



National Grocers Association

July 13, 2011

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

Submitted Electronically

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

To Whom It May Concern,

The National Grocers Association (N.G.A.) appreciates the opportunity to provide comments to the Interagency Working Group (IWG) regarding the **Interagency Working Group on Food Marketed to Children: Proposed Nutrition Principles: FTC Project No. P094513 (Proposed Principles)**. N.G.A.'s comments are focused on the impact the Proposed Principles will have on the supermarket industry, in particular independent retailers and wholesalers.

N.G.A. is the national trade association representing the retail and wholesale grocers that comprise the independent sector of the food distribution industry. An independent retailer is a privately owned or controlled food retail company operating a variety of formats. Most independent operators are serviced by wholesale distributors, while others may be partially or fully self-distributing. Some independents are publicly traded, but with controlling shares held by the family and others are employee owned. Independents are the true "entrepreneurs" of the grocery industry and dedicated to their customers, associates, and communities. N.G.A. members include retail and wholesale grocers, state grocers associations, as well as manufacturers and service suppliers.

The Proposed Principles will impact both national food brands and private label products which are a large part of our members business. Independent grocers and their suppliers are directly impacted, not only by the marketing of national brands, but because many sell private label products as well, and their businesses are directly tied to the advertising, marketing and promotional activities discussed by the Proposed Principles. Grocery stores are actively and personally involved with in-store promotions and advertisements of many national and private label products subject to these Proposed Principles limitations.

According to the IWG, the “voluntary principles” are intended to (1) make a meaningful contribution to a healthful diet; and (2) minimize the content of nutrients that could have a negative impact on health and weight. The supermarket industry has long been committed to promoting healthy food choices by providing customers with nutritious foods and our stores are proud to offer a large variety of products including products that are low fat, low calorie, low sugar, gluten free, and locally grown produce. Therefore, guidelines that adversely impact consumers and independent grocery stores but do not support the guidelines’ objective should first be subject to further review and study before implementation.

The Proposed Principles Are Too Arbitrary and Broad to Implement

According to the Proposed Principles, the IWG’s standards for acceptable foods are inconsistent and stricter than any other healthy food standard set by the federal government. For example, IWG’s standards are stricter than foods approved under the Proposed Rule for School Lunches, Healthier U.S. Schools Program, the 2010 Dietary Guidelines, FDA’s Definition of Healthy, and the Women, Infants and Children Program (WIC). **The Proposed Principles are not consistent, and even contradict many of the standards set by other federal agencies.** The contradictions are not only confusing for our members and consumers, but creating multiple inconsistent standards is an inefficient use of federal resources.

The Proposed Principles also create a wide range of ramifications due to the hundreds/thousands of products that are covered. The Working Group recommends the following foods to be included:

- “(1) **Breakfast cereals** – all cereals, whether intended to be served hot or cold (PCC F122);
- (2) **Snack foods** – snack chips (such as potato chips, tortilla chips, and corn chips), pretzels, snack nuts (salted and roasted), popcorn, snack bars (including breakfast and cereal bars), crackers, cookies, processed fruit snacks (such as fruit leather), gelatin, and pudding (PCC F115, F163, F212);
- (3) **Candy** – chocolate and other candy bars, other chocolate candy, hard candy, chewy candy (including licorice, gummi candy, and jelly beans), and sour candy (PCC F211, excluding gum and breath mints);
- (4) **Dairy products** – milk (including flavored milk drinks), yogurt, yogurt drinks, and cheese (PCC F131, excluding butter, eggs, and cream, F132, F139, excluding cottage cheese and sour cream, F223);
- (5) **Baked goods** – snack cakes, pastries, doughnuts, toaster baked goods (such as frozen waffles, French toast sticks, and toaster pastries), bread, rolls, bagels, breadsticks, buns, croissants, taco shells, and tortillas (PCC F161, F162);
- (6) **Carbonated beverages** – all carbonated beverages, both diet and regular (PCC F221, F222);
- (7) **Fruit juice and non-carbonated beverages** – fruit juice, juice drinks, fruit-flavored drinks, vegetable juice, tea drinks, energy drinks, sports drinks, cocoa, bottled water, and all other non-carbonated beverages, including ready-to-pour beverages as well as those

sold in concentrated or powdered form (PCC F171, excluding all varieties of coffee, F172, F173, F224);

*(8) **Prepared foods and meals** – frozen and chilled entrees, frozen pizzas, canned soups and pasta, lunch kits, and non-frozen packaged entrees (such as macaroni and cheese) (PCC F121, F125, F126);*

*(9) **Frozen and chilled desserts** – ice cream, sherbet, sorbet, popsicles and other frozen novelties, frozen yogurt, and frozen baked goods (such as frozen pies and cakes) (PCC F133);*

*(10) **Restaurant food** – menu items offered in a restaurant (including both quick-serve and other types of restaurants) (PCC G330).”*

This exhaustive list of categories includes only a fraction of all the foods covered in the Proposed Principles sold in grocery stores and includes many foods that are recommended by existing federal guidance on foods. N.G.A. believes the proposed standards are too strict and unreasonable to follow.

The definition of “measured media” in the Proposed Principles is also overly broad. The Proposed Principles include 20 categories of advertisement, including television, radio, print, internet advertising and promotional activities.¹ Independent grocery stores use many of these methods to inform customers of sales and promote their businesses including radio and television ads, weekly inserts, coupons and in-store promotions. Further, to keep up with recent marketing trends, many independent grocers use the internet and social media websites to advertise and promote sales. Restricting the types of foods grocery stores can advertise also restricts a grocery’s store’s ability to advertise and differentiate their business.

Another broad aspect of the Proposed Principles is the affected target audience. The target audiences are children and adolescents ages 2-17 and the IWG even recognizes that restrictions on marketing to teens may result in limits on food marketing that reaches a substantial adult audience. N.G.A. supports narrowing the scope of marketing covered for teens and only cover children ages 2 to 12 under the Proposed Principles. **N.G.A. believes the Proposed Principles are too broad and must be withdrawn and be studied to determine any effect on a healthy diet and obesity.**

The Advertising Restrictions Could Significantly Impact Retailers’ Bottom Line

Independent grocery stores are directly tied to the advertising and marketing products discussed in the Proposed Principles. Our members regularly run ads to promote their businesses and

¹ The Interagency Working Group’s proposed definitions incorporate 20 categories of advertising, marketing and promotional activities, which include: television, radio, and print advertising; company sponsored web sites, ads on third-party Internet sites, and other digital advertising, such as email and text messaging; packaging and point-of-purchase displays and other in-store marketing tools; advertising and product placement in movies, videos, and video games; premium distribution, contests, and sweepstakes; cross promotions, including character licensing and toy co-branding; sponsorship of events, sports teams, and individual athletes; word-of-mouth and viral marketing; celebrity endorsements; in-school marketing; philanthropic activity tied to branding opportunities; and a catch-all other category.

advertise sales on many of the brands and foods that are covered by the Proposed Principles. The average net profit for the independent sector of the supermarket industry in 2009 was only 1.68 of gross sales revenues². At a time when customers have drastically cut back on their food purchases, any additional barriers are likely to place a significant burden on stores and the consumers they serve. Such stringent limitations on marketing would substantially reduce the way our members reach out to their customers and would limit their ability to advertise products and differentiate their business.

The foods included in the Proposed Principles are exceedingly broad and even include many foods currently approved for the Women Infants and Children program. In fact, many of the foods most affected by these stringent Principles are lower-calorie, nutrient dense foods that the government elsewhere has encouraged people to eat. Placing such stringent restrictions on a grocery store's ability to advertise will have a negative impact on the economy and jobs in retail, food, advertising and media industries.

Additionally, the Proposed Principles will negatively impact consumer choice and local communities. As discussed above, strict restrictions on advertising and promotions will result in costly reformulation of products and decreased sales for grocery stores. The Proposed Principles will have wide-spread negative economic effects on both the local and national levels.

First Amendment Speech Rights

The Bureau of Consumer Protection recently released a statement that the Proposed Principles do not violate the First Amendment, claiming "a report is not a law, a regulation or an order, and it can't be enforced" with "no legal consequences," thereby not affecting free speech rights.³ However, N.G.A. believes these guidelines violate the First Amendment's protection of commercial speech as currently established by Supreme Court doctrine. In the last fifteen years, the Supreme Court has invalidated all governmental suppression of commercial advertising on the grounds that those regulations violate the First Amendment right of free speech.⁴ In fact, in a recent 7-2 decision, the Supreme Court ruled a ban of the sale of violent videogames to children as unconstitutional. The Proposed Principles, if mandatory, would be found in violation of the First Amendment by the Supreme Court. Although the IWG's decision to make these guidelines "voluntary" was intentional given the Supreme Court's trend toward protecting the First Amendment's commercial speech right, the intent and effect of the Proposed Principles are to suppress speech and since they are coming from the government, the effect will not be regarded as "voluntary" suggestions, but de facto mandatory.

² N.G.A. FMS 2010 Independent Grocers Survey

³ Vladeck, David. "What's on the Table." *BCP Business Center*. Bureau of Consumer Protection, 1 July 2011. <<http://business.ftc.gov/blog/2011/07/whats-table>>.

⁴ See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

The IWG's Proposed Principles Are Not Voluntary

Due to the fact that the Proposed Principles are “voluntary,” the agencies did not follow the standard comment and regulatory process that provides checks and balances on regulatory power. Also, the 2009 Omnibus Appropriations bill that created the Interagency Working Group asked for the group to conduct a study and offer recommendations to Congress on the marketing and advertising of foods and beverages to children and teens. However, IWG did not follow Congress’ mandate and no such study was conducted. **N.G.A. urges the IWG to first withdraw the Proposed Principles and then conduct a study, as directed by Congress, with recent statistics and evidence offering recommendations to Congress.**

The Proposed Principles should be viewed as a government regulation demanding mandatory compliance due to the prospective coercive effects. To comply with the Proposed Principles, independent grocery stores may have to choose to abandon marketing efforts central to their businesses or face the possibility of future government enforcement actions. Also, even if the government has no legal basis for law enforcement action, consumer activist groups may threaten actions against the industry for not abiding by the Proposed Principles.

Further, our members will have no due process recourse against these “voluntary” Proposed Principles as proposed since the agencies acted to avoid regulatory and judicial review. N.G.A., food retailers, food wholesalers and manufacturers have had a lot of recent experience with “voluntary Principles,” including Country of Origin Labeling⁵ and Nutrition Labeling⁶, both of which began as “voluntary regulations” and quickly became government mandates.

There Is No Causal Relationship Between Advertisements and Obesity

The Proposed Principles contradict nutrition guidance provided by other federal agencies and even ignore the research of the FTC Bureau of Economic Research that shows an increase in obesity rates while food advertising rates for children’s exposure were going down.⁷ Also, according to research by Dr. J. Howard Beales of The George Washington University School of Business, research shows that advertising restrictions lead to adverse improvements in products, meaning that when products are restricted from being advertised, they are not improved.⁸ The IWG’s standards for healthy food are not based on amount of calories in food, which the CDC has stated is the key to maintaining a healthy weight for a lifetime.⁹ **Based on all these contradicting studies and evidence, N.G.A. requests that a new study be conducted that incorporate these federal agency findings on healthy food.**

⁵ 7 CFR Part 60 and Part 65

⁶ Public Law 101-535

⁷ Debra J. Holt, Pauline M. Ippolito, Debra M. Desrochers, and Christopher R. Kelley. *Children's Exposure to Television Advertising in 1977 and 2004: Information for the Obesity Debate* (June 2007).

⁸ Health Claims in Advertising and Labeling: A Study of the Cereal Market, Bureau of Economics Staff Report, Federal Trade Commission, August 1989,

⁹ CDC, *Overweight and Obesity: Causes and Consequences, 2011*

Conclusion

N.G.A. requests that IWG withdraw the Proposed Principles and take the time to conduct a new study, as Congress directed, and not rely upon old data. The Proposed Principles did not follow the standard comment and regulatory process that requires economic and regulatory analysis, including its effect on small businesses. Also, a study requested in the 2009 Omnibus Appropriations bill that created the Interagency Working Group was not completed. The decision made by IWG will be far-reaching and adequate time should be invested before any changes are made. The current Proposed Principles are extremely broad and encompass a wide range of food products and media sources. Independent grocery businesses and other segments of the food industry will be negatively impacted by such broad guidelines.

N.G.A. appreciates this opportunity to provide comments to the FTC. If N.G.A. can provide any further information please do not hesitate to contact us.

Sincerely,

Thomas F. Wenning
Executive Vice President and General Counsel