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July 14, 2011

Donald Clark, Secretary
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 - FTC Project No. P094513.
Comments on Proposed **Marketing Definitions**

To Whom It May Concern:

Attached you will find Nestlé USA's Comments to the *Preliminary Proposed Nutrition Principles to Guide Industry Self Regulation* of the Interagency Working Group on Food Marketed to Children (IWG Proposal). Pages 6-9 deal specifically with the Marketing Definitions.

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

To Whom It May Concern:

These Comments are submitted by Nestlé USA, Inc., Nestlé Prepared Foods Company, and Dreyer's Grand Ice Cream, Inc. (jointly referred to as Nestlé USA) in response to the *Preliminary Proposed Nutrition Principles to Guide Industry Self Regulation* of the Interagency Working Group on Food Marketed to Children (IWG Proposal).

By way of background, Nestlé USA markets such food and beverage brands as Nestlé® Toll House®, Nestlé® Nesquik®, Nestlé® Coffee-Mate®, Stouffer's®, Lean Cuisine® , Nescafé®, Nestlé® Juicy Juice®, Buitoni®, Dreyer's® and Edy's®, Nestlé® Crunch®, Wonka®, and DiGiorno®.

Nestlé USA is committed to responsible communication to consumers, including children. We implemented our global parent company's policy on marketing to children and are members of the Better Business Bureau's Children's Food and Beverage Advertising Initiative (CFBAI). As a CFBAI member we have made our nutritional standards for healthier dietary choices public, and we advertise a limited number of products to children. We are committed to the ongoing nutritional improvement of our products, which includes the reduction of trans fats, sodium, and sugars, as well as incorporating healthful ingredients such as whole grains and vegetables. Nestlé USA is a member of the Healthy Weight Commitment Foundation, which is working to remove 1.5 trillion calories from the food supply by 2015.

Nestlé USA has reviewed the IWG Proposal and while we appreciate the IWG's goal of addressing the high rates of childhood obesity in America, we do not agree with the proposed principles outlined in the IWG Proposal for several reasons. Primary among those reasons are that the nutrition principles are inconsistent with other federal food and nutrition standards, are unnecessarily complicated, and take a narrow view of healthful eating; the marketing principles are over reaching, unreasonable, and unworkable; and the IWG has not provided any evidence that its proposed

restrictions on marketing will impact youth obesity rates. Notwithstanding these serious shortcomings, the IWG's "voluntary guidelines" would impose a great burden on the food and other industries (such as media and entertainment) with no regard for the guidelines actual implications.

We appreciate that the IWG strived to create an open process; nevertheless the critical evaluation required of federal agencies in developing policies, like notice-and-comment rulemaking, is absent. Although the ultimate work product is suppose to be a report to Congress, what the IWG created was a program that fundamentally reshapes the advertising practices of the food industry, and it has done this with very little evidence to support that the program will have the desired impact. H.R. 1105 called for a Working Group to "conduct a study and develop recommendations," and to identify "evidence concerning the role of nutrients, ingredients, and foods in preventing or promoting the development of obesity." The IWG Proposal and request for comment does not satisfy this charge from Congress.

As a member of the CFBAI and the Grocery Manufacturers Association ("GMA"), Nestlé USA supports the Comments filed by both these organizations and in the sections below elaborates on a few key areas of the IWG Proposal that are particularly problematic.

I. Proposed Nutrition Principles

The IWG's Proposed Nutrition Principles place undue emphasis on restricting certain foods and nutrients rather than focusing on the components of a healthful diet. In doing so, the IWG has disregarded established nutrition principles. It has also employed a one-size-fits-all approach to different types of foods and to the youth who consume those foods. In an effort to get what it considers the "right" foods in front of children and teens, the IWG treats all youth the same, whether they are 2 years old or 17 years old. The IWG also fails to look at the role positive nutrients play in the diet and there is no mention of calories, a key factor in obesity. Its focus on added sugars and Reference Amount Customarily Consumed (RACC) is unnecessarily complicated, confusing, and ill-defined. The IWG Proposal creates contradictory federal policies, notwithstanding the Dietary Guidelines for Americans that strive to foster harmony in nutrition health policy. Finally, unrealistic goals, like calling for therapeutic sodium levels, removes important incentives for enhancing the nutritional properties of foods. There is no incentive to strive toward a goal that is unobtainable.

Single Standard vs. Food Category Approach

By utilizing an across the board, one-size-fits-all set of criteria, the IWG Proposal in effect says that to be acceptable each food must duplicate the recommended patterns and proportion of nutrients in the total diet; that each food must be an ideal food. This approach ignores the variety of the actual food supply, the way people eat, and long standing dietary advice such as "all foods can fit within a healthful eating style."^[1] Alternatively, a food category approach to nutrition profiling considers both the role of a food in the diet and its intrinsic nutritional properties. By allowing criteria to be appropriately tailored to reflect the inherent nature of a particular food category, a food category

^[1] ADA Position Paper on Total Diet Approach to Communicating Food And Nutrition Information. Journal of the American Dietetic Association 102:100-108

approach therefore also allows for the setting of meaningful and realistic nutrient targets.

If an IWG objective is to drive the development of healthier products, realistic nutritional criteria must be set^[2]. In setting effective yet attainable nutritional targets, it is necessary to take into account a food's intrinsic nutritional profile, which is only feasible within a food category approach. Having specific and realistic targets per food category is a better incentive to develop or reformulate food products with a healthier profile than the IWG's one-size-fits-all proposal. We recognize the IWG believes it has identified the food categories most heavily advertised to children; however, given that the types of products that are advertised to children change with time (and indeed have changed since the report cited by the IWG), appropriate nutrition criteria should instead apply to all foods and beverages, excluding logical exemptions (e.g., water).

Target Population

Just as one set of nutrient criteria does not fit all food categories, one set of nutrient criteria does not fit all age groups. While the Dietary Guidelines for Americans apply to children and adults 2 years of age and older, it is important to note that these are general guidelines and not precise nutrient recommendations. Even more importantly, the 2010 Dietary Guidelines provide further detailed recommendations by age group, sex, and activity levels.

The IWG nutritional criteria for all children 2-17 ignores the unique nutritional needs and recommended smaller serving sizes for children under 4 years of age. As evidenced by the FDA's Nutrition Facts templates for children under 4 and under 2, as well as the special RACC serving sizes for children under 4, the nutritional needs of young children should be handled separately. Young children have vastly different caloric needs (1,000 per day versus 2,000 calories for older children, typically). Consequently, these children have different food group needs and they also consume smaller serving sizes, but at frequent eating occasions.

Additionally, the IWG's nutrition principles do not allow flexibility for, or have not considered, other sub-populations that may need special consideration, specifically teen athletes and very active children as well as children with issues of underweight or failure to thrive.

Transparency

Although the criteria in the IWG Proposal are intended to operate primarily in the background as guidance to manufacturers developing products and, arguably, for media companies who will be placing food product ads and validating the "nutrition" of these products, the criteria in the IWG Proposal will be public. Therefore, Nestlé USA believes that any set of nutrient criteria need to be as transparent and user friendly as possible. Specifically:

^[2] Tetens I, Oberdorfer R, Madsen C, de VJ. Nutritional characterisation of foods: science-based approach to nutrient profiling. Summary report of an ILSI Europe workshop held in April 2006. Eur J Nutr 46 Suppl 2:4-14. 2007

A set of nutrient criteria should use the Labeled Serving Size (LSS) rather than the Reference Amount Customarily Consumed (RACC). A compliance criterion should be readily available to all and capable of understanding by many. RACC is a regulatory term and concept that is less familiar to the public. While many products may be labeled on a RACC basis, there are many products that have serving sizes that differ from the RACC (i.e., single serve containers). The LSS is already a required element in the Nutrition Facts Panel, is information consumers can readily see, more accurately reflects what is actually consumed, and therefore increases transparency.

A system of nutrient criteria should use total sugars rather than added sugars. All sugars, regardless of whether added or naturally occurring, are metabolized in the same manner and are not nutritionally different. The Nutrition Facts Panel displays total sugars, not added sugars, and therefore, it is extremely difficult, if not impossible, to confirm the amount of added sugar without proprietary formula information. We believe that a criterion for total sugars better aids transparency.

Policy Difference / Regulatory Deviations

There are a number of instances in the IWG Proposal in which a position differs from guidance or policy with other offices of the government or which deviate, intentionally or otherwise, from existing regulations. These differences and deviations will cause confusion to consumers and manufacturers, alike. The following are some examples:

- The IWG sets one sodium limit for both main dishes and meals, thus ignoring the larger contribution to total daily intake of meals. FDA regulations set different sodium disclosure limits for meals versus main dishes, and we believe this approach should be used in developing a set of nutrient criteria for meals and main dishes that are advertised to children.
- The IWG's Option 2 on food groups and how much must be included in a main dish or meal is confusing. The IWG appears to require contributions from at least two different food groups for main dishes and at least three different food groups for meals. Not only is this inconsistent with the regulatory definition regarding the number of different food groups that must be included in a main dish and meal (both require foods come from two different food groups), but the portion sizes also differ in the IWG definitions (differ depending on food group) versus regulations (40 g).
- The Saturated Fat criteria set forth under the IWG's Principle B is inconsistent with 21 CFR 101.62(c)(i) in that there is no additional small RACC (30 g or less) requirement for a "Low Saturated Fat" claim.

Nutrient Components to Encourage (Food Groups and/or Nutrients)

While the IWG Proposal outlines minimum food group contributions, we believe all nutrients for which the FDA has set a Daily Value (DV) also play a role in closing nutritional gaps. It is reasonable that a nutrient requirement may be met through fortification, preferably with a nutrient

that is either a “shortfall nutrient” as defined in the 2010 Dietary Guidelines for Americans (i.e., dietary fiber, potassium, calcium, and vitamin D) or is a nutrient required to be listed on the Nutrition Facts panel.

The FDA has defined what constitutes a meaningful contribution to the diet by establishing minimum nutrient content requirements for “good source” claims (i.e., 10% of the Daily Value). In cases where a minimum food group requirement can’t be met (e.g., a small serving size), providing at least a “good source” of an essential nutrient can positively impact one’s daily nutrient needs.

Calories

The 2010 Dietary Guidelines define two “overarching concepts.” One of these two concepts focuses solely on calories. Specifically, the concept states, “Maintain calorie balance over time to achieve and sustain a healthy weight.” One of the ways the 2010 Dietary Guidelines propose Americans meet this goal is to monitor food intake and specifically states, “The Nutrition Facts label found on food packaging provides calorie information for each serving of food or beverage and can assist consumers in monitoring their intake.” By omitting calories from the criteria, the IWG discounts the importance calories play in maintaining and/or achieving a healthy weight. Eating excess amounts of any type of food, even if healthy, will cause overweight or obesity.

Water Exemption

A strict application of the IWG’s Principle A would not allow water to be advertised to children since it does not make a food group contribution. This may be an unintended consequence of the criteria in the Proposal. One of the key consumer messages in the 2010 Dietary Guidelines is, “Drink water instead of sugary drinks.” We believe bottled water should be exempt from the requirement to make a food group contribution.

Sodium

Given that adults and children 4 years and older share the same FDA Nutrition Facts panel, all sodium-specific recommendations can be based on a daily intake of 2,300 mg, the 2010 Dietary Guidelines upper limit for older children. IWG appears to have already adopted a similar rationale by basing daily food group consumption recommendations on 2,000 calories, the default Daily Value for a product labeled for adults and children over 4 years old. This rationale can also be applied to sodium.

Unfortunately and contrary to what the IWG expected, the nutrition principles do not foster further advances by food companies in developing and promoting nutritionally improved, healthful food options for children and adolescents. The 2010 Dietary Guidelines for Americans focused on obesity based on the latest nutrition research, yet the IWG proposal is not consistent with the Guidelines. Nestlé has and continues to devote substantial product development resources toward finding a balance between palatable, enjoyable foods that are also consistent with healthful eating habits. From our experience, we can say that the timeframes and nutritional profiles contemplated by the IWG are not realistic.

II. Proposed Marketing Definitions

The IWG states its marketing definitions, taken from the FTC 2006 (and 2008) study of youth-directed food marketing expenditures and activities, have been vetted, tested, and are the right ones for defining “marketing to children and adolescents.” We disagree. The 20 categories of marketing set forth in the study were created by the FTC for purposes of data collection. Superimposing audit report criteria as the basis for identifying marketing directed specifically to children and adolescents is not workable. We respectfully disagree with the statement that the FTC template for collecting expenditures “has already been vetted through public comment in connection with the 2006 FTC Study.” The Order criteria was fashioned as a gross measure of expenditures and wasn’t designed to serve as a going forward model of establishing what is and is not marketing to youth for the purpose of advertising and other consumer communications.

The definitions are too broad and poorly defined for use in restricting advertising. Use of the definitions would misclassify large amounts of marketing activity as directed to children or adolescents. Industry constituents did not agree with these definitions in the 2006 study and remain opposed to the definitions and rationale as set forth in the IWG proposal. The shortcomings are real, as is evidenced by the fact the FTC staff had to issue numerous clarifications and regularly consult on the scope and reach of the definitions. If the FTC’s definitions are accepted, marketers and lawyers will spend countless hours deciphering their meaning and reach, even when the intent of any given communication is not to market to children.

What follows are a few areas and definitions that pose serious concerns to Nestlé USA. Central to all of the points raised below is what it means to “market to children or adolescents.” The IWG’s definitions of marketing to youth take away a company’s ability to make its products *known*, and certainly not just to children or adolescents. The definitions also negatively impact the positive social and philanthropic efforts of companies.

Advertising and Adolescents

Nestlé USA believes that standards for marketing to children under 12 are appropriate and, as a CFBAI participant, abides by standards that reasonably define marketing to children. We do not believe that extending marketing limitations to adolescents (12-17) is appropriate

Notwithstanding the greater responsibilities and privileges (e.g., right to drive, marry, sign up for military service) that are bestowed on teenagers in our culture, the IWG proposal would restrict reaching them with a TV or Internet ad for a frozen dinner or cookies. An advertiser would run afoul of the IWG principles when it broadcasts such an ad to an adult-targeted audience (such as gatekeepers) when adolescents make up just 20% of that audience. Consider, for example, that in May 2011 YouTube’s audience composition of 12-17 year-olds was in the mid-teens, but in any given month it could edge up to the 20% threshold or beyond. Media buys are based on average past site performance – making it a challenge to comply, since actual demographics are not known beforehand. Also, an advertiser interested in targeting young adults (twenty plus year olds) could easily and inadvertently reach a television audience comprised of 20% teens as cable networks such as ABC Family, Adult Swim, and MTV are above the 20% threshold, and broader age reaching

networks such as ESPN and Comedy Central are closely approaching 20%. Clearly, a food advertiser's media choices can be severely limited with a low threshold definition for teen advertising.

Product Packaging

Food companies, big and small, rely on the product label as the primary means for communicating with consumers. Beyond the mandatory information that informs consumers about the food, the often limited label space is the primary vehicle by which food companies can distinguish their products from the competition. Packaging often carries iconic bright colors and characters that are associated with the brand. Strip products of their color and characters and they appear all the same on shelf. Yet, it appears that this is what the IWG principles would do. Under the proposed principles the presence of an animated character on product packaging is definitive proof that the product is marketed to children. The proposed ban extends beyond licensed third-party characters to include a company's own, often trademarked, characters, so that a company would be prohibited from featuring its characters on packaging of products that don't meet the IWG nutrition standards. This would be true whether that product is intended to be marketed to children, to gatekeepers for their children, or even to adults.

The ban against animated characters is written such that that even "characters" like Santa Claus, the Easter Bunny, and Halloween's ghosts and goblins are off-limits unless the stringent and largely unobtainable criteria are met. Seasonal packaging of many food products would be eliminated, even though the majority of seasonal food products are directed to adults and gatekeepers. Every time a company considers adding a cute or whimsical character on packaging (seasonal or not) it would have to ask itself, "Could this be appealing to children or viewed as appealing to children?" This question will be asked even if youth are not the target. While we suspect that the IWG does not intend to ban the use of the Easter Bunny, the concern reflects key problems of the proposal: overly broad categories of conduct are covered and the criteria employed does not distinguish child-focused marketing from other communications that might include children.

Company Characters

The elimination of animated characters extends beyond packaging, because animated characters and trademarked company characters are used in all types of advertising and marketing efforts. For example, Companies use costumed versions of their characters at all-family and adult events. But if the character is appealing to children as defined by the IWG, the company's marketing efforts would be seen as reaching children, regardless of actual intention. Similarly, a print ad using a company character could, under the IWG, be viewed as directed to children, even when the media itself is not child-directed. Some company characters have been in existence for decades, with generations of adults having grown up with them, and marketers use these characters to reach those adults. Nevertheless, the IWG would have companies abandon them.

In-Store Activities

Few in-store activities are directed to children or teenagers, as they do not make up the majority of shoppers. Offers, discounts, and promotions are generally directed to adults and gatekeepers. Yet, if the product or elements of a promotion may appeal to children, if the offer uses certain words (“Your kids will enjoy”), or otherwise depicts children, the in-store activity could be prohibited unless the food product qualified under IWG standards. Companies market food products to parents for their children, and the point of sale is a convenient place for this to occur. Most store visitors are adults and the vast majority of purchasing decisions are made by parents and caregivers, not children and adolescents. The IWG focus on in-store activities is mis-placed and would restrict communications that most would not view as targeting children or adolescents.

Event Marketing

The IWG considers sponsorship of a public event to be youth-targeted if one of several indicators is met, including if 30% or more of the attendees are children (or 20% adolescents) or more subjectively – if the event involves child-oriented themes, activities, incentives, or features animated characters. Under this definition, there are many events that a company or brand would now decline to sponsor or participate in – even if they are actually family-oriented events and the target is not children or teens. Participating in a health fair, fun run, community reading or book festival could all be called into question. These family events often have activities for children and demographics of such events are usually not measured. The outcome under the IWG Proposal would mean fewer sponsorships of positive community events, since very few food products would meet the IWG standards. These community events may be the very ones that support play and physical activity – a necessary part of the solution to the childhood obesity problem.

“Company” sponsorship of an event would also be implicated, if the company’s name is also a name identified with its products and some of its products meet the IWG nutrition standards and others do not. Companies often use their company name to sponsor philanthropic events or events that advocate healthy lifestyles. Yet, a company would not comply with the IWG principles if, for example, 20% of attendees were teens (or 30% children) and the following activities were engaged in: adult-targeted product information pamphlets, product sampling to adults of non-IWG qualifying foods, company banners displayed, or if a company’s costumed character identified with a non-IWG qualifying food was present.

Philanthropy and In-School

Nestlé USA is proud of its philanthropic and in-school activities. As a CFBAI member, Nestlé USA does not advertise branded products in pre-kindergarten and elementary schools, but can and does engage in public service activities and charitable donations to these schools. For example, in conjunction with Reading is Fundamental, the company has donated thousands of books to elementary schools, including sets of books that address healthy lifestyle topics. These books and their book cases carry a simple book plate that refers to Nestlé USA as the donor. Under the IWG proposal, Nestlé could not identify itself in this manner. Similarly, Nestlé USA has partnered with the National Education Association (NEA) – the nation’s largest professional educators’ organization – to expand nutrition and physical activity resources for teachers. The program, *Healthy Steps for*

Healthy Lives, provides instructional activities that teach students about being healthy. Some of the program materials bear Nestlé’s name in a “brought to you by” manner. Since only some Nestlé branded products qualify under the IWG’s nutrition stringent standards, Nestlé would no longer be able to engage in this type of activity.

There are other examples of Nestlé USA’s education and community related philanthropic activities, like its Adopt-a-School program, donating food and employees volunteering at local homeless shelters, etc. Depending on the demographics, these efforts would no longer be allowed, unless all mention of the food company is eliminated. This is particularly troublesome and unfair, since a bank, insurance company, or just about any other company could identify itself. Again, this may not be what the IWG intended, but it is an outcome of applying expenditure criteria to an attempt to regulate business conduct.

III. Self-regulation

Nestle appreciates the constructive role that the federal government, especially the FTC, has played in spurring industry self-regulation and the FTC’s strong support for such self-regulation. We believe that industry self-regulation is working to improve the nutritional profile of foods advertised to children, and we have collaborated with the CFBAI to develop a transparent and reasonable industry-wide nutrition criteria program for products advertised to children under 12. Importantly, the CFBAI’s definitions of what it means to market “to” children are balanced and workable. We also believe that a successful solution to today’s childhood obesity issue must acknowledge the important and primary role of parents and family in solving the issue and society’s need to make physical activity a key component of the solution.

Nestlé USA will continue to explore and develop products with health and wellness in mind, and will continue to support self-regulation that views the food industry as playing a role in the overall strategy of addressing childhood obesity.

Sincerely,

Scott Remy 
Chief Communications Officer