

*Before the*  
FEDERAL TRADE COMMISSION  
Washington, DC 20580

In the Matter of	)	
Interagency Working Group On Food	)	
Marketed To Children:	)	FTC Project No. P094513
General Comments and Proposed	)	
Marketing Definitions	)	

Children Now, joined by the following organizations and individuals,

American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Society of Bariatric Physicians, California Pan-Ethnic Health Network, California School Health Centers Association, Campaign for Commercial Free Childhood, Center for Digital Democracy, Center for Media Justice, Chicago Media Action, Consumer Action, Corporate Accountability International, Dale Kunkel, PhD, University of Arizona, David V B Britt, retired CEO, Sesame Workshop, Healthy Kinder, Inc., Industry Ears, Islamic Society of North America, Katherine Heinz, PhD, Lecturer, Santa Clara University, Lean and Green Kids, MomsRising, National Policy & Legal Analysis Network to Prevent Childhood Obesity, a project of Public Health Law & Policy, Parent’s Television Council, Public Health Advocacy Institute at Northeastern University School of Law, Robert W. McChesney, Gutgsell Endowed Professor , Depart. Of Communication, University of Illinois at Urbana-Champaign, Sacramento Black Child Development Institute, Shape Up America!, Statewide Youth Action Network for Sustainable Communities, The Prevention Institute, United Church of Christ, OC Inc.. United States Conference of Catholic Bishops, and Walter Willett, MD, DrPH, Prof of Epidemiology and Nutrition, Harvard School of Public Health (“Children Now *et al.*”), appreciate the opportunity to comment on the Interagency Working Group’s Preliminary Proposed Nutrition

Principles to Guide Industry Self-Regulatory Efforts.<sup>1</sup> These comments will focus on the marketing definitions.

Children Now *et al.* expect that if the Principles are followed by advertisers and media companies, they will significantly reduce the marketing of unhealthy foods and beverages to children and teens. The Principles improve upon the definitions used in existing self-regulatory programs by providing consistent standards and broader coverage. Children Now *et al.* thus urge CFBAI, CARU, and the children's media companies to voluntarily follow the Principles once they are finalized.

Children Now *et al.* support the Working Group's proposal to use the definitions from the FTC Food Marketing Reports as a starting point for voluntary guidelines. However, for ease of application and completeness, the FTC definitions should be simplified to cover any form of marketing that is 1) intended to target children or adolescents, OR 2) reaches an audience with a significant share of children or adolescents. Children Now *et al.* also urge that instead of exempting certain types of marketing from the definition of "targeted to adolescents," the Working Group should adopt two sets of comprehensive Principles -- one for child-targeted marketing and the other for teen-targeted marketing.

**I. IF ADVERTISERS AND MEDIA COMPANIES FOLLOW THE VOLUNTARY GUIDELINES, MARKETING OF UNHEALTHY PRODUCTS TO CHILDREN AND TEENS WILL BE SIGNIFICANTLY REDUCED**

Children Now *et al.* expect that the Principles will have a positive effect on child and adolescent health if companies follow them. The proposed Principles are superior to those currently employed by the Children's Food and Beverage Advertising Initiative (CFBAI).

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<sup>1</sup> Interagency Working Group on Food Marketed to Children, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts: Request for Comments* (2011) [hereinafter *IWGFMC Principles*], available at <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>.

Adoption of these Principles would provide incentives for companies to reformulate products to meet the nutrition criteria and market only products meeting those criteria to children and teens.

**A. The Proposed Principles Improve upon the CFBAI Definitions**

The Principles offer several improvements over CFBAI's current self-regulatory program. Seventeen food and beverage manufacturers, which collectively account for a significant portion of food marketing to children, voluntarily participate in this initiative.<sup>2</sup> Participants pledge to comply with the CFBAI Core Principle which include a provision that "all 'advertising primarily directed to children under 12' will be for healthy dietary choices, or better-for-you products, in accordance with company-developed standards that are consistent with established scientific and/or government standards."<sup>3</sup> However, the CFBAI lets participants define "advertising primarily directed to children under 12" as they choose, subject only to CFBAI review and approval. Thus, the value of these pledges rests in part on how "advertising primarily directed to children under 12" is defined.

The definition proposed by the Working Group is superior to the CFBAI Core Principles in several ways. First, the Working Group Definition encompasses marketing to adolescents as well as children. None of the CFBAI's Core Principles address marketing to people over 12 years of age. This alone represents a significant improvement over the CFBAI definitions.

Second, the FTC definition for measured media proposes a lower threshold than CFBAI. For measured media, the CFBAI Core Principles include media for which children constitute

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<sup>2</sup> *Children's Food and Beverage Advertising Initiative*, BETTER BUSINESS BUREAU, <http://www.bbb.org/us/children-food-beverage-advertising-initiative/> (last visited June 29, 2011).

<sup>3</sup> Better Business Bureau, *Children's Food and Beverage Advertising Initiative Program and Core Principles Statement 1-2* (2010) [hereinafter *CFBAI Core Principles*], available at <http://www.bbb.org/us/storage/0/Shared%20Documents/Enhanced%20Core%20Principles%20Third%20Edition%20-%20Letterhead.pdf>.

between 25-50% of the audience as defined by each participating company.<sup>4</sup> According to CFBAI, “most participants” use a threshold no higher than 35%.<sup>5</sup> The proposed Principles use audience shares of 30% for children and 20% for teens, thereby reaching more of the intended target audience.<sup>6</sup>

Third, although both the CFBAI and the Working Group propose different definitions for measured and non-measured media, the Working Group proposal is better because it considers the factors disjunctively. For example, in the case of television advertising to children, the FTC’s definition applies to advertising if *any* of the following three factors apply: (1) a marketing plan specifically indicates that the television advertising was intended to reach children under age 12; (2) the advertising appeared in any television program, programming block or daypart that had a viewing audience consisting of 30% of more children ages 2-11; or 3) the advertising occurred in a television program rated TV-Y or TV-Y7.<sup>7</sup> In contrast, the CFBAI Core Principles allow participants to “also include supplemental measures to identify advertising primarily directed to children under 12.”<sup>8</sup> Presumably, this means that some companies could claim that a television program with 30% or more children in the audience is not a “children’s program” because it does not meet the supplemental factors.

Another limitation of the CFBAI Core Principles is that they give companies a great deal of leeway in defining child-targeted marketing in “non-measured media.”<sup>9</sup> Non-measured media is defined as television, radio, print and Internet (third-party websites). The CFBAI allows each company to establish its own standards: “Participants may use an analysis of factors, including

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<sup>4</sup> *CFBAI Core Principles*, at 3.

<sup>5</sup> *Id.*

<sup>6</sup> *IWGFMC Principles*, at 18.

<sup>7</sup> Federal Trade Commission, *Order to File Special Report*, FTC Matter No. P094511, app. at B-2 (Aug. 12, 2010) [hereinafter *FTC Instructions*], available at [http://www.ftc.gov/os/6b\\_orders/foodmktg6b/P094511/P094511order.pdf](http://www.ftc.gov/os/6b_orders/foodmktg6b/P094511/P094511order.pdf). See fn19.

<sup>8</sup> *CFBAI Core Principles* at 3.

<sup>9</sup> *Id.*

the overall impression of the advertising, the target demographic based on the company's media plan, actions taken to restrict child access, such as age screening, and the audience definition for measured media.”<sup>10</sup> Using these vague criteria, a company that sponsored its own website to promote products not meeting the nutrition criteria could presumably claim that its website was not “child-targeted” even if it had actual knowledge that more than 20% of the visitors to the site were children aged 2-11. By contrast, the Working Group proposal would include company sponsored websites that met any one of four factors, such as audience demographic data and whether the website prominently features a celebrity highly popular with children.<sup>11</sup> Thus, the Working Group Proposal Principles will cover more marketing to children and teens than the CFBAI Principles.

**B. The Media Companies and Advertisers Should Agree to Follow the Principles**

Children Now *et al.* urge that all children's media companies, self-regulatory bodies such as CFBAI and CARU, as well individual companies that advertise foods and beverages to children or teens, agree to follow the Principles.

The White House recognized that media companies place a crucial role in efforts to curb obesity among youth because they “can directly control the type and volume of advertisements shown on their platforms [and] can impose limits on advertising, regardless of advertisers’ participation in a voluntary scheme.”<sup>12</sup> The White House further noted that “use of uniform nutritional criteria would facilitate” efforts to get media companies to participate.”<sup>13</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *FTC Instructions* app. at B-3.

<sup>12</sup> White House Task Force on Childhood Obesity, *Solving the Problem of Childhood Obesity Within a Generation* 30 (2010) [hereinafter *Task Force Obesity Report*], available at [http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce\\_on\\_Childhood\\_Obesity\\_May2010\\_FullReport.pdf](http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf).

<sup>13</sup> *Id.* at 31.

Media companies have been reluctant to develop their own Nutrition Principles because they lack expertise regarding nutrition. However, Nickelodeon promised during a Commerce Committee hearing in 2008 that if uniform nutrition standards were adopted, it would use them as a filter in all marketing and advertising relationships.<sup>14</sup> Children Now *et al.* urge Nickelodeon to make good on its commitment and other media companies such as Disney, the Cartoon Network and Facebook to follow suit. Media companies are familiar with the characteristics of their audiences, and thus can easily identify which types of advertising would fall under the objective criteria defining child- or teen-directed advertising.

Children Now *et al.* also urge that the Children's Advertising Review Unit (CARU), in addition to the CFBAI, adopt the Nutrition Principles in its self-regulatory program. CARU is the "children's arm of the advertising industry's self-regulation program and evaluates child-directed advertising and promotional material in all media to advance truthfulness, accuracy and consistency with its *Self-Regulatory Guidelines for Children's Advertising* and relevant laws."<sup>15</sup> In the 1990s, CARU extended its mission by adding a privacy component to its guidelines, in order to "help advertisers deal sensitively with the child audience in a responsible manner."<sup>16</sup>

To date, CARU has avoided entering the "good foods/bad foods debate," claiming it was "unworkable."<sup>17</sup> CARU noted that its staff members are "not experts in nutrition" and could not

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<sup>14</sup> Watch What You Eat: Food Marketing to Kids: J. Hearing Before the Subcomm. on Labor, Health and Human Serv., Educ., and Related Agencies & Subcomm. on Fin. Serv. and Gen. Gov't of the S. Comm. on Appropriations, 110th Cong. (2008) (statement of Marva Smalls, Executive Vice President and Chief of Staff, Nickelodeon/MTV Networks Kids and Family Group) *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg47517/pdf/CHRG-110shrg47517.pdf>.

<sup>15</sup> *About the Children's Advertising Review Unit*, CHILDREN'S ADVERTISING REVIEW UNIT, <http://www.caru.org/about/index.aspx> (last visited June 29, 2011).

<sup>16</sup> *Id.*

<sup>17</sup> Wallace Snyder, Remarks at the FTC Workshop on Perspectives on Marketing, Regulation, and Childhood Obesity, 67 (July 15, 2005) (transcript available at [http://www.aeforum.org/aeforum.nsf/c9d5c812ee8f0e6a80256c5100355eb2/0bdfa770056db0b98025708b003f0a56/\\$FILE/transcript\\_050715.pdf](http://www.aeforum.org/aeforum.nsf/c9d5c812ee8f0e6a80256c5100355eb2/0bdfa770056db0b98025708b003f0a56/$FILE/transcript_050715.pdf)).

evaluate nutritional properties of food.<sup>18</sup> Adopting the Principles would obviate the need for CARU to develop its own nutritional guidelines. Furthermore, adoption by CARU has the potential to extend the benefits of self-regulation to companies that do not participate in the CFBAI.

## **II. THE FTC DEFINITIONS MAY BE SIMPLIFIED TO ENCOURGE BROAD COVERAGE AND ADOPTION**

To define what constitutes marketing to children and adolescents, the Working Group proposes to use the definitions used by the FTC's studies of youth-directed food marketing expenditures.<sup>19</sup> The Working Group recognizes that the proposed definitions are substantially broader in age range and scope than those currently used by industry members in connection with existing self-regulatory programs governing foods marketed to children, but believes it important that the proposed nutrition principles encompass a broad range of marketing techniques to be most effective in encouraging children to make healthier food choices.

Children Now *et al.* agree that that the FTC's definitions provide a useful starting point. They also agree that to be effective, the marketing definitions must be broader than those currently used by CFBAI. The White House Obesity Task Force observed that "self-regulation must apply to all forms of marketing across multiple platforms."<sup>20</sup> If only some forms are covered, then advertisers will simply shift the marketing of food not meeting the nutrition guidelines to those forms.

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<sup>18</sup> Elizabeth Lascoux, *Id* at 80.

<sup>19</sup> The definitions used in the 2008 Report and those that are being used to prepare the update, vary in only a few small details. For purposes of these comments, Children Now *et al.* generally use the most recent definitions, on the theory that any changes were made to improve upon the earlier definitions based on experience or to reflect changes in market practices.

<sup>20</sup> *Task Force Obesity Report* at 31.

To ensure all forms of marketing were covered, the FTC identified seventeen categories: 1) television advertising; 2) radio advertising; 3) print advertising; 4) company-sponsored Internet sites; 5) other internet and digital advertising; 6) packaging and labeling; 7) movie theater/video/video game advertising; 8) in-stores advertising and promotions; 9) premiums; 10) promotion or sponsorship of public entertainment events; 11) product placements; 12) character licensing, toy co-branding, and cross-promotion; 13) sponsorship of, sports teams or individual athletes; 14) word-of-mouth and viral marketing; 15) celebrity endorsements; 16) in-school marketing; 17) advertising in conjunction with philanthropic endeavors; and also included a catch-all, 18) other promotional activities.<sup>21</sup> The guidance to industry self-regulatory efforts should clearly state that all marketing is to be covered. There should be no question as to whether any particular marketing activity it is covered by the Principles.

The Working Group proposes to adopt the FTC's specific criteria within each of these categories of when a particular marketing technique is targeted to children and to adolescents. While we believe that the FTC's definitions provide a useful examples, they should to be simplified to promote widespread voluntary adoption. The FTC definition may be distilled into two basic benchmarks: (1) whether the marketing is intended for children and/or teens, or (2) whether the marketing in fact reaches a significant percentage of children and/or teens. It is important that marketing that meets *either* benchmark is included within the definition.<sup>22</sup>

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<sup>21</sup> The Working Group's request for comments refers to 20 categories. It seems to be referencing the categories used in the 2008 Food Marketing Report. *FTC Instructions* app. at D1-D7. In any event, the two are similar, and any marketing that would fall into one of the defined categories would fall into "other."

<sup>22</sup> As discussed above, the FTC definitions clearly contemplate that the criteria are disjunctive. Some language in the Working Group proposal could be read to imply that subjective criteria should be used only where objective criteria is not available. *See, e.g., IWGFMC Principles* at 18-19. Children Now *et al.* do not support favoring "objective criteria" over subjective criteria because audience composition data is not generally available to the public and, depending upon how it is collected, may not be any more reliable than the so-called "subjective" indicia of intent.



## **A. Indicia of Intent**

The FTC definitions provide several illustrations of “intent to target an audience.” For example, the FTC considers Internet advertising to be targeted to children if “a marketing plan specifically indicates that the Internet advertising was intended to reach children under age 12” or “the company knowingly sought the participation of children in the Internet or digital advertising campaign.”<sup>23</sup> Other indicia of intent include the use of “child-oriented animated or licensed characters.”<sup>24</sup> Under the FTC definitions, marketing meeting any one of these factors qualifies as child- or teen-directed. Children Now *et al.* support this approach.

### **1. Other Factors Can Be Reliable Indicators of Intent to Target Children or Teens**

Because intent can be manifested in many different ways, Children Now *et al.* urge the Working Group to clarify that the examples in the FTC definitions are illustrative and not exclusive. In other words, while the FTC definitions provide practical guidance, other factors could also be used to demonstrate intent to target children or teens.

For example, statements made by executives can indicate that companies are targeting a particular demographic. When Coke launched a music-based campaign in March 2011, *AdAge* quoted the Senior VP for sparkling products as saying, “[w]e can't afford not to talk to teens. You can't think, 'Teens already know us,' and skip a couple of years. Every six years there's a new population of teens in the world.”<sup>25</sup> The same article quoted Coca-Cola’s CEO, Muthar Kent, remarking to analysts that: “Our success in growing our sparkling category today depends

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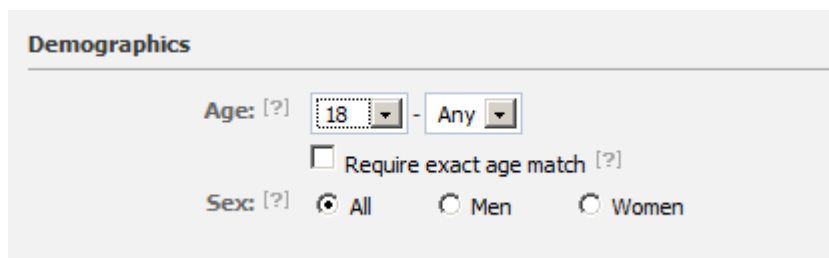
<sup>23</sup> *FTC Instructions* app. at B-4-B-5.

<sup>24</sup> *Id.*

<sup>25</sup> Natalie Zmuda, *Coca-Cola Launches Global Music Effort to Connect With Teens*, AD AGE GLOBAL (Mar. 3, 2011), <http://adage.com/article/global-news/coca-cola-launches-global-music-effort-connect-teens/149204/>.

on our ability to grow and connect with teens, the generation of tomorrow.”<sup>26</sup> Such statements evidence intent to target teens.

Similarly, the manner in which a company designs a targeted marketing campaign can evidence its intent to target children or teens. For example, although the current default minimum is 18 for advertising on the Facebook platform, a marketer could set a lower age.<sup>27</sup>

A screenshot of the Facebook Demographics targeting interface. The title "Demographics" is at the top. Below it, the "Age" section shows a range from "18" to "Any", with a dropdown arrow next to "18". Below the age range is a checkbox labeled "Require exact age match" with a question mark. The "Sex" section shows three radio button options: "All" (which is selected), "Men", and "Women".

Setting the minimum age at 14, for example, would show intent to target teens.

The decision to use a marketing agency that specializes in marketing to teens can also indicate intent to target teens. For example, Fuse marketing describes itself as a “youth marketing agency that connects brands with teens and young adults.”<sup>28</sup> Other examples of intent would include the submission of an advertising campaign for a youth marketing awards<sup>29</sup> and a advertising on a television program identified as specifically designed to serve the educational or informational needs of children or teens by on a television station’s Children’s Television Report Form 398.<sup>30</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Advertise on Facebook*, FACEBOOK, <https://www.facebook.com/ads/create/> (last visited June 29, 2011). In some cases, marketers are required to set an age target by Facebook terms. *Facebook Ad Guidelines*, FACEBOOK, [https://www.facebook.com/ad\\_guidelines.php](https://www.facebook.com/ad_guidelines.php) (last visited June 29, 2011).

<sup>28</sup> FUSE MARKETING, <http://www.fusemarketing.com> (last visited Jul. 13, 2011).

<sup>29</sup> *See, e.g., Submit Your Youth Campaign For The Genny Award*, YPULSE, <http://www.ypulse.com/submit-your-youth-campaign-for-the-genny-award> (last visited June 29, 2011).

<sup>30</sup> *See generally* 47 CFR §§73.671, 73.673, 73.3526(e)(11)(iii). Form 398s are available to the public in the station’s public inspection file, on the station’s website, and on the FCC website: <http://transition.fcc.gov/Forms/Form398/398.pdf>.

## 2. Use of Industry Ratings

The Working Group specifically includes ratings as indicia of whether movies, videos or video games are targeted to children or teens.<sup>31</sup> While Children Now *et al.* support this concept, the industry ratings utilized by the FTC are too limited.

The FTC's definition of child-targeted marketing includes advertising in or contiguous to any motion picture rated G by the MPAA. Movies that receive a G rating contain "nothing in theme, language, nudity, sex, violence or other matters that, in the view of the Rating Board, would offend parents whose younger children view the motion picture."<sup>32</sup> However, since only about 3% of all movies rated by the MPAA from 1995 to 2011 received a G rating, children are obviously watching many movies with a PG or higher rating.<sup>33</sup> Children Now *et al.* urge the Working Group to consider a PG rating as indicating intent to target children.<sup>34</sup>

In addition, Children Now *et al.* are aware that some "PG-13" movies are cross-promoted with fast food kids' meals. For example, *The Twilight Saga: Eclipse* was cross-promoted with Burger King Kids' Meals.<sup>35</sup> *The Green Hornet* was cross-promoted with Cool Kids Combos meals at Carl's Jr.<sup>36</sup> While we do not condone this practice, it does provide another indicia of intent to target children.

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<sup>31</sup> *IWGFMC Principles* at 18.

<sup>32</sup> *What Each Rating Means*, MPAA, <http://www.mpa.org/ratings/what-each-rating-means> (last visited July 13, 2011).

<sup>33</sup> *Top Grossing MPAA Ratings 1995 to 2011*, THE NUMBERS, <http://www.the-numbers.com/market/MPAARatings/> (last visited July 13, 2011).

<sup>34</sup> The PG rating signifies that "in the view of the Rating Board, that parents may consider some material unsuitable for their children, and parents should make that decision. The more mature themes in some PG-rated motion pictures may call for parental guidance. There may be some profanity and some depictions of violence or brief nudity. But these elements are not deemed so intense as to require that parents be strongly cautioned beyond the suggestion of parental guidance. There is no drug use content in a PG-rated motion picture." *What Each Rating Means*, MPAA, <http://www.mpa.org/ratings/what-each-rating-means> (last visited July 13, 2011).

<sup>35</sup> Jennifer Brandt, *Is Your Child Ready for PG-13 Movies?*, PARENTSASK (June 24, 2010), <http://www.parentsask.com/articles/your-child-ready-pg-13-movies>.

<sup>36</sup> Julius Marx, *Green Hornet Kids Meal Toys at Carl's Jr.*, ACTION FIGURE INSIDER (Nov. 18, 2010), <http://www.actionfigureinsider.com/main/green-hornet-kids-meal-toys-at-carls-jr>.

In collecting data for the 2008 Food Marketing Report, the FTC considered movies rated PG to be marketed to teens.<sup>37</sup> The MPAA describes PG-13 as “a sterner warning by the Rating Board to parents to determine whether their *children* under age 13 should view the motion picture, as some material might not be suited for them.”<sup>38</sup> Thus, it may be appropriate to consider movies rated PG-13 as targeted to teens.

For video games, the FTC defines advertisements in video games rated EC by the Entertainment Software Ratings Board (ESRB) as child-targeted.<sup>39</sup> Titles rated EC for Early Childhood have content suitable for ages 3 and older and contain no material that parents would find inappropriate.<sup>40</sup> Children Now *et al.* support the inclusion of EC rated video games, but note that only 1% of the rated games released in 2010 received an EC rating.<sup>41</sup> Thus, we suggest include games rated E for Everyone, which are defined as containing content suitable for ages 6 and older. This would be more protective of children, as 55% of games rated and released in 2010 were rated E.<sup>42</sup>

In defining marketing to adolescents, the FTC’s first request included advertisements in video games rated E or E10+.<sup>43</sup> E10+ means “everyone 10 and older.” A T for teen rating means that the game is suitable for ages 13 and older. Children Now *et al.* urge the Working Group to consider using both E10+ and T ratings as indicia of targeting to teens.

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<sup>37</sup> In the most recent data request, however, the FTC does not list any movie ratings as a criterion for teens.

<sup>38</sup> *What Each Rating Means*, MPAA, <http://www.mpaa.org/ratings/what-each-rating-means> (last visited July 13, 2011), emphasis added.

<sup>39</sup> *FTC Instructions* at B-6.

<sup>40</sup> *ESRB Ratings Guide*, Entertainment Software Rating Board, [http://www.esrb.org/ratings/ratings\\_guide.jsp](http://www.esrb.org/ratings/ratings_guide.jsp) (last visited July 13, 2011).

<sup>41</sup> Chris Pereira, *How Many Mature Rated Games Were Released in 2010?*, 1UP (Mar. 15, 2011), <http://www.1up.com/news/how-many-mature-rated-games-released>.

<sup>42</sup> *Id.*

<sup>43</sup> However, it did not include ratings as a factor in its more recent definitions. See Federal Trade Commission, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, app. at B-15 (2008) [hereinafter *2008 Food Marketing Report*].

## **B. Audience Measurement**

The second general benchmark uses audience measurements or other factors to determine that a particular audience has been reached. The FTC definitions include audience measurements for certain categories of marketing. For example, television advertising targeted toward children includes any advertising that “appeared in any television program, programming block, or day part that had a viewing audience consisting of 30% or more children ages 2-11, as measured on an annual basis.”<sup>44</sup> For adolescents, television advertising is included if it “appeared in, during or contiguous to any television program, programming block or day part that had a viewing audience consisting of 20% or more adolescents ages 12-17, as measured on an annual basis.”<sup>45</sup> The FTC selected these percentages because they are approximately double the proportion of each age group in the U.S. population.

The FTC uses different percentages for Internet and digital advertising. For example, it defined Internet advertising to children as advertising that “appeared on any website for which demographic data indicate that children ages 2-11 constituted at least 20% of the audience for any month.”<sup>46</sup> Digital advertising targeted to children was defined as that in which “20% or more of the participants in or audience of digital advertising campaign were children, according to demographic data or other information within the company’s possession, custody, or control.”<sup>47</sup> The FTC selected 20% instead of 30% because “this level of audience share is approximately

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<sup>44</sup> *FTC Instructions* app. at B-2.

<sup>45</sup> *Id.* at C-2. The same percentages are used for radio advertising, print advertising, movie theater/video/videogame advertising, promotion or sponsorship of public entertainment events, product placements, sponsorship of sports teams or individual athletes, celebrity endorsements, and advertising in conjunction with philanthropic endeavors.

<sup>46</sup> *FTC Instructions* app. at B-5; *see also* B-3 (using 20% standard for company-sponsored internet sites); B-6 (other digital advertising), B-11 (participant in word of mouth marketing campaigns); B-12 (viral marketing).

<sup>47</sup> *Id.*

double the proportion of that group in the population of active Internet users during 2009” using data from comScore.<sup>48</sup> Using the same rationale, the FTC selected the 20% threshold for teens.<sup>49</sup>

Children Now *et al.* support using audience share data to identify marketing that should be subject to the nutritional guidelines. It makes sense to use population percentages for most media, since virtually all households consume television, radio, and print media. Similarly, it makes sense to use Internet usage rather than population as the basis for determining the threshold for children’s exposure to Internet and digital advertising, since very young children are less likely to use the Internet.

Children Now *et al.* also think that it is important for companies to use the same thresholds. Of the 17 companies that participate in the Children’s Food and Beverage Advertising Initiative, 11 use 35% and 2 use 30%. Four companies (Cadbury Adams, Coca-Cola, Hershey and Mars) do not use audience share for children under 12 but do use audience shares ranging from 25 to 50% for children under 6.<sup>50</sup> Since children age 0-5 make up only 6.54% of the population and few children under 2 watch television or use the Internet, little if any marketing is covered by these definitions.

Setting the audience threshold at 30% as recommended by the Working Group would create a uniform standard that for many companies would be more protective than the ones used today. On the other hand, a threshold set closer to the percentage of children in the population would be even more protective.

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<sup>48</sup> *FTC Instructions* app. at B-3.

<sup>49</sup> *FTC Instructions* app. at C-3.

<sup>50</sup> Better Business Bureau, Participants Definitions of Advertising Primarily Directed to Children Under 12 and Policies on Not Advertising to Children Under Six (2011), *available at* <http://www.bbb.org/us/storage/0/Shared%20Documents/audience%20definitions%20for%20under%2012%20and%20under%20age%20six-march%202011-final.pdf>.

Children Now *et al.* are not persuaded that the threshold should be set at twice the percentage of the age groups in the population (or population of internet users). The Working Group explains that “these audience shares are likely to ensure capturing most programming or publications targeted to children or adolescents, while not including substantial amounts of adult fare that happen to have some young people in the audience.”<sup>51</sup>

Children Now *et al.* are concerned that using this threshold could leave out a large number of programs, events, and websites popular with children and teens. The relative merits of these concerns -- that using percentages double the proportion of children and teens in the audience could leave large numbers of children and teens unprotected or that using lower percentages could result in the inclusion of substantial amounts of adult fare -- present a factual question that could be answered by examining data. Unfortunately, however, the data that would be necessary to test these claims is not generally available to the public and can only be obtained at great expense.

Children Now *et al.* thus urge the Working Group to obtain and analyze audience share data for different types of marketing to determine whether it is necessary to use the higher threshold to prevent inclusion of a substantial amount of marketing intended for adults.

### **C. Simplified Definitions Based on the FTC Definitions Will Facilitate Broad Adoption**

The Principles should be designed so that is easy to tell if companies have agreed to follow them and if so, whether they are in fact following them. Companies will be more likely to agree to apply the Principles if they can be assured that their competitors are following them as well. Those concerned about the epidemic of childhood obesity need to be able to identify companies that have agreed to follow the Principles – and those that have not.

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<sup>51</sup> *IWGFMC Principles*, at 18.

Broad criteria and universal coverage helps to addresses one particular problem with the Principles, that is, that much of the information needed to apply the criteria are accessible only to the companies themselves. Audience measurements are usually not available without incurring the substantial cost of purchasing the data. Internal company marketing plans are also generally not available to the public. Having a broad set of criteria maximizes the opportunity for outside review of the compliance with the Principles.

Broad criteria and universal coverage also make easier for companies to implement the Principles. The FTC definitions aimed to study expenditures and thus had a reason to separate the media into separate advertising categories. For the purposes of the Principles, the only determination required is whether the marketing is intended for children and/or teens or in fact reaches a significant percentage of children and/or teens. Companies should be able to make this decision with greater ease than having to analyze the marketing under different tests for different types of media.

The use of the simplified definition will also facilitate assessment and review by public health organizations and academics. Although Children Now *et al.* urge the FTC to continue collecting data through a compulsory process and to make periodic reports to Congress on the progress made by the industry, the public should not have to wait several years until another report is prepared to be able to assess the impact of the voluntary guidelines.

### **III. THE PRINCIPLES SHOULD COVER BOTH CHILD AND ADOLESCENT MARKETING.**

Question #23 asks about the “similarly broad definitions of what constitutes marketing to children ages 2-11 years and adolescents ages 12-17.”<sup>52</sup> It also seeks comment on the advantages and disadvantages of applying the nutrition principles only to marketing techniques

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<sup>52</sup> *IWGFMC Principles*, at 23.



that are “more narrowly focused on adolescents,” such as in-school marketing, social media, the Internet, digital, viral and word of mouth, thereby excluding the traditional measured media.<sup>53</sup>

This inquiry appears to be motivated by industry concerns such as those expressed the HHS forum. For example, one participant asserted that it was “misguided” to apply restrictions to teenagers, and “unjustifiable” to treat teenagers as children.<sup>54</sup> Other participants called the standards as “unworkable.”<sup>55</sup> Another asked how useful the standards would be if industry could not comply.<sup>56</sup>

Children Now *et al.* believe that it would be a mistake not to include all forms of marketing to teens. Teens are a significant target for food marketers. The FTC found that of the \$1.6 billion spent in marketing to youth, \$1.05 billion was directed at teens.<sup>57</sup> Moreover, of that amount, the largest share, totaling \$745 million (46%) of youth-directed advertising, was spent on television advertising.<sup>58</sup> Other measured media accounted for over \$100 million (7%).<sup>59</sup> In contrast, in-school marketing amounted to only \$186 million (11%) of youth marketing expenditures, while new media such as Internet, digital and word of mouth marketing was only \$77 million (5%).<sup>60</sup> While it is true that television advertising tends to be more expensive than digital marketing, these figures nonetheless suggest that excluding measured marketing would mean that teens would continue to receive large amounts of marketing for unhealthful products.

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<sup>53</sup> *Id.* at 23-24

<sup>54</sup> Dan Jaffe, Remarks at the HHS Forum on Food Marketed to Children, 77 (May 24, 2011) (transcript available at <http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript.pdf>).

<sup>55</sup> Barbara Hiden, Remarks at the HHS Forum on Food Marketed to Children, 75 (May 24, 2011); Elaine Kolish, Remarks at the HHS Forum on Food Marketed to Children, 81 (May 24, 2011) ) (transcript available at <http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript.pdf>)

<sup>56</sup> Joy Dubost, Remarks at the HHS Forum on Food Marketed to Children, 42 (May 24, 2011) (transcript available at <http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript.pdf>).

<sup>57</sup> 2008 Food Marketing Report at 7 (303 million were considered “duplicative.”).

<sup>58</sup> *Id.* at 8.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

Nor does protecting teens from marketing of unhealthful foods “treat teens as children.” Indeed, marketing limits that take into account the vulnerabilities of teens – which differ from both children and adults – would provide teens with greater opportunity to make their own, rational decisions about what to consume. More than either children or adults, adolescents are prone to impulsive or risky behavior.<sup>61</sup> This is not due to lack of education, as adolescents may be equally aware of risks, or even report a higher level of awareness than adults.<sup>62</sup> Rather, the presence and influence of peers can increase risk taking in adolescents.<sup>63</sup> In addition, adolescents’ emotional states tend to be more volatile and more negative than those of both children and adults.<sup>64</sup> Adolescents display “more swings in mood, more intense moods, lower or more variable energy levels, and more restlessness” than at other ages.<sup>65</sup> Adolescents may also have higher anxiety.<sup>66</sup> As a result, adolescents tend to be more susceptible to marketing techniques suggesting that eating certain foods or drinks will make them happier or more popular. Limiting marketing of unhealthful foods and beverages to teens would give them greater ability to think about whether they really want to purchase or consume those products.

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<sup>61</sup> Linda Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE AND BIOBEHAVIORAL REVIEWS 417 (2002); Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249 (1996); Edelgard Wulfert, Jennifer Block, Elizabeth Santa Ana, Monica Rodriguez, & Melissa Colman, *Delay of Gratification: Impulsive Choices and Problem Behaviors in Early and Late Adolescence*, 70 J. PERSONALITY 533 (2002).

<sup>62</sup> Baruch Fischhoff, et al., *Teen Expectations for Significant Life Events*, 64 PUBLIC OPINION QUARTERLY 189 (2000), available at <http://sds.hss.cmu.edu/media/pdfs/fischhoff/teenexpectations.pdf>; Susan Millstein & Bonnie Halpern-Felsher, *Judgments About Risk and Perceived Invulnerability in Adolescents and Young Adults*, 12 JOURNAL OF RESEARCH ON ADOLESCENCE 399 (2002); Susan Millstein & Bonnie Halpern-Felsher, *Perceptions of Risk and Vulnerability*, 31 JOURNAL OF ADOLESCENT HEALTH, supp. 1 10 (2002); Marilyn Quadrel, Baruch Fischhoff, & Wendy Davis, *Adolescent (in)vulnerability*, 48 AMERICAN PSYCHOLOGIST, 102 (1993).

<sup>63</sup> Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOLOGY 625 (2005).

<sup>64</sup> Christy Buchanan, Jacquelynne Eccles & Jill Becker, *Are Adolescents the Victims of Raging Hormones? Evidence for Activational Effects of Hormones on Moods and Behavior at Adolescence*, 111 PSYCHOLOGICAL BULLETIN 62, 98 (1992).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

As a practical matter, it would be difficult to limit marketing to only certain types of media. Most contemporary marketing is cross-platform. The concept of “convergence” of media content has been around since the 1990’s.<sup>67</sup> Some TV executives predict that “we are only two years away from 75 percent of TV content being available online and on mobile devices.”<sup>68</sup> Marketing campaigns likewise take place on several media platforms. A particular campaign can include television advertising, movie product tie-ins, and website or other digital promotions.

Media companies are working to facilitate this practice. For example, News Corporation is in discussions with Hulu.com in order to facilitate the sale of advertising spots on both news and online video, with the goal that an executive describes as “to extend the ability of your ads to travel with our content across screens to create a unified audience experience regardless of platform”<sup>69</sup> The CW network has partnered with Shopkick to provide a mobile app reward system to viewers of television commercials.<sup>70</sup> PepsiCo has partnered with “television tagging” iPhone application IntoNow.<sup>71</sup> A user will “tag” the commercial after the application hears it playing, and will receive a digital coupon in the iPhone.<sup>72</sup> Thus, for the Principles to adequately cover a given marketing campaign, they must encompass all media and marketing techniques.

Exempting traditional measured media targeted to teens from coverage of the Principles would also have a disparate impact on youth of color. Youth of color already tend to be at greater risk for obesity. In 2007-08, non-Hispanic whites had the lowest obesity rates at 16.7% for boys and 14.5% for girls. Obesity rates for non-Hispanic blacks were much higher at 19.8%

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<sup>67</sup> Augustine Fou, *Total Convergence*, GO-DIGITAL (Jan. 19, 1998), <http://go-digital.net/articles/convergence.html>.

<sup>68</sup> D.M. Levine, *In 2 Years Nearly All Content Will Be Online*, ADWEEK (June 7, 2011), <http://www.adweek.com/internet-week-blog/2-years-nearly-all-tv-content-will-be-online-132322>.

<sup>69</sup> Brian Steinberg, *News Corp. 's Hulu Hope: More Commercials*, CRAIN'S NEW YORK BUSINESS (May 30, 2011, 12:53 PM), <http://www.crainsnewyork.com/article/20110531/FREE/110539989>.

<sup>70</sup> Jennifer Van Grove, *Shopkick & The CW Strike Deal to Deliver Rewards for Watching TV Ads*, MASHABLE (May 19, 2011), <http://mashable.com/2011/05/19/shopkick-cw-partnership/>.

<sup>71</sup> Jennifer Van Grove, *Tag a TV Ad, Get a Free Pepsi*, MASHABLE (Apr. 20, 2011), <http://mashable.com/2011/04/20/intonow-pepsi-partnership/>.

<sup>72</sup> *Id.*

for boys and 29.2 % for girls. Hispanic youth also had higher rates of obesity than whites, at 25.5% for boys and 17.5% for girls.<sup>73</sup> At the same time, recent research shows that minority youth tend to have greater exposure to traditional, measured media. Among 8 to 18 year olds, for example, African Americans watched nearly 6 hours of television each day and Hispanics watched over 5 hours, while whites watched only about 3.5 hours.<sup>74</sup>

Rather than exempting certain types of marketing to teens from their single Principle, the Working Group should adopt two sets of comprehensive Principles, one for child-targeted marketing and the other for teen-directed marketing. This way, companies that find the adolescent marketing Principles unworkable could at least comply with the child-directed Principles. Children Now *et al.* hopes that such companies would expand their participation to include teen-directed marketing over time.

#### **IV. CONCLUSION**

Children Now *et al.* encourage members of the food and beverage industry, media companies and self-regulatory bodies to voluntarily follow the Principles adopted by the Working Group. The Principles should be based on the FTC definitions, but should be modified to cover any form of marketing that is intended to target children or adolescents OR that reaches an audience with a significant share of children or adolescents. Rather than exempt certain types

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<sup>73</sup> Task Force Obesity Report at 5.

<sup>74</sup> Victoria Rideout, *Children, Media and Race: Media Use Among White, Black, Hispanic and Asian American Children* 11 (2011), available at <http://web5.soc.northwestern.edu/cmhd/wp-content/uploads/2011/06/SOCconfReportSingleFinal-1.pdf>.

of marketing to adolescents from the Principles, the Working Group should adopt one set of comprehensive Principles for children and another for teens.

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