Before the
FEDERAL TRADE COMMISSION
Washington, D.C.

Interagency Working Group on Food Marketed to Children: Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts	)	Project No. P094513
General Comments and Proposed Marketing Definitions	)	

Comments of the National Association of Broadcasters

The National Association of Broadcasters ("NAB") is a non-profit, incorporated association of radio and television stations and broadcasting networks that represents the American broadcasting industry. Broadcasters have provided a vital service to communities, viewers, and listeners across the United States for nearly a century. Because the protection of First Amendment values lies at the heart of broadcasters' mission to provide universal access to free programming for viewers and listeners of all ages, NAB advocates before Congress, agencies, and the courts to ensure robust protection of those values.

The goals of the Interagency Working Group on Food Marketed to Children ("Working Group") to promote children's health and reduce the incidence of childhood obesity are laudable ones that NAB wholeheartedly endorses. *See* Interagency Working Group on Food Marketed to Children, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts, Request for Comments* (Apr. 28, 2011) ("Request").

Indeed, NAB is engaged in a number of efforts that further these goals. For example, NAB is currently helping to promote a Public Service Campaign in support of *Let's Move*, First

Lady Michelle Obama's initiative to combat childhood obesity. *See* NAB Spot Center, Let's Move! Ad Council PSAs, http://www.nab.org/AM/ASPCode/SpotCenter/campaign.asp?id=88 (providing downloads of radio and television public service announcements designed to address childhood obesity) (last visited July 12, 2011). In addition, NAB's education foundation (NABEF) coordinated with education groups on a "Let's Move! Flash Workout," featuring music superstar Beyoncé. On May 3, 2011, students at over 600 middle schools across the country and internationally participated in a pre-choreographed "Let's Move" dance exercise routine at the same time. *See* www.nabef.org/letsmove (last visited July 11, 2011). Going forward, broadcasters are partnering with educators and groups promoting the benefits of healthy diet and exercise to reinforce the messaging in schools and in the media.

Despite our interest in the Working Group's goals, NAB is nonetheless concerned about the Working Group proposal. The Working Group has inquired whether a law making mandatory "the proposed voluntary principles" would "raise First Amendment concerns." Request at 24. The answer is yes. If made binding, the marketing restrictions set forth in the proposal would regulate speech as an indirect means of regulating conduct – an approach that is impermissible under a long line of Supreme Court precedent. Moreover, they would do so without being narrowly tailored to advancing the Working Group's stated goals. Accordingly, they would unduly burden the speech interests of advertisers (who have a right to provide truthful information about their products), adult audiences generally (who have a right to receive such information), and parents (who can use the information provided by food advertisements to make informed decisions about their children's diets). And even if the proposed restrictions were to remain nominally voluntary, their implementation would still raise serious constitutional

concerns, because a regulatory regime that purports to be non-binding often chills speech by bringing indirect pressure to bear on the regulated parties.

Finally, the Working Group proposal may well have the unintended negative consequence of undermining support for advertiser-supported broadcast programming, including "children and family television programming." Request at 24. Such programming is particularly important for viewers who choose not to subscribe to pay television services – a group that includes proportionally greater numbers of lower-income and minority households.

I. If Made Mandatory, The Restrictions In The Working Group Proposal Would Violate The First Amendment

A. The Restrictions Limit Constitutionally Protected Speech As A Means Of Regulating Conduct

The First Amendment protects the free flow of information in the marketplace of ideas, and that protection encompasses commercial speech as well as other forms of expression. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001) ("For over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 n.21 (1993); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-63 (1976). It is therefore beyond dispute that a regulation imposing the types of marketing restrictions set forth in the Working Group proposal would cover constitutionally protected speech and would be subject to First Amendment scrutiny. *See Sorrell v. IMS Health, Inc.*, No. 10-779, 2011 WL 2472796, at *4 (U.S. June 23, 2011) (finding "[s]peech in aid of pharmaceutical marketing" to be "a form of expression protected by the Free Speech Clause of the First Amendment" and giving "heightened" scrutiny to restrictions on that speech).

In carrying out that kind of scrutiny, the Supreme Court has over and over again struck down laws that impose burdens on commercial speech as a means of regulating conduct that the government could address more directly. As these decisions explain, "bans that target truthful, nonmisleading commercial messages" often "serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech," and "rarely survive constitutional review." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502-04 (1996) (Stevens, J., joined by Kennedy, J., and Ginsburg, J.); *see also, e.g.*, *Sorrell*, 2011 WL 2472796, at *16 ("[T]he State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193 (1999).

If given the force of law, the marketing restrictions at issue here would fall squarely into that category. It is plain that the Working Group seeks to block children from consuming certain kinds of foods, and in service of that goal seeks to force food manufacturers to change the composition of their products. As the Request states, "a large percentage of food products currently in the marketplace would not meet the principles," and "reformulation" of food would "require substantial changes in the nutritional profile of the food, such as significant reductions in added sugars or sodium content." Request at 5; *see also id.* at 3 (recommending that industry "strive to create foods that meet" the proposed nutrition principles and suggesting that the effect of the marketing restrictions will be to "improve[] . . . the overall nutritional profile of foods marketed to children"); *id.* at 13. While the Working Group's goal is to change what foods children and adolescents consume, seeking to limit advertisers' speech – based on its content –

during programming that might be watched or listened to by some children is not a direct means of achieving that end. The proposed restrictions thus would run afoul of a long line of First Amendment precedent.

This analysis is not affected by the fact that the government's stated interest here is to shield children. As the Supreme Court recently reaffirmed, "[e]ven where the protection of children is the object, the constitutional limits on government action apply." *Brown v. Entertainment Merchants Ass'n*, No. 08-1448, 2011 WL 2518809, at *10 (U.S. June 27, 2011); *see also id.* at *5 ("Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975)). Under the constitutional principles applicable to advertisers' speech, mandatory restrictions on marketing certain kinds of food to children would be presumptively invalid. *See Sorrell*, 2011 WL 2472796, at *13.

B. The Restrictions Are Not Tailored To Directly Advance A Substantial Government Interest

For a mandatory set of marketing regulations along the lines of the Working Group proposal to have any chance of surviving First Amendment scrutiny, the government would have to "show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 2011 WL 2472796, at *13; *see also Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (explaining the requirement of "a 'fit' between the legislature's ends and the means chosen to accomplish those ends – a fit . . . that employs not necessarily the least restrictive means but, as we have put it in the other contexts . . . , a means narrowly tailored to achieve the desired objective" (internal quotation marks omitted)); *Discovery Network Inc.*, 507 U.S. at 417 (explaining that the tailoring inquiry requires the

government to "carefully calculate[] the costs and benefits associated with the burden on speech imposed by its prohibition" (internal quotation marks omitted)).[1] NAB does not deny that the Working Group's stated goals of promoting children's health and reducing childhood obesity are important. But the marketing restrictions would not meet the standards for advancing a substantial government interest. The restrictions are not, for example, narrowly tailored to advancing those goals, and there is insufficient evidence that such restrictions would actually effect any beneficial change at all.

1. The restrictions are overinclusive. As noted above, serious constitutional questions are raised where the government regulates speech even though it could more directly achieve its goals by other means. *See supra* at p. 4; *see also 44 Liquormart, Inc.*, 517 U.S. at 507 (plurality op.) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [government's] goal . . . . As a result, . . . the [government] has failed to establish a 'reasonable fit' between its abridgment of speech and its . . . goal." (quoting *Fox*, 492 U.S. at 480)). But even setting that fatal flaw aside,

[1] Precisely what level of scrutiny is appropriate for a commercial speech regulation is subject to some debate. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Supreme Court set forth a four-part test for evaluating such a regulation, which asks whether "the expression is protected by the First Amendment"; whether "the asserted governmental interest is substantial"; whether "the regulation directly advances the governmental interest asserted"; and whether the regulation "is not more extensive than is necessary to serve that interest." *Id.* at 566. Subsequently, however, numerous members of the Court have questioned whether commercial speech should be treated any differently than political speech or other forms of fully protected speech. *See, e.g.*, *Lorillard*, 533 U.S. at 554; *Greater New Orleans Broad. Ass'n*, 527 U.S. at 184; *Discovery Network*, 507 U.S. at 435-36 (Blackmun, J., concurring). In *Sorrell*, its most recent commercial speech decision, the Court again declined to expressly decide this question, but noted that "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Sorrell*, 2011 WL 2472796, at *13. The same is true here. Regulations embodying the marketing restrictions set forth in the Working Group proposal would not withstand First Amendment scrutiny either under *Central Hudson* or under a more rigorous test.

the marketing restrictions are strikingly overinclusive, and are therefore not drawn to achieve the government's stated aim.

First, by their terms, the restrictions sweep in programming that has up to an 80% adult audience. With respect to broadcast advertising, the restrictions define programming as "targeted" toward children if it has a 30% audience share of children aged 2-11 or a 20% audience share of adolescents aged 12-17. *See* Request at 18. These thresholds appear to have been somewhat arbitrarily chosen by doubling the percentage of the population that falls into those age categories – a methodology for which the Working Group provides no basis. *See id.*[2] But even assuming that the Working Group is correct that "these audience shares are likely to ensure capturing most programming . . . targeted to children or adolescents," *id.*, the burden on the First Amendment rights of adults – and the marketers seeking to reach them – is nevertheless substantial. *See, e.g.*, *id.* at 17 ("[R]estrictions on marketing targeted to adolescents are more likely to result in limits on food marketing in media that also reach a substantial adult audience."); *id.* at 23 (same).

As the Supreme Court made clear in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), which struck down tobacco advertising regulations aimed at protecting minors, such a burden on adults is not permissible. The Court explained that "tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco

[2] The restrictions are also vague on this score, because programming will be considered to be targeted toward children not only if it meets objective audience share levels but also if "[a] marketing plan" states "that the . . . advertising was intended to reach" viewers aged 2-17 – a test that might well be difficult to apply in practice. *See* Federal Trade Commission, *Marketing Food to Children and Adolescents: A Report to Congress* (July 2008) (appendices), *cited in* Request at 18-19; *see also Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (explaining that the vagueness of a "content-based regulation of speech" raises "special First Amendment concerns because of its obvious chilling effect on free speech").

products." *Lorillard*, 533 U.S. at 564 (concluding that the state had failed to show that the regulations were not more extensive than necessary). Similar interests are at play in this context: adult audiences of programming that has a 20% youth-audience share have an interest in receiving truthful information about food, and food retailers and manufacturers have a corresponding interest in conveying information about their products. As in *Lorillard*, the failure to tailor food marketing restrictions to avoid overly burdening these speech interests is fatal to any attempt at justifying those restrictions under the First Amendment.

Ironically, by blocking food advertising during programs with a substantial adult audience, the restrictions may prevent the general public from receiving important information regarding various foods' existence and nutritional content. That could actually hamper parents – who might well be watching programs along with their children – from making informed decisions about improving their family diet. *See* Food Marketed to Children, Forum on Interagency Working Group Proposal, Transcript at 45 (May 24, 2011) ("Working Group Transcript"), *available at* http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript.pdf (comment by the Grocery Manufacturers Association) ("[L]imiting the marketing of healthy foods, including most yogurts, soups, vegetable juices, and many cereals, as the [Working Group] has proposed, will not help Americans identify these healthier options."); *see also id.* at 36, 42; *cf. 44 Liquormart*, 517 U.S. at 503 (Stevens, J., joined by Kennedy, J., and Ginsburg, J.) (expressing "especial[]" skepticism of "state attempts to deprive consumers of accurate information about their chosen products").

Second, the marketing restrictions are tremendously broad in another respect: their extensive coverage of different types of food and different types of advertising. As many commenters have explained, and the Request itself acknowledges, the restrictions would cover

huge swathes of the foods currently being marketed, including many that are generally considered to be healthy and nutritious. *See, e.g.*, Working Group Transcript at 62 ("Under the advertising ban, almost no grain-based products, including unsweetened cereals, could be marketed to children and adolescents."); *see also* Request at 5 ("[A] large percentage of food products currently in the marketplace would not meet the principles."); *id.* at 8 (explaining that "individual foods marketed to children" must have a "significant amount" of "fruit, vegetable, whole grain, fat-free or low-fat milk products, fish, extra lean meat or poultry, eggs, nuts and seeds, or beans"); *id.* at 13 (noting that "the high proportion of foods currently in the marketplace that would not meet the[] limits, even with significant reformulation"). In addition, the restrictions would apply to "all kinds of promotional activities" deemed to be "directed to youth," without any effort to distinguish among various kinds of advertising or to consider whether particular kinds are more likely to have a negative impact. Request at 18. Taken together, these expansive provisions reflect a failure to tailor the restrictions in a way that burdens protected speech as little as possible while still promoting children's health and reducing childhood obesity. *See, e.g.*, *Lorillard*, 533 U.S. at 563 ("To the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices while permitting others. As crafted, the regulations make no distinction among practices on this basis.").

2. There is insufficient evidence that marketing restrictions decrease childhood obesity. An independent reason why the marketing restrictions could not withstand First Amendment scrutiny if enacted into law is that there is insufficient evidence that "the speech restriction directly and materially advances the asserted governmental interest" in improving children's health and reducing the incidence of childhood obesity. *Greater New Orleans Broad. Ass'n*, 527

U.S. at 188. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Such a showing is especially important where the government chooses to suppress "truthful, nonmisleading information" rather than to address the possibility of fraud. *44 Liquormart*, 517 U.S. at 505; *see also Discovery Network, Inc.*, 507 U.S. at 426 (explaining that the government's interest in protecting consumers from "commercial harms" provides "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech").

Here, as the proposal acknowledges, there is no evidence to support the theory that television and radio advertising (or, for that matter, any form of marketing) has an effect on the diets or health of adolescents. *See* Request at 17. Indeed, the Institute of Medicine study cited by the Working Group – which is the *only* cited evidence relating to the effect of marketing on children's health – was unable to conclude that television advertising affects the purchase requests, food beliefs, preferences, or short-term food consumption of teens aged 12 to 18 years, and even noted some evidence suggesting that such advertising does *not* influence the usual dietary intake of adolescents. *See* Institute of Medicine of the National Academies, *Food Marketing to Children and Youth: Threat or Opportunity?*, at 379 (2006) ("IOM Study"), http://www.nap.edu/catalog/11514.html.[3] Accordingly, any restriction on food marketing targeted at adolescents would necessarily be based on "mere speculation or conjecture." *Edenfield*, 507 U.S. at 770-71.

[3] The July 2008 Federal Trade Commission report from which the marketing definitions in the Working Group proposal were adopted also relied on the IOM study. *See* Federal Trade Commission, *Marketing Food to Children and Adolescents: A Report to Congress* (July 2008), *cited in* Request at 18 & n.48.

The evidence marshaled by the Working Group in support of restricting marketing targeted at children aged 2 to 11 is similarly inadequate. Although the IOM Study noted an "association" between adiposity in children and exposure to television advertising, the authors conceded that "the current evidence is not sufficient to arrive at any finding about a causal relationship from television advertising to adiposity." IOM Study at 379-80.[4] A single study suggesting correlation rather than causation does not demonstrate that limitations on food marketing would advance the government's stated interest to a material degree. Where the Supreme Court has found that requirement met, it has relied on much stronger evidence of a cause-and-effect relationship between restriction of speech and diminishment of the problem to which the government has addressed itself. *See, e.g.*, *Lorillard*, 533 U.S. at 557-58 (discussing "numerous studies" showing that "advertising affects demand for tobacco products" and that regulation of advertising would combat underage tobacco use).

Accordingly, without much greater "evidentiary support," the courts would not agree that the "advertising ban" contemplated by the Working Group "will significantly advance the State's interest" in combating obesity. *44 Liquormart*, 517 U.S. at 505. A mandatory version of the Working Group proposal would therefore not pass muster under the First Amendment.

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[4] The authors did find sufficient evidence to conclude that "television advertising influences children [aged 2 to 11] to prefer and request high-calorie and low-nutrient foods and beverages." IOM Study at 379. But, of course, children often obtain their food from adults who are exercising their own judgment and making their own choices – and the study did not find evidence that children's mere requests translated into significant consumption of unhealthy foods or negative health outcomes as a result of such consumption. To the contrary, as a general matter the study found only moderate or weak evidence that the usual dietary intake of children is influenced by television advertising. *Compare Lorillard*, 533 U.S. at 558 (citing to a report by the Institute of Medicine concluding that "'advertising and labeling play a significant and important contributory role in a young person's decision to use cigarettes or smokeless tobacco products'" (quoting 60 Fed. Reg. 41332)), *with 44 Liquormart*, 517 U.S. at 504-06 (rejecting evidence proffered by the state on the ground that it failed to demonstrate a significant link between price advertising and alcohol consumption).

II. Even Voluntary Restrictions On Food Marketing May Well Have A Chilling Effect And Present Constitutional Problems

For all the reasons set forth above, it is plain that a law based on the Working Group proposal would violate the First Amendment. But even a "voluntary" regulatory program is not immune from constitutional scrutiny. *See, e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (explaining that courts should "look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications" to violate the First Amendment); *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 660 (E.D. Pa. 2004) (finding that compliance with a so-called informal notice issued by the State Attorney General's office to internet service providers "was not voluntary" in effect and that the notice "resulted in a prior restraint on protected expression"). Depending on the degree of informal pressure ultimately brought to bear on broadcasters, advertisers, and other affected entities, the Working Group proposal may well have a significant chilling effect on protected speech.

As courts have long recognized, "[a] regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than others." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001). Here, despite the Working Group's statements that its proposal does not mandate specific action, the request for comments seeks ideas on "encourag[ing] the greatest participation from the food industry" and sets specific targets of 2016 and 2021 by which the industry is expected "to fully implement the proposed nutrition principles for all foods." Request at 23.[5] Advertisers may fear that if they do not meet these expectations,

[5] Notably, even when formulated as guidelines to be implemented voluntarily, these kinds of "requests" to industry go well beyond Congress's directive to the Working Group. The explanatory statement accompanying the Act that established the Working Group asked only that the Working Group study the issue of marketing food to children and provide a report to Congress. *See* 155 Cong. Rec. H1,653-06, H2,059 (daily ed. Feb. 23, 2009) (explanatory statement submitted by Rep. David Obey, Chairman of the H. Comm. on Appropriations,

they will be perceived negatively by the agencies that make up the Working Group and will experience less favorable treatment in other contexts in which these agencies are the decisionmakers. They may also fear that the exact extent of their compliance will be publicized, with a pejorative characterization given to any company that refuses to toe the "voluntary" line. For such reasons, even so-called "guidelines" adopted by regulatory bodies often operate as *de facto* mandates, as the courts have recognized. *See, e.g.*, *Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998); *see also generally Chamber of Commerce of U.S. v. U.S. Dep't of Labor*, 174 F.3d 206, 210 (D.C. Cir. 1999) ("[T]he voluntary form of the rule is but a veil for the threat it obscures.").

Accordingly, the mere "voluntariness" of the Working Group proposal is not sufficient to obviate the very serious First Amendment concerns that it raises. The government should be extremely wary of setting up any voluntary regulatory regime that would be struck down as unconstitutional if it were expressly made mandatory.

III. The Working Group Proposal May Unintentionally Undermine Support For Advertiser-Supported Broadcast Programming

If the Working Group's proposal were fully complied with, either as a voluntary matter or because it was mandated by law, it would likely have a negative impact on advertiser-supported broadcast programming, including programming targeted to children and families. *See* Request at 24.

Regarding H.R. 1105, Omnibus Appropriations Act, 2009 and incorporated by reference into the Omnibus Appropriations Act, 2009, Pub. L. No. 118-8, 123 Stat. 524 (2009)) ("The Working Group is directed to conduct a study and develop *recommendations* for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children." (emphasis added)), *cited in* Request at 2.

Commercial support remains the financial backbone of free radio and television broadcasting. Without advertising, free broadcasting would not exist. Particularly in today's highly competitive media marketplace – in which local television and radio broadcast stations compete with video and audio outlets that earn both advertising revenues and subscription fees – it is more important than ever that broadcasters are not hampered in their ability to access advertising revenue streams.[6] There are also clear public interest benefits to be gained from policies permitting television and radio stations to air freely advertisements with truthful information about legal products and services. Radio and television stations in this country are licensed to, and are obligated to serve, specific local communities. In addition to airing popular network and other national programming, local stations air local news, sports, weather, and emergency information that simply is not available on nationally oriented outlets such as national cable television channels. The continued viability of these important locally oriented services depends on the ability of stations to earn adequate advertising revenues.

NAB also notes that policies undermining economic support for free, over-the-air broadcast programming would disproportionately adversely affect those households that do not subscribe to increasingly expensive cable and satellite television services. A recent survey by Knowledge Networks confirmed that lower income, Hispanic, Asian, and African-American households are more likely than the general population to rely exclusively on free, over-the-air television broadcasting. *See* Knowledge Networks, Press Release, *Over-the-Air TV Homes Now Include 46 Million Consumers* (June 6, 2011), http://www.knowledgenetworks.com/news/releases/2011/060611_ota.html.

[6] In 2010 alone, advertising for food, beverages, and restaurants on broadcast television and radio exceeded 7 billion dollars. *See* Advertising Age Datacenter, Total U.S. Measured Advertising Spending by Category (2011).

It is important for the Working Group to consider the impact that restrictions on advertising would have on advertiser-supported broadcast programming generally and on programming targeted to children and families specifically. Indeed, Congress has previously expressly acknowledged that "the financial support of advertisers assists in the provision of programming to children." 47 U.S.C. § 303a note. We urge the Working Group to be cognizant of the role that advertisers play in supporting broadcast programming, including child-oriented television programming, and of the fact that the people most likely to be adversely impacted by a decline in free, over-the-air broadcast programming are lower-income and minority families and children less likely to subscribe to pay television services.

Conclusion

NAB and its members share the concerns expressed by the Working Group about the epidemic of childhood obesity in this country, and will continue to be involved in efforts to improve children's health through public service campaigns and promotion of positive messages about the importance of exercise and a nutritious diet. However, given the primacy of freedom of speech to television and radio broadcasters and their duty to serve the public, NAB cannot support a proposal that unduly burdens the First Amendment rights of advertisers and audiences. The Working Group proposal should be rejected.

Respectfully submitted,

Jane E. Mago
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street N.W.
Washington, D.C. 20036
(202) 429-5430

Elaine J. Goldenberg
Leah J. Tulin
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

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