



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 Frozen Potato Products Institute (FPPI) appreciates the opportunity to provide 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). FPPI is the national trade association representing domestic manufacturers and producers of frozen potato products, and our member companies account for approximately 95 percent of the total annual United States production of frozen potato products. FPPI represents the specific interests of the frozen potato processing industry in regulatory and legislative matters at both the federal and state levels.

The frozen potato products industry is committed to producing safe, wholesome, nutritious products that consumers enjoy. FPPI strongly supports efforts to encourage healthy eating. In particular, we support efforts to encourage increased vegetable consumption among children in the U.S., and share the IWG's desire to improve children's and adolescents' diets. However, we are very concerned by the proposed principles because they infringe upon free speech rights protected by the First Amendment. In addition, we also have concerns about the IWG's proposed nutrition principles and marketing definitions for food marketed to children and adolescents. Specifically, our comments highlight the following concerns:

- 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 current federal nutrition policy, would prohibit marketing for many nutritious foods, like frozen potato products, 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.

FPPI urges the IWG to withdraw the proposed principles and instead focus its recommendations to Congress on more cooperative approaches to address childhood obesity.

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. Under the key precedent, *Central Hudson*, 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.^{1/} 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.

A reviewing court is unlikely to uphold the proposed principles for several reasons:

- The proposed principles would not pass scrutiny under *Central Hudson* because there is no basis to conclude that the principles would directly advance the government’s interest in preventing and reducing childhood obesity. Obesity is a complex problem that is not directly attributable to or caused by any one factor such as advertising. 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.
- Even assuming that the IWG’s proposal would actually affect childhood obesity, the principles would fail to pass constitutional muster under *Central Hudson* 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.

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

- Even though the proposed principles are intended to protect children, this does not immunize them from the need to adhere to the First Amendment. 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.” ^{2/}
- The proposed principles are not truly voluntary and therefore are subject to judicial review. ^{3/} 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 also would be bound, as media outlets would likely decline to run advertisements if they do not adhere to the principles. ^{4/}

Moreover, we believe that a reviewing court would be particularly skeptical of the IWG’s proposed principles in the current environment, as the Supreme Court is strongly protective of the First Amendment and is particularly inclined to review cases of government overreaching.

II. The Proposed Nutrition Principles are Flawed.

FPPI 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 nutritious foods like frozen potato products. 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 and would mark a significant departure from established nutrition policy. Underlying this inconsistency is the failure of the proposed principles to adhere to the *Dietary Guidelines for Americans, 2010* (Dietary

^{2/} *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)).

^{3/} 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’”).

^{4/} 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.

Guidelines). ^{5/} 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.

We are particularly concerned with the following incongruities of the proposed principles with federal nutrition policy:

- The proposed principles 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 Dietary Guidelines, in contrast, 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. The 1500 mg 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 Dietary Guidelines in this regard.
- The IWG’s limits are more restrictive than the regulatory definition of “healthy” established by the Food and Drug Administration (FDA). ^{6/} 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 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.

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

^{5/} U.S. Department of Agriculture and U.S. Department of Health and Human Services, *Dietary Guidelines for Americans*, 2010, 7th ed., Washington, D.C.: U.S. Government Printing Office, December 2010.

^{6/} 21 C.F.R. § 101.65(d)(2).

the government to establish consistent federal nutrition standards because conflicting federal guidance will cause confusion among the food industry and consumers.

B. Marketing for Many Nutritious Foods, Like Frozen Potato Products, 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 result is not supported by nutrition science and directly contradicts the IWG's stated goal of promoting healthy diets. In particular, we are concerned about the proposal's impact on the advertising of frozen potato products.

Frozen potato products are a tasty and nutritious source of key nutrients. Potatoes are an excellent source of potassium and a good source of fiber. ^{7/} Notably, the 2010 Dietary Guidelines for Americans identifies potassium and fiber as nutrients of concern and specifically recommends increased consumption of vegetables in which these nutrients are naturally occurring, like potatoes. ^{8/}

Additionally, potatoes are well-liked by children and adolescents. Public policy should encourage consumption of nutritious foods that children enjoy eating, rather than promoting foods that are unlikely to be consumed. However, under the IWG's proposed principles, companies will not be able to advertise certain frozen potato products to children unless they 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.

Contrary to popular misconceptions, fried, oven-baked and roasted potato products do provide nutritional benefits. Consider the following facts:

- One medium serving of oven-baked French fries (114 grams) provides 474 mg of potassium. This is more potassium than is provided by one medium banana. ^{9/}
- Oven-baked French fries have 50 percent more vitamin C, more potassium, and similar fiber levels to a serving of spinach.

^{7/} Appendix C to 21 C.F.R. Part 101.

^{8/} *Dietary Guidelines for Americans, 2010* at 41 ("To meet the recommendation for fiber, Americans should increase their consumption of beans and peas, other vegetables, fruits, whole grains, and other foods with naturally occurring fiber."), 68 ("Get more potassium in your diet. Food sources of potassium include potatoes, cantaloupe, bananas, beans, and yogurt.").

^{9/} School Nutrition Dietary Assessment Study-III: Volume II: Student Participation and Dietary Intakes. *Final Report. Mathematica Policy Research, Inc., November 2007. Available at <http://www.mathematica-mpr.com/publications/PDFs/SNDAAvol2.pdf>.*

- Oven-baked French fries have almost three times the potassium and a similar amount of fiber as a serving of broccoli.
- Oven-baked French fries have almost triple the potassium and double the fiber as a serving of green peppers.

However, due to their restrictive sodium levels, the IWG's proposed principles would prohibit marketing most brands of oven-baked French fries and roasted potato products to children. The IWG should consider acceptance of foods by children as part of its nutrition standards. If the IWG's principles only allow marketing of foods that children are unlikely to consume, children and adolescents may end up eating fewer vegetables and consuming fewer naturally-occurring nutrients, contrary to the Dietary Guidelines' recommendations. Failure to provide adequate sources of shortfall nutrients like potassium and fiber could have serious long-term health consequences for the nation's children.

It is entirely counterintuitive to prevent advertising of frozen potato products to children under a scheme that purports to improve childhood nutrition, when the prohibited advertising promotes products that are good sources of nutrients the federal government acknowledges are beneficial to childhood nutrition. This is not responsible public policy.

C. The Proposed Principles are Unrealistic to Implement.

FPPI also is 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.

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, affecting support of children's charities, athletic activities, and funding for philanthropic healthy-behavior initiatives, such as 5K run/walk events.

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 affect change through more cooperative efforts. ^{10/} We believe that the IWG should 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 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. ^{11/} Self-regulation 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'

^{10/} Additionally, we are concerned that the IWG has failed to meet its Congressional mandate, which required it to "conduct a study and develop recommendations for standards for the marketing of food." Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84. Before attempting to establish standards, the IWG should have conducted a comprehensive study of the issue as directed by Congress.

^{11/} *The Children's Food & Beverage Advertising Initiative in Action: A Report on Compliance and Implementation During 2009* (December 2010).

restrictive standards), manufacturers would have no reason to produce incrementally “better for you” versions of a product.

V. Conclusion.

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. FPPI 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 this proposal and report to Congress the numerous flaws and challenges, both constitutional and technical, inherent in the IWG’s mandate.

Respectfully submitted,

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