of certain products in media where the audience consists primarily of younger children. A system that makes these efforts, in effect, mandatory, is unnecessary.

VII. Conclusion

In light of the above, NYA respectfully urges the IWG to withdraw its proposal. It simply makes no sense to prevent the advertising of what is considered under current FDA labeling rules to be low fat yogurt to children, given the well-documented nutrition benefits yogurt provides and the well-established dietary recommendations to increase the consumption of low fat dairy by the U.S. population at large. The IWG has provided no scientific basis for its principles, and has no evidence

³³ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001), citing *Reno v. ACLU*, 521 U.S. 844, 875 (1997). Just last month, the Supreme Court of the United States similarly stated, “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.” *Brown v. Entertainment Merchants Assn.*, No. 08-1448, 2011 U.S. LEXIS 4802, at *13-14 (2011) (rejecting an attempt by California’s legislature to ban the sale of violent video games to minors).


³⁴ See, e.g., *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983); see also *id.* at 74 (“The level of discourse . . . simply cannot be limited to that which would be suitable for a sandbox.”).

that limiting the advertising of wholesome and nutritious products like low fat yogurt to children will decrease childhood obesity.

Furthermore, the sweeping restrictions may actually serve to restrict a parent's ability to receive valuable information about the nutritional benefits of yogurt and the role it can play in a healthful youth or adolescent diet. Parents have a variety of yogurt choices available to them and should be permitted to make well-informed decisions about whether to include yogurt in their children's diet. A blanket prohibition on the advertising to children of almost any yogurt – based on inartful and confusing language that is at odds with existing federal regulations and guidelines – ignores the significant body of science documenting the benefits of yogurt and effectively deprives parents of valuable information about a nutritious food option.

If NYA can assist the IWG with additional information or perspectives, please do not hesitate to contact us. Thank you for the opportunity to respond.

Respectfully submitted,



Elise Cortina
Interim Executive Director

APPENDIX

Key Nutrients: Snacks Commonly Consumed by Children Ages 6-10

Data as of: 07-06-2011

Product/Weight	Serving Weight (g)	Calories	Total Fat (g)	Saturated Fat (g)	Sodium (mg)	Total Carbohydrates (g)	Sugars (g)	Dietary Fiber (g)	Protein (g)	Vitamin A (%DV)	Vitamin D (%DV)	Calcium (%DV)	Iron (%DV)	Vitamin C (%DV)	Data source
FRUIT															
Orange, raw, navel (1 fruit 2- ⁷ / ₈ " diameter)	140	69	0	0	0	18	12	3	1	7	0	6	1	100	USDA Database NDB No: 09202
Banana, raw, 1 medium (7" to 7- ⁷ / ₈ " long)	118	105	0	0	1	27	14	3	1	1	0	0	2	17	USDA Database NDB No: 09040
Apple, raw, with skin (1 medium-3" diameter)	182	95	0	0	2	25	19	4	0	2	0	1	1	1	USDA Database NDB No: 09003
Mott's Original Applesauce (1/2 cup)	113	100	0	0	0	24	22	1	0	0	0	0	0	20	Product package
YOGURT															
Yoplait Trix (4 oz.) all flavors	113	100	0.5	0.5	50	20	14	0	3	10	10	10	0	0	Product package
Yoplait Go-gurt (2.25 oz) all flavors	64	70	0.5	0.0	30	13	10	0	2	8	10	10	0	0	Product package
Dannon Coolision Tubes (2.2 oz.) all flavors	62	60	1.0	0.0	35	11	9	0	2	0	6	10	0	0	Product package
Dannon Danimals Crush Cup (4 oz.) all flavors	113	110	1.5	1.0	75	19	16	0	5	0	15	15	0	0	Product package
Chobani Champions (3.5oz.) Very Berry	100	100	1.5	1	40	12	11	0	8	2	20	10	0	4	Product package
CHEESE															
Kraft String-ums String Cheese (1 oz.)	28	80	6.0	3.5	200	1	0	0	7	4	0	15	0	0	www.kraftrecipes.com
SAVORY SNACKS															
Potato chips, plain, salted	30	163	11.0	1.2	158	15	0	1	2	0	0	0	3	9	USDA Database NDB No: 19411
Snacks, popcorn, microwave, regular (butter) flavor, made with partially hydrogenated oil (1 oz.) Yield: ~5 ½ cups popped	28	149	8.5	2.0	219	16	0	3	2	1	0	0	4	0	USDA Database NDB No: 25014
SWEETS: CANDY, COOKIES, ICE CREAM															
Hershey's Milk Chocolate Candy Bar (1 regular)	43	210	13.0	8.0	35	26	24	1	3	0	0	8	2	0	Product package
Starburst Original Candies (9 pieces)	40	130	0.0	0.0	40	31	22	0	2	0	0	0	0	0	www.wrigley.com
Jelly Beans (14 pieces)	41	150	0.0	0.0	10	37	30	0	0	0	0	0	0	0	www.brachs.com
Cookies, chocolate chip, commercially prepared, regular, higher fat, enriched (1 big cookie 3.5" to 4.5" diameter)	40	190	9.3	4.0	138	26	14	1	2	0	0	1	7	0	USDA Database NDB No: 18159
Ice cream, vanilla (1/2 cup)	66	137	7.0	4.5	53	16	14	1	2	6	1	8	0	0	USDA Database NDB No: 19095

Commonly consumed snacks by 6-10 year olds from NPD Group/Snack Track Database 2 years ending May 2011
 USDA's National Nutrient Database for Standard Reference