



July 14, 2011

Donald S. Clarke  
Secretary  
Federal Trade Commission  
Office of the Secretary  
Room H-113 (Annex W)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

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

Dear Secretary Clark,

The American Beverage Association (ABA) is pleased to submit these comments to the United States Federal Trade Commission (FTC), Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and the Department of Agriculture (USDA) on the "Interagency Working Group on Food Marketed to Children Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts Request for Comments" (proposed principles or principles).

The ABA is the trade association for America's non-alcoholic refreshment beverage industry. Founded in 1919 as the American Bottlers of Carbonated Beverages and renamed the National Soft Drink Association in 1966, the ABA today represents hundreds of beverage producers, distributors, franchise companies and support industries. ABA's members employ more than 220,000 people responsible for United States sales in excess of \$110 billion per year. Members market hundreds of brands, flavors and packages, including bottled waters, teas, sports drinks, energy drinks, water beverages, fruit juices, fruit drinks, full-calorie carbonated soft drinks, mid-calorie carbonated soft drinks, and diet carbonated soft drinks.

## **I. Executive Summary**

ABA member companies share the IWG's concerns regarding the increasing rate of childhood obesity, and continue to demonstrate their commitment to developing solutions to address this critical societal issue. ABA member companies have worked proactively with federal, state, and local governments, as well as partners in the corporate and nonprofit sectors, to promote balanced food choices, develop low and no-calorie beverage options, and encourage physical activity. As discussed

more fully below, these voluntary efforts have been successful – but more work clearly needs to be done.

These successes serve as a model for future efforts to fight childhood obesity. It is critical that a wide and diverse group of stakeholders—including expert governmental agencies —engage in collaborative efforts to address the obesity epidemic.

The ABA is concerned, however, that the Interagency Working Group (IWG) proposal strays from productive industry-implemented approaches. The proposed nutrition principles as released by the IWG are unworkable, Constitutionally suspect, and not based on sound data. Additionally, the principles fail to acknowledge that obesity is a complex problem that must be addressed with a multi-faceted approach. As explained below, the IWG proposal is unfortunately counterproductive to our shared societal goals.

We therefore call upon the IWG to withdraw the proposed principles and initiate a truly voluntary and collaborative effort between industry, consumer groups and the IWG to identify a workable and productive alternative to the current proposal. Such an alternative would abandon the flawed concepts of government-mandated categorization of foods and Constitutionally-problematic marketing restrictions. Instead, the ABA looks forward to working with the IWG to develop a self-regulatory model that focuses on voluntary industry efforts to reduce childhood obesity - focusing on ingestion of foods while children are not subject to direct adult/parental supervision, such as in the school environment, and in due recognition of the limited cognitive ability of younger children to comprehend certain marketing messages.

## **II. Summary of the IWG Proposal**

The IWG released its proposed principles on April 28, 2011, with the goal of providing “voluntary” principles to “guide...industry in determining which foods would be appropriate and desirable to market to children to encourage a healthful diet and which foods industry should voluntarily refrain from marketing to children.” The working group focuses on the “ten categories of food most heavily marketed to children.” The IWG states that by the year 2016, all food products within the categories most heavily marketed directly to children should meet two basic nutrition principles. First, such foods should be formulated to “make a meaningful contribution to a healthful diet” (Principle A). A food can meet this threshold either by containing at least 50% by weight of one or more listed food groups (Option 1) or by containing specific minimum amounts of each of one or more listed food groups per Reference Amount Customarily Consumed (RACC) (Option 2). Foods in the ten categories identified by the government should also be formulated “to minimize the content of nutrients that could have a negative impact on health and weight” (Principle B). According to the IWF, food that does not meet these two principles should not be marketed to children.

**III. The ABA is committed to working with the IWG to build on the ABA's successful efforts to promote proper nutrition and combat obesity.**

**A. ABA member companies have led numerous self-regulatory efforts to promote proper nutrition and diet.**

The ABA recognizes the significant dietary challenges faced by many American children, including obesity, and is committed to doing its part to address the issue in a proactive manner. ABA strongly supports the IWG's goal of improving children's diets and addressing the high rate of childhood obesity. ABA member companies have worked closely with governmental and non-governmental entities to implement numerous efforts to encourage sound food choices.

For example, ABA member companies developed and implemented voluntary national School Beverage Guidelines to reduce the availability of full-calorie beverages in schools. This initiative removed full calorie soft drinks from schools and replaced them with lower-calorie and smaller portion-sized options, such as juices, teas, and waters. As a result, beverage calories in schools were reduced by approximately 88 percent. In addition, approximately 98% of all measured schools and school districts comply with the Guidelines.

ABA member companies have also voluntarily reduced full calorie beverage marketing to children. The ABA strongly supports the International Council of Beverage Associations Commitment on Marketing to Children through which ABA member companies agreed not to place any marketing communications for beverages other than fruit juice, milk and water in paid, third party media whose audience consists of 50 percent or more of children under the age of 12.

ABA member companies also follow the guidelines of the Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus, the self-regulatory body for children's advertising. In addition, some ABA member companies were among the first to sign on to the Children's Food and Beverage Advertising Initiative, a program that increases the percentage of advertising for products that meet certain nutrition standards directed at children under 12, as well as advertising messages that encourage good nutrition and healthy lifestyles.

More recently, ABA member companies (The Coca-Cola Company, Cott Beverages, Dr Pepper Snapple Group, Honest Tea, Nestlé Waters North America, PepsiCo, and Sunny Delight Beverages Co.) have made a commitment through the voluntary "Clear on Calories Initiative" to encourage calorie monitoring by prominently displaying calorie counts on the front of beverage product packages and beverage company owned and operated vending and fountain equipment labels as well. This beverage industry initiative is well underway.

ABA's member companies also offer an extensive range of low- and no calorie products that meet both consumers' need for adequate hydration, and their desire for refreshing beverages throughout the calorie spectrum.

Finally, the beverage industry also supports numerous physical activity initiatives across the country to encourage people to be more active. Beverage companies provide millions of dollars of support to the YMCA and Boys and Girls Clubs and sponsor youth sports teams and leagues throughout the country. For example, in conjunction with the National Association for Sport and Physical

Education, The Coca-Cola Company developed the "Live It!" program, which encourages middle school students to get active and provides nutritional education materials.

PepsiCo and America On the Move developed a lesson plan called Balance First to help educate kids about energy balance. This program reached three million elementary school students in 2004. In 2005, as part of a partnership with Discovery Education, PepsiCo distributed the Balance First program to 15,000 middle schools in the United States.

ABA member companies have also joined the Healthy Weight Commitment Foundation (HWCF) to provide funding and support for programs and activities designed to help people achieve a healthy weight through energy balance by balancing calories in and calories out. The national, multi-year effort is designed to help reduce obesity—especially childhood obesity—by 2015, with HWCF members making significant commitments in the marketplace, workplace and schools.

Beverage companies also support health and wellness initiatives. Dr Pepper Snapple Group (DPSG) has launched a three-year, multi-million dollar alliance to support the American Diabetes Association's efforts to fight obesity and diabetes in the U.S. As part of the relationship, DPSG will support ADA programs nationally and locally, including Weight Loss Matters, an ADA program that educates people about the importance of reducing calories and controlling portion sizes as well as the benefits of physical activity with an emphasis on walking.

ABA member companies also sponsor educational websites such as Kidnetic.com, an interactive site designed to teach kids and their families how to live healthier lives through proper diet and physical activity.

Together, these initiatives demonstrate that ABA member companies have—and will continue—to engage in proactive efforts to fight obesity and promote wellness.

**B. ABA member companies provide numerous options for consumers, allowing them to choose the beverage to best suit their preferences, including taste and nutritional objectives.**

ABA member companies provide consumers with numerous beverage options, allowing them to choose beverages that satisfy their preferences. ABA member companies offer a wide variety of beverages, including bottled waters, a range of fruit juices, fruit drinks, teas, sports drinks, mid-calorie carbonated soft drinks, and diet carbonated soft drinks. This wide array provides virtually limitless choices to consumers. The IWG hopes to encourage children to choose certain foods over others by limiting advertising. However, the IWG fails to note that consumers have numerous choices available now to meet their nutritional goals and objectives. ABA members provide numerous options so that consumers have no problem aligning their beverage choices with their individual or family preferences. These options, coupled with the voluntary industry initiatives described above, enable consumers to make better-informed choices for their families.

**IV. The IWG principles should focus on the overall composition of an individual's diet. The government should not create a list of "good" and "bad" foods.**

Instead of addressing the importance of exercise and overall diet, the government has adopted a misguided approach in which the government labels foods as "good" or "bad". In order to effectively combat obesity and reinforce overall good health, individuals should focus on the total diet, overall food patterns, and whether there is an imbalance between energy consumption and expenditure over time. As noted by the CDC, "Overweight and obesity result from an energy imbalance. This involves eating too many calories and not getting enough physical activity. . . . Weight management is all about balance – balancing the number of calories you consume with the number of calories your body uses or 'burns off.'"<sup>1</sup>

Unfortunately, data show that many Americans consume far more calories than they expend. This results in a significant energy surplus, and this problem has become more pronounced over the past 40 years. Data from USDA's Economic Research Service ("ERS") show that average daily per capita calories, adjusted for spoilage and other waste, increased from 2,057 in 1970 to 2,674 in 2008. At the same time, the American public expends the same or fewer calories than it did 40 years ago in its daily activities. The most simple and effective way to address the issue of obesity is to both eat less and exercise more.

The IWG principles ignore this holistic and common sense view of weight management and instead target individual nutrients and specific foods. In essence, the principles create a government edict that mandates categories of "good" and "bad" foods and attaches consequences to these classifications. If a food fits into the "good" category it can be marketed to children; if not, it cannot.

The proposal amounts to a government-issued Scarlet Letter that would inappropriately categorize foods. This approach to reducing obesity is inconsistent with recognized guidelines for weight management. As noted by the American Dietetic Association, all foods and nutrients, if consumed in moderation with appropriate portion size and combined with regular physical activity, can fit within the total diet of American consumers.<sup>2</sup> Advising consumers to eliminate or avoid specific foods or nutrients has historically proven to be an ineffective and even counterproductive approach for weight management.

Additionally, the scheme may have serious unintended consequences by prohibiting marketing of foods that can be desirable components of a well-balanced diet. For example, under the proposal, any foods marketed to children should make a "meaningful contribution to a healthful diet."<sup>3</sup> Under

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<sup>1</sup> See e.g., CDC, "Overweight and Obesity: Causes and Consequences" (2009), available at <http://www.cdc.gov/obesity/causes/index.html> (last accessed June 17, 2011).

<sup>2</sup> ADA, "Total Diet Approach to Communicating Food and Nutrition Information," *Journal of the American Dietetic Association* 2007; 107(7):1224-1232 ("[t]he total diet or overall pattern of food eaten is the most important focus of a healthful eating style. All foods can fit within this pattern, if consumed in moderation with appropriate portion size and combined with regular physical activity.").

<sup>3</sup> Interagency Working Group on Food Marketed to Children, Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts Request for Comments, pg. 8 (2011).

this principle, individual foods marketed to children would contribute a significant amount of at least one of the following food groups: fruits, vegetables, whole grain, fat-free or low-fat milk products, fish, extra lean meat or poultry, eggs, nuts and seeds, or beans.<sup>4</sup> Beverages are undoubtedly an essential part of a balanced diet because they provide needed hydration. Yet, under the restrictive principles proposed by the IWG, even bottled water could not be marketed to children, despite the fact that it provides no calories. Additionally, the principles state that foods marketed to children should also be those with minimal quantities of nutrients that could have a negative impact on health and weight. This principle could reduce marketing for a number of healthful beverages, including all 2% and whole milk, enhanced and flavored waters, yogurt, and many vegetable and fruit juices.

The principles are at once too broad and too narrow—they would prohibit marketing of specific desirable beverages while failing to focus on the overall composition of an individual’s diet. ABA believes that individuals should focus on understanding total caloric needs to underscore that all foods and beverages can fit into a sensible, balanced diet that is combined with regular physical activity. Education on energy balance – calories in and calories out – rather than a list of “good” and “bad” foods is critical. Making caloric information more accessible to consumers –as the Clear on Calories initiative does – helps to enable consumers to make informed choices in the context of their daily diets.

**V. The IWG’s “voluntary” principles violate the First Amendment because they chill protected commercial speech, do not promote a substantial government interest, do not directly and materially advance the government’s interest, and restrict more speech than is necessary to advance the government’s asserted interest.**

Freedom of speech has been recognized as the touchstone of individual liberty, “the indispensable condition of nearly every other form of freedom.”<sup>5</sup> It is perhaps unsurprising, then, that courts have fastidiously protected the First Amendment right of individuals and organizations to participate in the “marketplace of ideas.”<sup>6</sup> More than three decades ago, the U.S. Supreme Court held that the freedom of speech guaranteed by the First Amendment to the United States Constitution<sup>7</sup> extends to commercial speech.<sup>8</sup> In a long line of cases since, the Court has firmly established the rights of advertisers to disseminate, and consumers to receive, information about lawful commercial products. The right to communicate includes the right to communicate to children. As noted last month by the Supreme Court, the government’s authority with respect to children “does not include a free-floating power to restrict the ideas to which children may be exposed.”<sup>9</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

<sup>6</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 786 (Foundation Press, Inc. 1988) (1978).

<sup>7</sup> U.S. Const. amend. I.

<sup>8</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>9</sup> *Brown v. Entertainment Merchants Assoc.*, 564 U.S. \_\_\_\_ (2011).



Under well-established precedent, the government bears a significant burden of justifying any speech restriction, including restrictions ostensibly directed to children. A governmental restriction on speech that proposes a commercial transaction must satisfy four criteria to survive First Amendment scrutiny: (1) the speech must concern lawful activity and not be misleading; (2) the government must establish that its asserted interest is substantial; (3) the restriction must directly and materially advance the governmental interest asserted; and (4) the government must demonstrate that its regulatory policy is no more restrictive of speech than necessary to advance its asserted interest.<sup>10</sup> The principles proposed by the IWG fail the *Central Hudson* test.

**A. The IWG principles are not “voluntary” and will impermissibly chill protected speech.**

Although the proposal is described as “voluntary,” in practice it is voluntary in name only. Under the proposed principles, the IWG would issue a government edict categorizing certain foods as “bad” and not fit for marketing to children. Additionally, the “request” that entities comply with the marketing principles would necessarily result in compliance in light of the extensive enforcement and oversight powers of the agencies issuing the principles. Broadcasters are also likely to be coerced into compliance by the proposed principles. In fact, as discussed below, the program is designed to be coercive. Courts have rejected similar “voluntary” programs due to the chilling effect on protected speech. The government cannot avoid First Amendment protections afforded commercial speech simply by labeling a speech restriction “voluntary.” Courts will not be fooled by semantics.

**1. The principles created by the IWG principles create mandatory classification of foods.**

The IWG takes great pains to characterize the proposed nutrition principles as “voluntary.” However, in practice the principles create government-mandated classification of foods. Under the proposal, any food marketed to children should 1) provide a meaningful contribution to a healthful diet and 2) minimize the content of nutrients that could have a negative impact on health or weight. Any foods falling out side of these two principles would, in the eyes of the IWG agencies, be inappropriate for marketing to children. Thus, the IWG divides the world into “good” and “bad” foods based on extremely precise nutrient requirements and limitations. The categorization of foods into “good” and “bad” foods is not voluntary. The proposal amounts to a government-issued Scarlet Letter that would inappropriately categorize foods in a mandatory fashion.

**2. Courts have struck down ostensibly “voluntary” government-developed programs due to the fear that such programs will chill Constitutionally-protected commercial speech.**

The only “voluntary” aspect of the proposal is the “request” for companies to cease marketing to “children” of foods that the government has characterized as “bad.” However, in light of the relationship between regulated entities and the agencies it seems clear that entities will be forced to self-censor in violation of the First Amendment. This chilling effect on speech appears to be the IWG’s goal, despite the fact that such a scheme is impermissible under the Constitution.

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<sup>10</sup> *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm’n of NY*, 447 U.S. 557, 566 (1980).

**a. Sub silentio pressures and “raised eyebrow regulation” are inappropriate under the First Amendment**

The IWG principles were developed by government regulators with extensive enforcement powers against the very companies being asked to comply with them. As such, the agencies have significant power to coerce compliance from regulated entities. This type of regulation has been rejected by courts, which have recoiled from “sub silentio pressures and ‘raised eyebrow’ regulation” in the context of the First Amendment.<sup>11</sup> Accordingly, even a seemingly neutral voluntary program could be invalid to the extent it increases the likelihood that entities “will censor themselves to avoid official pressure and regulation.”<sup>12</sup> Such pressure is inappropriate and unacceptable in the context of the First Amendment.

**b. The government may not secure First Amendment compliance through threats or promises to publicize noncompliance.**

In the mid-1970s, broadcasters adopted a family viewing policy designed to reduce violent content on television. The self-regulatory effort arose after a concerted effort by Congress and the FCC to address the issue. The then-chairman of the FCC, pursuant to a Congressional directive, held a series of meetings with networks and trade associations to develop a policy that would “serve as a catalyst for the achievement of meaningful self-regulatory reform.”<sup>13</sup> The chairman's message was amplified in statements to the press and before broadcast groups that public hearings would be convened if voluntary action was not undertaken.<sup>14</sup> The FCC's proposed policies were adopted by the networks and were to be enforced through an industry code.

The U.S. District Court for the Central District of California later invalidated the policy on First Amendment grounds. The court held that “the existence of threats, and the attempted securing of commitments coupled with the promise to publicize noncompliance . . . constituted per se violations of the First Amendment.”<sup>15</sup> The court described the FCC's tactics as “backroom bludgeoning” and

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<sup>11</sup> *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (en banc). There, the U.S. Court of Appeals for the D.C. Circuit struck down a Federal Communications Commission effort to require noncommercial radio stations receiving federal funding to make audio tapes of all broadcasts “in which any issue of public importance” was discussed. Noting that an inhibiting effect on programming was inherent in government financial support of noncommercial broadcasting, the court cautioned that “the risk to First Amendment values must be minimized if the scheme is to pass constitutional muster.” *Id.* at 1115. This particular scheme, the court noted, “carrie[d] with it a serious danger of chilling vigorous public affairs programming,” as it increased the vulnerability of noncommercial licensees to official pressures and the likelihood that broadcasters would censor themselves to avoid official pressure and regulation. *Id.* at 1116, 1118-19.

<sup>12</sup> *Id.*

<sup>13</sup> Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 420 (1975).

<sup>14</sup> *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, 1098, 1105, 1117 (C.D. Cal. 1976), vacated and remanded on jurisdictional grounds sub nom. *Writers Guild of America, West v. ABC*, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).

<sup>15</sup> *Id.* at 1151.



found them to be in violation of the First Amendment and the Administrative Procedure Act.<sup>16</sup> The Court of Appeals, while vacating the lower court’s opinion for other reasons, agreed that “the use of these techniques by the FCC presents serious issues involving the Constitution, the Communications Act and the APA.”<sup>17</sup>

In similar fashion here, the initial version of the IWG principles were announced at a widely-publicized Public Forum discussing the link between food marketing and childhood obesity. As part of this forum, senior FTC staff indicated they “expect” industry to comply with the principles and that if the food industry does not comply “Congress may decide for all of us” what additional steps are required. These public pronouncements are, at best, an example of “raised eyebrow” regulation and, at worst, the type of “threats” denounced in the case discussed above. In light of these statements, one can necessarily expect a chilling effect on the lawful speech of the entities subject to the IWG principles.

**c. Classification schemes may be impermissible under the First Amendment when they induce self-censorship.**

Another example of an impermissible voluntary program arose in the context of local attempts to classify and restrict films. Under a licensing ordinance adopted by the city of Dallas, Texas, a film had to be reviewed by a classification board and receive a rating before being shown to the public. If the film was deemed “not suitable for young persons,” advertisements were required to disclose the classification and moviegoers under 16 had to be turned away at the box office. When challenged in court, the city argued that its licensing system was consistent with the First Amendment because it employed “classification rather than direct suppression.” The Supreme Court disagreed, noting that the classification would cause theater owners to shy away from any films that would receive an “unsuitable” rating, instead contracting to “show only the totally inane.”<sup>18</sup> In similar fashion here, the classification of foods as “good” or “bad” will likely cause companies and broadcasters to shy away from advertising any food that does not meet the IWG standards. This result is precisely what the IWG is hoping for, but it fails First Amendment scrutiny.

**B. Government Paternalism Alone is Not Adequate to Establish that the Government Has a Substantial Interest in Suppressing Speech.**

The second inquiry under the *Central Hudson* test requires the government to establish a “substantial” non-speech interest to justify its actions.<sup>19</sup> The Supreme Court has rejected the notion that government paternalism, alone, will satisfy this requirement. The Court has stated that it “view[s] as dubious any justification” for a restriction on commercial speech “that is based on the benefits of public ignorance.”<sup>20</sup> Similarly, the Court has rejected the notion that the government has an interest

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<sup>16</sup> *Id.* at 1142.

<sup>17</sup> *Writers Guild of America, West v. FCC*, 609 F.2d at 365.

<sup>18</sup> *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678-81 (1968).

<sup>19</sup> *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm’n of NY*, 447 U.S. 557, 566 (1980).

<sup>20</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977).

in preventing the dissemination of truthful commercial information “in order to prevent members of the public from making bad decisions with the information.”<sup>21</sup> Pointedly, the First Amendment requires the Court “to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”<sup>22</sup>

The IWG proposes to restrict marketing in order to improve children’s diets and address the high rates of childhood obesity. As discussed below, obesity is a complex condition based on numerous factors, and marketing restrictions are unlikely to directly advance the fight against obesity. Even assuming that marketing restrictions would contribute to obesity reduction—a point we strongly dispute—the government is restrained by the First Amendment when it attempts to keep truthful information from consumers.

Marketing provides parents with the information they need to make informed food choices for themselves and their families. As the IWG itself admits, the majority of those who will see the marketing that the IWG seeks to restrict will be adults. The IWG assumes that ignorance of the range of products available to consumers will result in healthier eating. Putting aside the questionable nature of this assumption, the decision to keep information from consumers is not the government’s decision to make. As stated by the court, the choice “between the dangers of suppressing information and the danger of its misuse” is a choice “that the First Amendment makes for us.” First Amendment precedent is clear that more speech is preferable to less speech and that restrictions on speech are highly suspect. This is particularly the case where, as here, the communications involve lawful products and information readily available to consumers. The government is simply not permitted to keep parents in the dark with respect to the range of lawful products available, even if it believes such a restriction would be for the public’s “own good.”<sup>23</sup>

**C. IWG Offers Insufficient Evidence to Show That Marketing Restrictions will Directly and Materially Advance the Government’s Asserted Interest of Reducing Obesity.**

The third inquiry under the *Central Hudson* test asks whether the regulatory policy directly advances the governmental interest asserted.<sup>24</sup> The government has the burden of demonstrating that this step is met.<sup>25</sup> “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.”<sup>26</sup> The IWG marketing restrictions fail under the third prong of the *Central Hudson* analysis because there is little evidence that restrictions on marketing to children will materially advance the government’s interest.

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<sup>21</sup> *Thompson v. Western States Medical Center*, 535 U.S. 357, 374 (2002).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm’n of NY*, 447 U.S. 557 (1980).

<sup>25</sup> *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

<sup>26</sup> *Id.* at 770-71.

## 1. Obesity is Based on a Complex Set of Factors that Will Not be Materially Influenced by the Proposed Marketing Restrictions

The primary objective of the IWG is to promote better diet and reduce the incidence of childhood obesity, an objective that we share. Obesity is an incredibly complex and multi-faceted problem. Factors that influence obesity include activity level, environment (including lack of healthy food and recreation options), genes and family history, socio-economic factors such as attitudes toward food, diet and physical activity, health conditions, certain medicines, emotional factors, smoking, and lack of sleep. Such a complex problem requires a thorough solution that brings a wide range of interested parties together to address multiple obesity-related factors. Unfortunately, the IWG overlooks a comprehensive solution in favor of an unproven, piecemeal approach. In light of the many factors that affect obesity, there is no evidence that marketing restrictions will advance the government's asserted interest.

Although issues related to weight gain and obesity are incredibly complex, it is well-recognized in the public health community that obesity is the result of an imbalance in excess energy consumption and too little energy expenditure over time.<sup>27</sup> In 2010, two of the agencies involved in the IWG, the USDA and the Department of Health and Human Services (HHS), released the final "Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans, 2010" (the Report). While the Report contains flaws, it correctly states that "[o]verweight and obesity result from energy imbalance (intake exceeding expenditure)," and that one can "[r]educe the incidence and prevalence of overweight and obesity of the US population by reducing overall calorie intake and increasing physical activity."<sup>28</sup> While the IWG references this report, it ignores one of its key findings—that the most simple and effective way to address the issue of obesity is to both eat less and exercise more. The IWG proposal offers no factual basis to demonstrate that restrictions on the marketing of lawful food will contribute to either reducing food intake or increasing the level of exercise necessary to achieve real reductions in obesity. The *Central Hudson* analysis requires sufficient evidence before allowing the government to restrict the dissemination of protected commercial speech.

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<sup>27</sup> See e.g., CDC, "Overweight and Obesity: Causes and Consequences" (2009), *available at* <http://www.cdc.gov/obesity/causes/index.html> (last accessed June 17, 2011) ("Overweight and obesity result from an energy imbalance. This involves eating too many calories and not getting enough physical activity. . . . When it comes to maintaining a healthy weight for a lifetime, the bottom line is – calories count! Weight management is all about balance – balancing the number of calories you consume with the number of calories your body uses or 'burns off.' . . . To remain in balance and maintain your body weight, the calories consumed (from foods) must be balanced by the calories used (in normal body functions, daily activities, and exercise)"; HHS, "Physical Activity Guidelines for Americans" at 12 (2008), *available at* <http://www.health.gov/paguidelines/pdf/paguide.pdf> (last accessed June 17, 2011) ("Physical activity and caloric intake both must be considered when trying to help control body weight. Because of this role in energy balance, physical activity is a critical factor in determining whether a person can maintain a healthy body weight, lose excess body weight, or maintain successful weight loss"); HHS and USDA, "2005 Dietary Guidelines for Americans" at v, *available at* <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf> (last accessed June 17, 2011) ("[p]oor diet and physical inactivity, resulting in an energy imbalance (more calories consumed than expended), are the most important factors contributing to the increase in overweight and obesity in this country").

<sup>28</sup> Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans, 2010, at A-2, *available at* <http://www.cnpp.usda.gov/DGAs2010-DGACReport.htm> (last accessed June 17, 2011).

The Report also explicitly acknowledges that “[t]he macronutrient distribution of a person’s diet is not the driving force behind the current obesity epidemic,” and that there “is no optimal proportion of dietary fat, carbohydrate, and protein to maintain a healthy body weight, to lose weight, or to avoid weight regain after weight loss. It is the total amount of calories eaten that is essential.”<sup>29</sup> Thus, an approach that targets specific foods is likely to be a counterproductive approach for weight management. As discussed previously, the IWG proposal includes granular descriptions of foods that may be permissibly marketed to children, thereby creating a list of “good” and “bad” foods for consumption. The evidence cited in previous reports by the very agencies now issuing the proposed principles demonstrates that such an approach will not materially advance the government’s interest. Accordingly, the marketing restrictions proposed by the IWG fail under the *Central Hudson* analysis.

## **2. Evidence Suggests that Marketing Limitations are Ineffective at Solving Childhood Obesity.**

The IWG proposal is “designed to encourage children, through advertising and marketing, to choose foods that make a meaningful contribution to a healthful diet...and minimize consumption of foods with significant amounts of nutrients that could have a negative impact on health or weight.”<sup>30</sup> Although a laudable goal, marketing restrictions will not materially advance this interest since there is little evidence of a connection between marketing and childhood obesity.

The IWG fails to cite any studies showing that advertising of food to children leads to obesity or negative health outcomes, or that banning food advertising to children improves health outcomes. Banning foods from advertising is not a policy that has proven to result in better health outcomes. There is a lack of evidence on the effectiveness of banning food advertising to children because few, if any countries, have implemented such bans. Available information on ad bans either shows little to no relationship between food advertising and children’s health outcomes or is insufficient to support a causal effect. For example, a 2007 Federal Trade Commission Report on Children’s Exposure to TV Advertising in 1977 and 2004 (FTC Report) focusing on the obesity debate found that data did not support that children saw more advertising today than they have in the past.<sup>31</sup> In fact, based on sophisticated survey methods, the FTC Report estimated that children’s exposure to food advertising on television did not increase between 1977 and 2004, and, in fact, is likely to have fallen modestly.<sup>32</sup>

While the FTC Report noted that foods advertised to children in 2004 did not represent a balanced diet, it also found that neither did the foods advertised in 1977. Yet, over that time period, rates of

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<sup>29</sup> *Id* at D1-59.

<sup>30</sup> Interagency Working Group on Food Marketed to Children, Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts Request for Comments, pg. 3 (2011).

<sup>31</sup> Federal Trade Commission Bureau of Economics Staff Report, Children’s Exposure to TV Advertising in 1977 and 2004: Information for the Obesity Debate (June 1, 2007).

<sup>32</sup> *Id.* at 63-64. The study also noted that children saw a huge increase in promotions for television programming as well as screen and audio entertainment. These sedentary entertainment products outnumber food advertisements by almost two to one and presumably would expand their advertising given an extensive ban on food advertising.

childhood obesity have increased dramatically. While IWG relies on data stating that food advertising has increased for adolescents, but decreased for children, it offers no studies or evidence to support its underlying assertion that exposure to food advertising is causally connected to obesity rates.<sup>33,34</sup>

The IWG has admitted that the connection between advertising and obesity is especially tenuous for adolescents. As noted by the IWG, the Institute of Medicine reported in 2006 that the evidence was insufficient on whether television advertising influenced the diets of adolescents.<sup>35</sup> Even for children under twelve, there is no conclusive evidence that marketing is tied to obesity. Marketing restrictions for those under twelve will be particularly ineffective since these children are not the purchasers of food. is the IWG proposal offers no evidence to show that marketing restrictions directed towards children will influence the behavior of parents.

By failing to provide evidence of a connection between advertising and obesity—and expressly acknowledging insufficient evidence in the case of adolescents—the IWG is acknowledging that there is a paucity of evidence to show that the proposed principles will directly and materially advance the government’s interest. However, *Central Hudson* requires that the government support restrictions on commercial speech with persuasive evidence that is clearly lacking in the IWG proposal. Because the government fails to meet its burden under the *Central Hudson* analysis, the principles are inconsistent with the First Amendment.

**D. The Principles are More Restrictive Than Necessary to Advance the Government’s Interest because they Would Restrict Speech to Adults and are Not Narrowly Tailored.**

The fourth inquiry under the *Central Hudson* test asks whether the regulatory policy is more extensive than necessary to serve the government’s asserted interest.<sup>36</sup> The Supreme Court has emphasized that “if the government could achieve its interests in a manner that does not restrict speech or that restricts less speech, the Government must do so.”<sup>37</sup> The Court explained that “[i]f the First

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<sup>33</sup> The IWG relied on a 2010 report from Yale University’s Rudd Center finding a decline in children’s exposure to food advertising by 4% from 2002 until 2008 with a 12% decline from its peak in 2004 and an increase in adolescent exposure to food advertising of 9% from 2002 to 2008, and the majority of this increase occurred from 2007 to 2008. Notably, the Rudd Report does not discuss whether this advertising leads to certain health outcomes. See IWG Working Group on Food Marketed to Children Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts Request for Comments 7, fn 16 (2011) (citing Rudd Center for Food Policy & Obesity, Trends in Television Food Advertising: Progress in Reducing Unhealthy Marketing to Young People?, (Feb. 2010)).

<sup>34</sup> At least one study dispels many common misconceptions about potential reasons for the rise in obesity rates in recent decades. The study’s main findings are that while children today have less free time and less unstructured playtime, it is not clear whether this unstructured playtime is spent in a sedentary manner. Interestingly, participation in organized activities has increased, including sports, while time spent participating in sedentary activities, including television, has declined. However, in spite of the statistics, the rate of obesity has increased. See Sturm, R., Childhood Obesity—What we can learn from existing data on societal trends, Part I, 2 Preventing Chronic Disease 1 (2005).

<sup>35</sup> IOM, Food Marketing to Children and Youth: Threat of Opportunity? (The National Academies Press (2006) at 306-309).

<sup>36</sup> *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm’n of NY*, 447 U.S. 557 (1980).

<sup>37</sup> *Thompson v. Western States Medical Center*, 535 U.S. 357, 371 (2002).



Amendment means anything, it means that regulating speech must be a last –not first – resort.”<sup>38</sup> The IWG marketing restrictions fail this prong of the *Central Hudson* analysis because they would suppress speech addressed to adults and are not narrowly tailored.

**1. Under the First Amendment, the governmental interest in keeping certain materials from children does not justify an overly broad suppression of speech addressed to adults.**

The IWG states that marketing is “targeted” to children when the audience share of the communication is 30 percent children ages 2-11 or 20 percent adolescents ages 12-17. These percentages mean that a substantial majority of the audience will likely be comprised of adults – particularly for restrictions aimed at the 12-17 audience - and that the restrictions on speech are overbroad under the First Amendment.

As a threshold matter, freedom of expression protects communications to children. Last month, the Supreme Court reaffirmed that “minors are entitled to a significant measure of First Amendment protection” and that the government does not possess “a free-floating power to restrict the ideas to which children may be exposed” – even with regard to violent video games.<sup>39</sup> This is true even if the government is ostensibly attempting “to protect the young from ideas or images that a legislative body thinks unsuitable for them.”<sup>40</sup> The IWG principles fail to adhere even to this threshold analysis.

Clearly, if violent video games marketed to children are subject to First Amendment protections, such protections apply to an even greater extent with regard to the promotion of food. The IWG principles propose marketing restrictions based on the content of the communication—i.e. the type of food being promoted. This is a broad overreach of federal power and there is no exception to free speech protections that would justify such a proposal. The IWG seems to argue that they should be able to regulate the content of food marketing to children because the value of food marketing is insubstantial when balanced against the cost of obesity. Putting aside the questionable connection between marketing and obesity, the IWG is simply not permitted to target the content of speech in this manner.<sup>41</sup>

The IWG principles are also Constitutionally-impermissible because they would improperly restrict appropriate communications to adults. As the Supreme Court has explained, the government may not “reduce the adult population...to reading only what is fit for children.”<sup>42</sup> Further, the Court has

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<sup>38</sup> *Id.*

<sup>39</sup> *Brown v. Entertainment Merchants Assoc.*, 564 U.S. \_\_\_\_ (2011).

<sup>40</sup> *Id.*

<sup>41</sup> *U.S. v. Stevens*, U.S. \_\_\_\_ (slip. op.) (2010).

<sup>42</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983); see also *id.* at 74 (“The level of discourse...simply cannot be limited to that which would be suitable for a sandbox.”).



noted that “the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech to adults.”<sup>43</sup>

Here, the IWG admits that its marketing restrictions will apply to marketing in which the majority of the audience is comprised of adults. The First Amendment protects an adult’s right to receive truthful and non-misleading information, even if some children will be exposed to that information. The interest in protecting lawful speech is substantial because food is a legal product for *everyone*, in contrast to other products that may not be legally marketed, sold to or used by children. The Supreme Court has strongly protected a speaker’s ability to propose a commercial transaction and the adult listener’s opportunity to obtain information about products. Because of the proposal’s substantial effect on speech to adults, the IWG’s marketing restrictions are overly broad.

## **2. The IWG Marketing Restrictions Fail because the Government Could Achieve its Interests in a Less Restrictive Manner**

As discussed previously, the proposed marketing restrictions are not “narrowly tailored” as is required for any limitations on commercial speech. The Supreme Court has stated that “if the government could achieve its interests in a manner that does not restrict speech or that restricts less speech, the Government must do so.”<sup>44</sup> In this regard, it is not sufficient that the government might find it more convenient to employ the more restrictive tool of allegedly “voluntary” limits on advertising.<sup>45</sup>

Here, the government aims to reduce childhood obesity and promote healthy diets. The government may pursue these objectives, but not by impermissibly restricting speech. For example, public education and awareness programs that advocate a balanced diet and regular exercise are key components for addressing obesity. The government has a significant ability to generate publicity, and should use this power to promote proper nutrition, a balanced diet and regular exercise. The government has, in fact, already taken steps in this direction with the release of the MyPlate and increased attention to physical activity. The government should continue these and similar efforts that do not restrict First Amendment rights. Although marketing restriction may be a more convenient tool for the government than the solutions proposed above, the First Amendment requires the government to minimize restrictions on speech within limited, Constitutional bounds.

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<sup>43</sup> *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

<sup>44</sup> *Thompson v. Western States Medical Center*, 535 U.S. 357, 371 (2002).

<sup>45</sup> *Thompson v. Western States Medical Center*, 535 U.S. 357, 371-373 (2002).

**VI. The IWG violates the Administrative Procedure Act (APA) by attempting to bypass APA procedures when developing and releasing the proposed principles.**

**A. The IWG's "Voluntary" Program Ignores APA Procedural Requirements.**

Even though the IWG characterizes its marketing principles as “voluntary,” their substance compels adherence to the procedural requirements of the Administrative Procedure Act (APA). The Administrative Procedure Act was designed “to settle and regulate the field of Federal administrative law and procedure” by outlining “legal guides” with “minimum basic essentials” for agencies.<sup>46</sup> The APA’s central purpose was “to afford parties affected by administrative powers a means of knowing what their rights are and how they may be protected.”<sup>47</sup> Through the APA, Congress granted members of the public and regulated industry the right to participate in the policymaking process. Thus, the APA requires for substantive actions by federal agencies that these agencies engage in notice and comment rulemaking that results in a final rule and that is subject to judicial review.<sup>48</sup>

The IWG improperly ignored the APA by not following any of these procedural requirements. This unilateral decision-making and disregard for procedure violates the APA; the IWG should not be allowed to circumvent the administrative process.

When an agency announces “voluntary” principles in a manner that is extraordinary, unnecessary, unsupported by the administrative record, and sure to generate undue pressure, it may violate the APA.<sup>49</sup> The IWG has ignored the APA’s requirements that provide for public feedback and input, and, in doing so, has deprived the public of a meaningful opportunity to participate.

Agency action that sets out a course of conduct for part of the private sector, and thereby has “substantial impact,” requires rulemaking.<sup>50</sup> The exceptions under the APA apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>51</sup> “The outer limits of the latter two exceptions—policy statements and procedural rules—can usually be

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<sup>46</sup> S. Rep. No. 752, 79th Cong. 1st Sess. 1, 7 (1945). The minimum procedures required of agencies exercising quasi-legislative powers are set forth in 5 U.S.C. § 553.

<sup>47</sup> *Id.* at 7.

<sup>48</sup> With regard to FTC rulemaking, the 1975 Magnuson-Moss Warranty Act, as amended by the FTC Improvements Act of 1980, imposes procedural safeguards for FTC trade regulations that are more restrictive than procedures established under the APA. Thus, if the IWG’s proposal fails to meet APA requirements, it will certainly fail to meet the FTC’s Magnuson-Moss standards as well.

<sup>49</sup> *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976).

<sup>50</sup> *Texaco, Inc., v. Federal Power Commission*, 412 F.2d 740, 743 (3d Cir. 1969). See also William T. Mayton, *A Concept of a Rule and the “Substantial Impact” Test in Rulemaking*, 33 Emory L. J. 889, 899-900 (1984).

<sup>51</sup> 5 U.S.C. § 553(b).

identified in terms of the effect of either on the primary behavior of the private sector.”<sup>52</sup> When a rule “instills a course of conduct” in the private sector, the agency should use rulemaking.<sup>53</sup>

One example from case law is *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976)<sup>54</sup>, in which the Court found the Federal Communications Commission’s (FCC) informal pressure and activities aimed at urging the networks and the National Association of Broadcasters to adopt a family viewing policy amounted to “final agency action” and as such, were reviewable.<sup>55</sup> The Court pointed out that Section Two of the APA “defines agency action in sweeping terms: so as to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”<sup>56</sup>

Prior to the passage of the family viewing policy, the FCC applied “persistent, pronounced, and unmistakable” pressure to the point of threatening industry with regulatory action if it did not adopt the proposals.<sup>57</sup> Regardless of the other factors that influenced the policy’s adoption, the FCC was the major driving force and its activities did not conform to the APA. The Court did not mince words in stating that an agency “could sit down at a table with the regulated industry, negotiate policy, delegate to the industry the power to enforce the policy, mouth empty words of congratulation about self-regulation, issue cynical denials of government responsibility, and avoid the Act entirely.”<sup>58</sup> Clearly, if tolerated, such behavior would essentially “seal out the public from the decision making process and [ ] frustrate judicial scrutiny.”<sup>59</sup>

In like manner here, the IWG has and will exert informal pressure that rises to the level of APA scrutiny. As such, the IWG should have engaged in notice and comment rulemaking with the opportunity for public comment and the right of judicial review. The course of action followed by the IWG violates that APA.

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<sup>52</sup> See William T. Mayton, *A Concept of a Rule and the “Substantial Impact” Test in Rulemaking*, 33 Emory L. J. 889, 899-900 (1984).

<sup>53</sup> *Id.* (citing *Levesque v. Block*, 723 F.2d 175, 182-83 (1st Cir. 1983); *Louisiana-Pacific Corp. v. Block*, 694 F.2d 1205, 1210 (9th Cir. 1982); *American Bus. Ass’n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980); *National Helium Corp. v. Federal Energy Admin.*, 569 F.2d 1127, 1146 (Emer. Ct. App. 1978); *Anderson v. Butz*, 550 F.2d 459, 462-63 (9th Cir. 1977); *Herron v. Heckler*, 576 F.Supp. 218, 232 (N.D. Cal. 1983)).

<sup>54</sup> *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, (C.D. Cal. 1976), vacated and remanded on jurisdictional grounds sub nom. *Writers Guild of America, West v. ABC*, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980) (court declined to rule on the lower court’s finding regarding non-adherence to the APA).

<sup>55</sup> 423 F. Supp at 1085.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1094.

<sup>58</sup> *Id.* at 1152.

<sup>59</sup> *Id.* (citations omitted).

**B. The IWG's Designation of Foods as "Good" or "Bad" is Arbitrary and Capricious.**

The IWG's proposed principles categorize foods as either "good" or "bad" without an adequate scientific or evidentiary basis and, on this basis, proposes "voluntary" marketing restrictions of these foods. The IWG's promulgation of these principles should be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA.<sup>60</sup>

In reviewing agency decisions to determine whether they are arbitrary and capricious, courts seek to determine whether the decision was "rational."<sup>61</sup> An agency violates the APA when it "relie[s] on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise."<sup>62</sup>

First, the IWG has unilaterally deemed foods as either "good" (Principle A) or "bad" (Principle B). These designations are "arbitrary and capricious" because they lack an adequate scientific basis as well as an adequate administrative record. In addition, there are foods generally recognized as part of healthful diet that are not encompassed by or are miscategorized under the IWG's two principles. For example, as discussed above, while bottled water would not be considered to make "a meaningful contribution" to the diet under the proposed principles, certainly the failure to recognize bottled water as a healthful option is "arbitrary and capricious." Marketing of other foods that make a meaningful contribution to the diet not recognized by Principle A would also be impermissible under the principles.

As discussed in Section IV.C.2 above, the IWG offers no studies or evidence which demonstrate that exposure to food marketing is causally connected to obesity rates. This lack of data is understandable—the few studies that have been conducted on the topic have shown little or no connection between food advertising and children's health outcomes. For example, a 2007 FTC Report found that children's exposure to food advertising has remained steady or fallen over the last three decades while rates of childhood obesity have increased dramatically.<sup>63</sup> This inverse relationship was not explained by the types of food advertised during the period.<sup>64</sup> The connection between advertising and obesity is especially tenuous for adolescents. As noted by the IWG, the Institute of Medicine reported in 2006 that the evidence was insufficient on whether television advertising influenced the diets of adolescents.<sup>65</sup> Without an adequate scientific basis behind placing

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<sup>60</sup> 5 U.S.C. § 706(2)(A); see also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974).

<sup>61</sup> *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Circ. 1976).

<sup>62</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>63</sup> Federal Trade Commission Bureau of Economics Staff Report, *Children's Exposure to TV Advertising in 1977 and 2004: Information for the Obesity Debate* (June 1, 2007) [hereinafter "FTC Report"].

<sup>64</sup> *Id.*

<sup>65</sup> IOM, *Food Marketing to Children and Youth: Threat of Opportunity?* (The National Academies Press (2006) at 306-309).

foods into distinct categories and banning the advertising of certain categories, IWG's proposed "voluntary" regulation is not "rational" and should be set aside as "arbitrary and capricious."

**VII. The IWG violates the Data Quality Act by presenting information that is not complete, accurate, and unbiased.**

The Data Quality Act (DQA) requires information disseminated by the government to be objective both in its presentation and substance. The IWG presents childhood obesity-related data out of context by failing to adequately discuss overall diet and the importance of physical activity. Additionally, the IWG fails to include a justification regarding why its principles are more restrictive than other federal nutrition standards. For these reasons, the IWG is not compliant with the DQA.

**A. The DQA requires objectivity in the use of data, including the presentation and substance of that data.**

The purpose of the DQA is to ensure the quality of information that federal agencies disseminate.<sup>66</sup> Under the DQA, federal agencies must issue guidelines ensuring the "quality, objectivity, utility, and integrity of information...disseminated."<sup>67</sup> The concept of objectivity, which is most relevant here, has two distinct elements: presentation and substance. The presentation component focuses on "[w]hether information is being presented in an accurate, clear, complete, and unbiased manner. This involves whether the information is presented within a proper context. Sometimes,...other information must also be disseminated in order to ensure an accurate, clear, complete, and unbiased presentation."<sup>68</sup> The substance component of the DQA requires a "focus on ensuring accurate, reliable, and unbiased information."<sup>69</sup>

The proposed principles were released by agencies subject to the DQA. They contain information regarding food choices that will have a substantial impact on private sector decisions, jobs, and communities. The DQA therefore applies to the principles, which must be objective both in presentation and in substance. Additionally, the information released by the IWG is influential and must be subject to a high degree of transparency and the best available science. The principles are not objective and fail to provide adequate justification and, therefore, must be corrected.

**B. The IWG principles are inconsistent with the DQA because the information presented is incomplete and not presented in the proper context.**

As noted, the DQA requires that the presentation of information by government agencies must be complete and presented in its proper context. The information contained in the proposed nutrition principles fails these criteria in several fundamental ways.

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<sup>66</sup> 44 U.S.C. § 3516. The original OMB government-wide IQA guidelines setting out the basic quality standards for scientific information were published at 67 Fed. Reg. 8452 (Feb. 22, 2002).

<sup>67</sup> 44 U.S.C. § 3516 .

<sup>68</sup> Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Other Agencies, 67 Fed. Reg. 8452, 8459 (Feb. 22, 2002).

<sup>69</sup> *Id.*

The IWG principles fail to present appropriate and complete information addressing whether there is a connection between advertising and obesity. The 2006 Institute of Medicine (IOM) Report on Food Marketed to Children found insufficient evidence to attribute obesity to advertising.<sup>70</sup> The IWG presents little evidence that the proposed restrictions on marketing will help American children build healthy diets. The DQA requires government agencies to meet a higher standard of proof in its presentations to the public.

The proposed principles are also not presented in a proper context. The data contained in the principles present certain foods in a negative light without addressing the context of their place in an overall diet. Reading the IWG's proposal without the benefit of any other research literature, one might be led to assume that marketing is the chief cause of childhood obesity, a proposition that clearly is not supported by the available evidence. What is most important in the context of reducing obesity is the composition of the overall diet and proper energy balance. Unfortunately, the IWG fails to present this balanced message in the principles document. As such, the data fail to meet the objectivity standard under the DQA.

**C. The information presented by the IWG is inconsistent with other federal nutrition standards, raising questions about its accuracy and reliability.**

The DQA requires that the substance of data released by agencies be accurate and reliable.<sup>71</sup> The proposed principles are inconsistent with, and in some cases more restrictive than, other federal nutrition standards, including those for the WIC program, National School Lunch Program, Healthier U.S. Schools Challenge, and the 2010 Dietary Guidelines for Americans (DGAs). This inconsistency not only breeds confusion and complicates compliance, it also raises questions regarding the reliability of the underlying data.

For example, the DGAs set intake goals for different age groups while the proposed principles apply to a broad age range that includes children and teens. Additionally, the sodium and saturated fat levels included in the proposed principles are inconsistent with those included in the DGAs. It is unclear why the principles diverge from previous nutrition standards when the IWG purports to base its decisions on these same standards.<sup>72</sup> The IWG fails to address whether the previous standards were incorrect and does not present data justifying a divergence from them. These flaws and omissions raise serious concerns about the accuracy and reliability of data underlying the proposed principles.

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<sup>70</sup> IOM, Food Marketing to Children and Youth: Threat of Opportunity? (The National Academies Press (2006) at 306-309).

<sup>71</sup> Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Other Agencies, 67 Fed. Reg. 8452, 8459 (Feb. 22, 2002).

<sup>72</sup> Interagency Working Group on Food Marketed to Children, Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts Request for Comments, pg. 3 (2011).



### **VIII. The IWG’s overly paternalistic proposal fails on public policy grounds due to its interference with consumer and parental choice.**

Neither applicable First Amendment legal principles nor sound considerations of public policy justify government action to censor food advertising so as to coerce purchasing decisions. The IWG proposal seeks to substitute its judgment on what foods parents and consumers should choose. Notably, consumers “vote with their feet” every day by choosing one product over another. It is precisely for this reason that ABA members provide a wide array of options for consumers, including numerous low and no-calorie beverages, fruit juices, and teas. Government does not have a legitimate reason to interfere with this relationship by determining which foods are “bad” and “good” for people. IWG is not aiming to shift or change market incentives by encouraging healthy eating through education; rather, it is censoring certain food advertisements and in doing so, impeding a viewer’s choices.

The principles are especially objectionable when considered in the context of the decisions parents make for their children. Parents are best equipped to make purchasing decisions for their families and particularly for younger children. In narrowing the scope of what advertising is permitted and banning other advertising entirely, the IWG interferes with the right of adults to make choices on the food their children consume. Such overreaching by the IWG presumes that parents are not equipped to make informed decisions about which foods their children should consume. What one drinks or eats is and should remain, primarily, a personal or familial decision.

### **IX. Conclusion – A Path Forward**

The ABA is strongly committed to doing its part to help address childhood obesity. ABA members have implemented numerous voluntary, proactive steps that have had measurable positive impacts on the beverages consumed by children. By contrast, the IWG’s proposed nutrition principles are unworkable, constitutionally suspect, and not based on sound data.

As an alternative, the ABA suggests that the IWG withdraw the proposed principles and initiate a collaborative effort between industry, consumer groups and the IWG to identify a workable and productive alternative to the current proposal. The effort must be truly collaborative, created by a coalition dedicated to improving children’s health—not a group coerced by the government to accept mandatory food classifications and improper restrictions on speech.

As a starting point for this effort, the ABA recommends that the IWG refer to the beverage industry’s School Beverage Guidelines and Marketing to Children Guidelines for thematic guidance. The School Beverage Guidelines, which provide that no full calorie beverages are offered in schools and limit vending machine displays to those products actually available in the school, are based on the premise that schools are unique spaces where parents are not typically present to assist children in making beverage decisions. The Marketing to Children Guidelines, on the other hand, apply to children under twelve and are based on the assumption that young children are less able to effectively understand the purpose of advertising or the distinction between advertising and other messaging than teens and adults.

These programs are not based on a distinction between the relative merits of individual foods. Rather, they suggest places or times where children are not supervised by adults or where special considerations need to be made because of a child’s age. These examples provide a starting point

for how the government and the beverage industry can work together to develop innovative programs to address childhood obesity.

As always, ABA welcomes the opportunity to meet with representatives of the IWG to discuss the work our members have done to promote sound nutrition, and to discuss additional actions that could be taken to address the complexities associated with combating obesity.

Respectfully submitted,

Patricia Magee Vaughan  
Senior Vice President and General Counsel  
Legal and Regulatory Affairs  
American Beverage Association