CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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July 14, 2011

VIA ELECTRONIC FILING
Federal Trade Commission
Office of the Secretary, Room H-113 (Annex W)
600 Pennsylvania Avenue N.W.
Washington, DC 20580

Re: Comments on Interagency Working Group: General Comments and Proposed Marketing Definitions: FTC Project No. P094513.

Dear Sir/Madam:

The U.S. Chamber of Commerce, the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, is pleased to submit these comments to the Federal Trade Commission (FTC) regarding the Interagency Working Group's (IWG) Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts (accessed at http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf (July 8, 2011) (the "Guidance").

The Guidance reflects an unhealthy federal intention and impulse to ban speech in violation of the First Amendment. Also, it does not consider the economic and employment impact of its proposed measures. Given that the IWG advocates the strongest of measures to change the way Americans feed their families and care for their children, including even "voluntary" government-directed prior restraints on truthful and lawful commercial speech, this was a significant oversight. Finally, the Guidance violates the Information Quality Act, 44 U.S.C. § 3516, note ("IQA"), so the propriety of some key IWG scientific conclusions and public policy choices are unclear.

For these reasons, the Chamber believes that the Guidance should be withdrawn. Any revised Guidance should be consistent with all relevant Supreme Court authorities, consider the economic and employment impact of the IWG's recommendations, and comply with the IQA.

I. Background

A. The 2009 Omnibus Appropriations Act (H.R. 1105) established the IWG, directing representatives from the Food and Drug Administration (FDA), the Centers for Disease Control (CDC), the U.S. Department of Agriculture (USDA) and the FTC to study and recommend standards for the marketing of food to adolescents and children 17 years old or younger.[1] The IWG's "primary objective" was "the promotion of children's health through better diet, with particular – but not sole – emphasis on reducing the incidence of childhood obesity." *See Guidance* at 3.

B. To that end, the IWG promulgated "proposed nutrition principles…to guide the 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 [ages 2-17]." *Id.* at 5 (emphasis added). So the federal government may control "the power of advertising and marketing," broadly defined,[2] the Guidance covers nearly all foods commonly eaten by children

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[1]In developing such standards, the IWG was directed to consider (l) positive and negative contributions of nutrients, ingredients, and food (including calories, portion size, saturated fat, *trans* fat, sodium, added sugars, and the presence of nutrients, fruits, vegetables, and whole grains) to the diets of such children; and (2) evidence concerning the role of consumption of foods in preventing or promoting the development of obesity among such children. *See* Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84.

[2]Among other things, the IWG defines the advertising and marketing subject to the ban to include the "use of child- or teen-oriented animated or licensed characters; use of language to appeal particularly to children or teenagers; use of child or teen models; child- or teen-oriented themes, activities, or incentives; and whether the company actively seeks the participation of children or teens in some aspect of the promotion." *Guidance* at 19. Thus:

> [T]he presence of an animated character on product packaging is definitive proof that the product is being marketed to children or adolescents. Therefore companies would be prohibited from featuring even their own logo characters on product packages…regardless of even when the product is intended to be marketed to adults. Companies would similarly be prohibited from using the words "child" or "adolescent" (or similar terms) on packaging or from featuring children or adolescents on packaging, even in communications directed to parents. Indeed, companies would be prohibited from making statements such as "your child would love this."

Redish, CHILDHOOD OBESITY, ADVERTISING AND THE FIRST AMENDMENT at 4 (June 8, 2011)(citations omitted), accessed at http://www.uschamber.com/sites/default/files/issues/environment/files/CHILDHOOD%20OBESITY%2C%20ADVERTISING%20AND%20THE%20FIRST%20AMENDMENT%20PDF.pdf (July 8, 2011).

and adolescents, including many products that FDA defines as "healthy." In fact, many products that bear FDA-authorized health claims and foods that USDA promotes for child consumption under its Women, Infants, and Children (WIC) food assistance program are subject to advertising ban and reformulation exhortations. *See* Redish, CHILDHOOD OBESITY, ADVERTISING AND THE FIRST AMENDMENT at 2 (June 8, 2011) (the "*White Paper*") accessed at http://www.uschamber.com/sites/default/files/issues/environment/files/CHILDHOOD%20OBESITY%2C%20ADVERTISING%20AND%20THE%20FIRST%20AMENDMENT%20PDF.pdf (July 8, 2011)(Exhibit 1); *see also* Johnson, IWG FOOD MARKETING RESTRICTIONS (June 30, 2011) accessed at http://www.uschamber.com/sites/default/files/issues/environment/files/Beth%20Johnson%20Presentation%20for%20USCC%20Event%20Final.pdf (July 8, 2011)(describing conflicts between IWG restrictions and other nutrition programs)(Exhibit 2).

The foods that the federal government believes threaten America's children include cereal, oatmeal, milk and yogurt, bread, frozen waffles, cookies, soda pop and candy, cheese, apple and orange juice, canned soup, and apparently all food served in any restaurant. *See Guidance* at 7, fn. 17. Yet, the Guidance does not acknowledge or address the scientific uncertainty regarding the relationship between food marketing, nutrition and obesity. *See id.* at 17. Nor does the government align the nutrition principles in the Guidance with the other government dietary guidelines or explain in any meaningful way the scientific and practical bases for this dissonance. *See* Johnson, *supra*; *Guidance* at 5.

III. COMMENTS.

A. The Guidance calls for a "voluntary" ban on lawful commercial speech in violation of the First Amendment.

In *Sorrell v. IMS Health, Inc.* 564 U.S. ___ (2011), the U.S. Supreme Court held those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. "But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech." *Id.* This principle applies also to speech aimed at children, for only "in relatively narrow and well-defined circumstances may government bar public dissemination" of protected speech to minors. The government simply does not have "a free-floating power to restrict the ideas to which children may be exposed." *See Brown v. Entertainment Merchants Association*, 564 U.S. ___ (2011).

According to Prof. Redish:

> [The IWG's] regulations of advertising on behalf of many of the most advertised foods in general, and ready-to-eat cereals and yogurt in particular, give rise to all of the constitutional pathologies sought to be prevented by the First Amendment's protection of commercial speech. Those regulations seek to manipulate lawful consumer choices, not by means of free and open debate but rather through a process of selective suppression of protected expression. Moreover, they will fail materially to advance their purported goal of reducing childhood obesity. Finally, even were we to suspend disbelief and make the inaccurate assumption that the regulations would bring about a beneficial result, there is no doubt that they sweep much further than necessary or appropriate to achieve their goal. The regulations therefore unconstitutionally suppress commercial speech.

White Paper at 1 (citations omitted).

The government's representatives have downplayed the Guidance's constitutional significance by emphasizing that it is only "voluntary" and has no legal consequences. *See* Vladeck, "What's on the table," FTC Business Center Blog (July 1, 2011) accessed at http://business.ftc.gov/blog/2011/07/whats-table (July 11, 2011). This begs credulity.[3] The point of the Guidance is that the government's preferences determine whether speech is permitted or banned. The government, however, does not have such power. *See, e.g., Bantam Books v. Sullivan*, 372 U.S. 58 (1963).[4]

Bantam Books is instructive. There, the Court invalidated Rhode Island's practice of notifying publishers that certain books met the definition of obscenity, ruling that the government cannot use the veiled threat of regulatory authority and police power to discourage speech. *Id.* at 66 - 67. The government defended its

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[3] The government's description of the IWG Guidance as some benign, legal non-entity is difficult to accept. To begin with, the federal government's track record suggests a high likelihood that what begins with "voluntary guidance" will end with mandatory regulations and direct enforcement actions. The IWG includes the federal agencies that wield the most significant regulatory authority over most other aspects of food companies' businesses, and that have the demonstrated power to conduct intrusive and burdensome investigations of industry practices, including inquiries into marketing activities aimed at children. Furthermore, the government here explicitly urges media companies to act as censors by refusing to run advertising that fails to comply with the Guidance's provisions.

[4] As Justice Brennan notes, freedom of expression must be ringed about with adequate bulwarks. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . ." *Bantam Books*, 372 U.S. at 66 (citations omitted).

conduct by claiming that the targets of its actions were free to ignore the government's exhortations, which carried no direct legal consequences. *Id.* at 68.

The Court vigorously rejected this defense, asserting that the practice of using exhortatory statements to control speech was a First Amendment vice because the government's "suggestions" afforded affected persons no safeguards whatever against the suppression of constitutionally protected matter. *Id.* at 68 – 69. In fact, government requests for a "voluntary" ban on speech was in reality "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Id.* at 70.

Here too, the government wields the veiled threat of regulatory authority and police power to suppress and control otherwise lawful speech. *See White Paper* at 6 – 7 (citations omitted). Here too, the government's claim that compliance is "voluntary" and that food companies have a choice in the matter is of no constitutional moment. The Guidance is a threat to America's food companies – do what the government says, or face enforcement action and wear a regulatory scarlet "A" that tars their commercial reputation, encourages consumers to shun them, and helps ideologues to sue them.[5] This "choice" is no choice at all. *Bantam Books,* 372 U.S. at 72 – 73.[6]

The IWG's justification for the ban is a scientifically uncertain causal connection between food marketing and childhood obesity. *See Guidance* at 5; Johnson, *supra* (demonstrating substantial contradictions and inconsistencies in government program nutrition principles); Beales, "The Impact of the Interagency Working Group's Proposed Restrictions on Advertising" at 10-13 (June 30, 2011) accessed at
http://www.uschamber.com/sites/default/files/issues/environment/files/BEALES%20-

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[5] *Accord* Hawthorne, THE SCARLET LETTER (1850)(A young woman, Hester Prynne, is led from the Boston town prison with her infant daughter in her arms and the scarlet letter "A" on her breast for public shaming, humiliation and shunning by the town fathers because she engaged in the socially disfavored act of adultery).

[6] The Constitutional principle here is clear.

> If a valid law has been violated, [food companies] can be made to account. But they would then have on their side all the procedural safeguards of the Bill of Rights, including trial by jury. From the viewpoint of the State, that is a more cumbersome procedure, action on the majority vote of the censors being far easier. But the Bill of Rights was designed to fence in the Government and make its intrusions on liberty difficult and its interference with freedom of expression well-nigh impossible.

Bantam Books, 372 U.S. at 67 – 68 (Douglas, J. concurring).

%20interagency%20working%20group%20presentation%20%5BCompatibility%20Mode%5D.pdf (July 11, 2011)(demonstrating that there are large evidentiary gaps and uncertainties in the case for the regulation of food marketing)(Exhibit 3); *White Paper* at 12-14 (noting that the government has failed to demonstrate a link between food marketing and nutrition outcomes).[7]

As the Supreme Court has pointed out, Americans must be "especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart v. Rhode Island,* 517 U.S. 484, 502 - 03 (1996). The IWG's proposed ban on truthful, legal commercial speech may reflect the best of intentions. Presumably, the IWG seeks to keep Americans in the dark for what it believes is our own good. But this is not something the First Amendment allows and the Guidance should not stand.

B. The IWG has improperly and inexplicably failed to assess or account for the Guidance's adverse economic and employment impact.

1. To begin with, the "voluntary" ban on advertising likely will decrease the revenue that newspapers, cable television and satellite programmers receive from food companies, leading in turn to higher subscription rates. Over-the-air broadcasting companies are at particular risk, because these companies are based on a business model that substantially relies on advertising dollars to fund operations.

Also, the advertising ban will raise consumer food prices and limit consumer choices. *See* Beales, *supra* at 7 - 8. Among other things, the evidence is that advertising restrictions reduce competition by creating high market entry barriers, and by discouraging product innovation and differentiation. *Id.* at 9.

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[7]As Prof. Redish reports, there is "strong evidence" that the reductions in exercise has caused the recent increase in childhood obesity, so even the total success of the proposed ban on advertising would leave substantial portions of the childhood obesity problem unaffected. Furthermore, there is no persuasive evidentiary basis that advertising by the food industry aimed at children has contributed significantly to the increase in childhood obesity. Thus, suppression of such expression would fail to materially advance the asserted governmental interest. Finally, the Guidance purports to ban marketing of nearly all ready-to-eat cereals, which represent the largest share of food advertised to children. Yet, the overwhelming evidence is that children who eat cereal more often have far healthier body weights than those who eat cereal less often. Thus, far from materially advancing a government interest, banning the advertising of cereal would work directly *against* the governmental interest in reducing obesity. "In and of itself, this fact sounds the death knell for the proposed regulations" under controlling law. *See White Paper* at 13 – 14 (citations omitted).

2. The IWG fails to disclose that adoption of its proposed nutrition principles will substantially increase the price of food, perhaps by as much as $1,632 per person per year. *See* Kerwin and Rohling, *"An Analysis of the Economic Impact of the Dietary Specifications of the Interagency Working Group on Food Marketed to Children,"* accessed at http://www.uschamber.com/sites/default/files/issues/environment/files/GES%20IWG%20Powerpoint%20July%2011.pdf (July 12, 2011)(Exhibit 4).[8] Summing the nutrition principles' cost, including higher food prices and the increased in-home food preparation time that families will need to comply with the government's requirements, Kerwin and Rohling estimate a $30.3 billion reduction in demand for U.S. grain, payments of approximately $489 billion for imported fruits and vegetables, and a total cost to American consumers of between approximately $229 billion and $1.15 trillion per year. *Id.* at 9.[9]

These are significant burdens for American families, particularly low-income families. The U.S. economy is under unprecedented stress, and millions of families struggling to make ends meet. Thus, it is difficult to understand how or why the IWG would advocate banning advertising by food companies and restaurants, and call for policies that will at once raise food prices and reduce the demand for American products, without giving even passing consideration for the impact these measures might have on American companies, workers and consumers.

The Guidance may play well to the passions, preferences and prejudices of a narrow stratum of privileged activists. But its utter failure to account for the needs and circumstances of the vast majority of American citizens is a monumental failure of administrative process and common sense.

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[8] This is a conservative estimate because it does not account "for the likely price increases that would be associated with increased demand for fresh fruits and vegetables under the IWG Diet." *See* Kerwin and Rohling, *supra* at 4. Specifically, the IWG's nutrition principles, if fully adopted, would result in a 71.8% reduction in the value of consumption of grain-based foods, a 1,009% increase in fruit consumption, and a 226% increase in vegetable consumption versus today's diet. Even under a 20% adoption rate, current fruit and vegetable expenditures would more than double while those for cereal and bakery products would fall 14%. *Id.*

[9] Kerwin and Rohling estimate compliance will require between 5.7 billion and 28.4 billion additional preparation hours, depending upon adoption rate. *See* Kerwin and Rohling, *supra* at 7. Note that their estimate does not include either the costs of American job losses or the costs incurred by companies and consumers due to the government's product reformulation requirements.

C. The IWG agencies and their Guidance are all subject to the IQA and to the implementing guidelines issued by the Office of Management and Budget. *See* 44 U.S.C. § 3516, note;[10] 67 Fed. Reg. 8452 (Feb. 22, 2002)(the "IQA Guidelines"). Each IWG member has issued its own information quality guidelines. *See* GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF INFORMATION DISSEMINATED BY THE FEDERAL TRADE COMMISSION at § VI, accessed at http://www.ftc.gov/ogc/sec515/documents/FTC515Guidelines.pdf (July 8, 2011); CDC GUIDELINES FOR ENSURING THE QUALITY OF INFORMATION DISSEMINATED TO THE PUBLIC, accessed at http://www.cdc.gov/maso/qualitycontrol/Guidelines.htm (July 8, 2011); FDA GUIDELINES FOR ENSURING THE QUALITY OF INFORMATION DISSEMINATED TO THE PUBLIC, accessed at http://aspe.hhs.gov/infoquality/guidelines/fda.shtml (July 8, 2011); USDA INFORMATION QUALITY ACTIVITIES, accessed at http://www.ocio.usda.gov/qi_guide/index.html (July 8, 2011). Yet, it appears that the IWG agencies disregarded all of their respective IQA guidelines, because the Guidance does not comply with the law.

1. When Congress enacted the Administrative Procedure Act (APA) in 1946, it contemplated that agencies would generally set and communicate policy by "rulemaking" or by "adjudication." *See* 5 U.S.C. §§ 553-554. It did not anticipate that federal agencies would accomplish regulatory and policy goals by disseminating "free-

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[10]The statute states in relevant part:

> (a) IN GENERAL – [OMB] shall...issue guidelines...that shall provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information)disseminated by Federal agencies....
>
> (b) CONTENT OF GUIDELINES – The guidelines under subsection (a) shall - - (1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and (2) require that each Federal agency to which the guidelines apply- (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information(including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a); (B) establish administrative mechanisms <u>allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a).</u>

44 U.S.C. § 3516, note (emphasis added).

standing" information - - that is, information about matters within the agency's jurisdiction but not linked to a particular rule - - such as the Guidance.[11]

However, over time agencies began using information in this fashion first as a supplement and then as an alternative to regulation because they understood that exhortatory government statements will change how regulated entities behave. *Accord Bantam Books*, 372 U.S. at 68 – 71.[12] The courts generally exempted "regulation by information" from APA judicial review, so the agencies often had wide latitude to do and say what they pleased.

To check and control the suspect administrative practice of "regulation by information," Congress enacted the IQA. It instructed agencies to disseminate only scientifically and statistically sound information and to ensure that persons adversely affected by information that violates IQA standards may seek and obtain correction from the offending agency. It also directed the Office of Management and Budget (OMB) to issue binding guidelines to define information quality and to govern the agencies' conduct.[13]

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[11] Congress enacted the IQA after it had became clear over a period of years that agencies throughout the government were increasingly using free-standing disseminations such as the Guidance on matters of ever more substantive importance. *See* S. Rep. No. 106-161 at 81 (1999); GAO/RCED-98-245, ENVIRONMENTAL INFORMATION: AGENCYWIDE POLICIES AND PROCEDURES ARE NEEDED FOR EPA'S INFORMATION DISSEMINATION at 19 (Sept. 1998)(recommending that EPA develop guidance and standards to "address obtaining stakeholders' involvement in [information] projects' design and development"); "Recommendation concerning significant agency information dissemination activities intended to promote policy goals," ABA House of Delegates 2001 Annual Meeting, DAILY J OF THE AM. BAR. ASSN., Report No. 107c, at 17, 20 (Aug. 6-7, 2001); 10 H.R. REP. NO. 105-592, at 49-50 (1998); Conrad, *The Information Quality Act – Antiregulatory Costs of Mythic Proportions?* 12 KAN. J. L. & PUB. POL., 521, 526 (2003)(citations omitted).

This worried Congress because, among other things, "regulation by information" insulated agencies from the bracing curative of judicial review. *See generally* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1200 (1982). Congress's pre-IQA presumption that agencies would speak to matters of policy almost entirely through either regulations or adjudications led many courts to find persons affected by agency dissemination of free-standing information did not have any APA review rights or protection. *See generally* Gelhorn, *Adverse Publicity by Administrative Agencies,* 86 HARV. L. REV. 1380, 1426-27 (1973).

[12] Environmental Law Institute, *Environmental Forum* 36 (July/August 1998).

[13]OMB says that it is "crucial" that Federal agencies follow the IQA Guidelines, because "The fact that the Internet enables agencies to communicate quickly and easily not only offers great social benefits, but also increases the potential harm that can result from information that does not meet basic information quality principles." 67 Fed. Reg. at 8452.

2. The IQA Guidelines, issued in 2002, require agencies to fully disclose how analytic results are generated, what specific studies and data are used to support normative conclusions, and when assumptions are used to bridge scientific uncertainties, among other things. *See* 67 Fed. Reg. at 8454 - 56. They stand for the principle that the quality of government-disseminated scientific information is a direct function of the information's objectivity and reproducibility, and that the public's ability to test these things depends entirely upon full disclosure of government scientific data and research methods. 67 Fed. Reg. at 8458 (agency must identify sources of disseminated information so that the public can assess for itself the objectivity of that information, and have access to full, accurate, transparent documentation and error sources affecting data quality).[14]

The IQA Guidelines set the quality standards that information disseminated by the government (including the Guidance) must meet. There is a primary quality test for basic information, an intermediate quality test for "influential information," and a third, more rigorous test for influential information regarding "risks to human health, safety, and the environment." *See OMB Guidelines at* §§ V(9)(defining "influential information"); V(3)(b)(ii)(setting high transparency standard governing "influential scientific, financial, or statistical information"); V(3)(b)(ii)(C) (requiring agencies disseminating influential information regarding human health, safety, and environment risks to define the expected risk or central estimate of risk for each subject population, disclose the appropriate upper or lower bound estimate of risk and all significant uncertainties, identify all of the peer reviewed studies used to justify policy positions, and disclose the methodologies used to reconcile inconsistencies in the scientific data). The Guidance's nutrition principles, and all of the IWG's public health claims, must meet this third test.

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[14] Agencies responsible for disseminating influential scientific, financial, or statistical information (such as the information at issue here) must provide a "high degree of transparency about data and methods to facilitate reproducibility of such information by qualified third parties." *Id.* at § V(3)(b)(ii). The standard is that data and methods used by an agency must be sufficiently transparent that "an independent reanalysis could be undertaken by a qualified member of the public." *Id.* Consequently, agencies must generally make available the "data and methods needed" to determine whether scientific results reported in government information are reproducible in any given case. *Id.* at § V(3)(ii)(B). This applies to analyses of data from a single study and to analyses that combine information from multiple studies, like the Guidance. Agencies may not rely on undifferentiated "weight of science" claims to support disseminated information and peer review, without more, is not dispositive of information quality. *See* 67 Fed. Reg. at 8456-57.

3. The Guidance's integrity depends first and foremost on the soundness and transparency of its underlying science. Consequently, the IWG should have treated IQA compliance as a priority matter, and all IQA principles and requirements accordingly should have been reflected therein. Instead, it seems the IWG gave the IQA very short shrift.

As a threshold matter, the IWG has failed to fully disclose how its key analytic results were generated, all of the specific studies and data it used to support its primary normative conclusions and when it used assumptions to bridge scientific uncertainties.[15] It has failed to provide the information that the public needs to understand why the nutrition principles deviate from other federal nutrition program standards, much less to reproduce the scientific findings that gird and justify the IWG's many new policy determinations. Also, it has failed to acknowledge the scientific uncertainties surrounding the assumed link between food marketing and childhood nutrition or obesity. Notably, the IWG asks commentators "Does the prevalence of obesity in both children and adolescents warrant the same approach to limits on food marketing for both age groups?", apparently presuming a causal connection between food marketing and childhood or adolescent obesity. *Guidance* at p. 20. However, the Guidance fails to acknowledge that the science is far from settled, much less offer a reasoned discussion of the evidence.[16]

The IWG also states that "Marketing can be an effective tool to encourage children to make better food choices, and voluntary adoption by industry of strong,

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[15]For example, the IQA Guidelines include mandatory agency pre-dissemination responsibilities. *See* §§ III, III(3). However, it does not appear the IWG fully complied. Also, there is no evidence that the IWG's analyses of the link between childhood nutrition and obesity risk define the expected risk or central estimate of risk for each subject population, disclose the appropriate upper or lower bound estimate of risk and all significant uncertainties, identify all of the peer reviewed studies used to justify policy positions, and disclose the methodologies used to reconcile inconsistencies in the scientific data as required by OMB. *IQA Guidelines* at § V(3)(b)(ii)(C).

[16] In fact, a 2005 report by the Institute of Medicine of the National Academies Committee on Food Marketing and the Diets of Children and Youth ("IOM Study"), funded by CDC, found "strong evidence" of advertising effects on short term food consumption for children 2 to 11, but "insufficient" evidence of such effects on adolescents ages 12 to 18. It also found "moderate evidence" of advertising effects on usual dietary intake for children ages 2 to 5, weak evidence for children ages 6 to 11, and no evidence on adolescents ages 12 to 18. The IOM Study concludes that "the current evidence is not sufficient to arrive at any finding about a causal relationship from television advertising to adiposity [obesity]." *See* Beales, *supra*. The Guidance should have reported and discussed these findings.

uniform nutrition and marketing principles…will advance the goal of promoting children's health." *See Guidance* at 1. However, the IWG does not disclose all of the material studies and data that it believes support this claim, much less address the studies and data suggesting it has significantly overstated its case. Significantly, the IWG neglects to mention that childhood obesity has increased at precisely the same time food advertising aimed at children has decreased, much less explain why this might be so. *See* Beales, *supra* (observing that children's exposure to food advertising on television is less than it was in 1977); Johnson, *supra* (documenting a drop in children's exposure to food marketing since 2004).

5. The Guidance offers new nutrition principles to change the way Americans live their lives, directs the reformulation of countless products to change the way that food companies and restaurants do business, and bans constitutionally protected food marketing to improve childhood nutrition and to solve the problem of childhood obesity. However, the IWG's failure to comply with the IQA's important information and scientific quality safeguards calls the Guidance's policy prescriptions into serious question. In its current form, the Guidance is the kind of "regulation by information" that the IQA was designed to prevent.

III. REQUESTED AGENCY ACTIONS.

A. The Chamber requests that the IWG withdraw its Guidance.

B. If new Guidance is issued, then it must comply fully with all relevant Supreme Court authorities, discuss the practical implications of its recommendations on American families and document IQA compliance.

IV. CONCLUSION.

The Chamber appreciates the IWG's attention to these comments. Please contact me if you have any questions.

Sincerely,

William L. Kovacs

EXHIBIT 1

CHILDHOOD OBESITY, ADVERTISING AND THE FIRST AMENDMENT

A WHITE PAPER

Martin H. Redish

Louis and Harriet Ancel Professor of Law and Public Policy
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June 8, 2011

INTRODUCTION[1]

Childhood obesity today represents an extremely serious and complex societal problem which requires a thorough and creative response by both the public and private sectors. In attacking this problem, however, it is vitally important not to settle for simplistic "quick fixes"—especially when they seriously threaten important constitutional rights. The so-called "voluntary" regulations prohibiting the advertising of certain foods (recently issued, with a request for comments, by the congressionally established and directed[2] Interagency Working Group on Food Marketed to Children)[3] will do nothing to remedy the problem of childhood obesity. Equally important, however, is the fact that those regulations unambiguously contravene the First Amendment's protection of commercial speech as currently established by clear Supreme Court doctrine. Ineffective and unconstitutional remedies are hardly the appropriate responses to one of the most pressing public health concerns currently facing the nation.

Commercial speech has received robust constitutional protection in recent decades, with the Supreme Court consistently recognizing the serious threat to important First Amendment values posed by the suppression of advertising for lawful products and services. Indeed, in the last fifteen years the Supreme Court has invalidated *all* governmental suppression of commercial advertising to have come before it, always on the grounds that those regulations violate the First Amendment right of free expression.[4]

As this white paper will demonstrate, the Interagency Working Group's regulations of advertising on behalf of many of the most advertised foods in general, and ready-to-eat cereals and yogurt in particular, give rise to all of the constitutional pathologies sought to be prevented by the First Amendment's protection of commercial speech. Those regulations seek to manipulate lawful consumer choices, not by means of free and open debate but rather through a process of selective suppression of protected expression. Moreover, they will fail materially to advance their purported goal of reducing childhood obesity. Finally, even were we to suspend disbelief and make the inaccurate assumption that the regulations would bring about a beneficial result, there is no doubt that they sweep much further than necessary or appropriate to achieve their goal. The regulations therefore unconstitutionally suppress commercial speech. We should heed the warning of the recently-issued *Report to the President,* prepared by the White House Task Force on Childhood Obesity, that "[any regulatory] efforts must carefully

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[1] In December 2009, due to my well-known views regarding the Constitution's robust First Amendment protection of commercial speech, I was invited by the Federal Trade Commission to participate in its public forum entitled *Sizing Up Food Marketing and Childhood Obesity* (Dec. 15, 2009). Following that forum, I was asked by General Mills, Inc. if I would be willing to further develop my thoughts on the particular advertising restrictions at issue here on a consulting basis. Given how strongly I feel about this issue [*See, e.g.,* MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER AND THE VALUES OF DEMOCRACY 14-62 (2001)], I readily agreed. This white paper is the result of that work.

[2] Omnibus Appropriations Act, H.R. 1105, 111th Cong. (2009).

[3] The group is composed of the Federal Trade Commission, Center for Disease Control and the U.S. Department of Agriculture. *See* Michelle Rusk, Senior Attorney, Division of Advertising Practices, Federal Trade Commission, Remarks at Federal Trade Commission public forum: *Sizing Up Food Marketing and Childhood Obesity* (Dec. 15, 2009) at Tr. 212–13.

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

consider freedom of speech interests."[5] Instead of pursuing constitutionally unacceptable and socially futile remedies, governmental agencies should focus their attention and resources on finding non-speech alternatives by which to achieve their worthy goal of ameliorating the problem of childhood obesity.

The first section of this white paper will describe the key elements of the recently issued regulations. The next section will explain why the mere fact that the regulations, at least in their initial stage, are to be termed "voluntary" in no way reduces the acute—and therefore justiciable—threat to First Amendment rights to which they give rise. The final section will explain why the regulations contravene the First Amendment's protection of commercial speech, as current Supreme Court doctrine has fashioned that guarantee.

I. THE WORKING GROUP'S REGULATIONS SUBSTANTIALLY RESTRICT FOOD MARKETERS' ABILITY TO PROMOTE LAWFUL PRODUCTS IN A TRUTHFUL MANNER

The Interagency Working Group's stated purpose in fashioning the regulations was to "tap into the power of advertising and marketing" in order to develop "a set of principles to guide industry efforts to improve the nutritional profile of foods marketed directly to children ages 2-17...."[6] The goal of the recently issued regulations, then, is to modify the behavior of both food manufacturers and consumers, not through direct legislative or administrative alteration or restriction of that behavior, and not through governmental attempts to persuade by making contributions to free and open debate, but rather indirectly through the selective, content-based manipulation of truthful speech about completely lawful activity.

The Working Group's proposed restrictions of foods marketed to children include two different forms of limitation: requirements that those foods (1) contain ingredients that make a "meaningful contribution to a healthful diet,"[7] and (2) "minimize the content of nutrients that could have a negative impact on health or weight."[8] Foods that fail to satisfy a combination of these two standards are not to be promoted in marketing targeted to children. It is worth noting that these standards are breathtakingly strict, barring the marketing of virtually all common foods, including many products that FDA defines as "healthy" (indeed, many products that bear FDA-authorized health claims would be barred from advertising) and foods that USDA promotes for child consumption under its Women, Infants, Children (WIC) food assistance program.

Because the Working Group fashioned its regulations in order to restrict and reshape "marketing targeted to children and adolescents,"[9] it is important to understand how the Group defines that phrase. Operative terms within the phrase include "targeted," "marketing," and "children and adolescents." In defining "marketing," the Working Group included "television, radio, and print advertising; company-sponsored web sites, ads on third-party Internet sites, and other digital advertising, such as email and text messaging; packaging and point-of-purchase displays and other in-store marketing tools; advertising and

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[5] White House Task Force on Childhood Obesity Report to the President, *Solving the Problem of Childhood Obesity Within a Generation*, at 31 (May 2010) (hereafter *White House Report*).
[6] Food for Thought: Interagency Working Group Proposal on Food Marketing to Children, at 1.
[7] Interagency Working Group on Food Marketed to Children: Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts—Request for Comments, at 15 (hereinafter, *Working Group Proposal*).
[8] *Id.* at 16. For more detailed description of the specific nutrients involved, see generally id.
[9] *Id.* at 16.

product placement in movies, videos and video games; premium distribution, contests, and sweepstakes; cross promotions, including character licensing and toy co-branding; sponsorship of events, sports teams, and individual athletes; word-of mouth and viral marketing; celebrity endorsements; in-school marketing; philanthropic activity tied to branding opportunities, and a catch-all other category."[10] In sum, according to the Working Group, "marketing activities are broadly defined to encompass virtually all kinds of promotional activities directed to youth."[11]

"[T]argeted to children and adolescents" is defined in a variable and wide-ranging manner.[12] For "measured media," including television, radio, print and some Internet advertising, the definitions refer primarily to audience share. For instance, in the case of television advertising, an advertisement is deemed to be targeted to children ages 2-11 if the advertising appears within a program, "programming block," or "daypart" where children 2-11 account for 30% or more of the audience, and an audience share of 20% adolescents ages 12-17 for a program, programming block, or daypart means that all advertising appearing therein is targeted to adolescents.[13] In the words of the Working Group, "these audience shares are likely to ensure capturing most programming or publications targeted to children or adolescents, while not also including substantial amounts of adult fare that happen to have some young people in the audience."[14] The Working Group makes this claim, even though in both instances the overwhelming portion of the audience is adult. And in fact, given the references to "programming blocks" and "dayparts," an advertisement could run in a program that has a 100% adult audience, and still be deemed be targeted to kids if surrounding programming is child- or teen-oriented. Indeed, even on all-family programming where the child or teen audience shares may be substantially below the 30% or 20% levels, advertising is barred if the advertiser has the subjective intent to reach children or teens (along with adults).[15] Thus, these restrictions are not just covering communications that are solely directed to, or received by, children and teens. They go far beyond this.

Outside of "measured media," the criteria for determining what constitutes "marketing to kids" become arguably even more questionable and overbroad. For example, under the proposed advertising

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[10] *Id.* at 18.

[11] *Id.*

[12] The Working Group has proposed adoption of the FTC's specific definitions of when a particular marketing technique is targeted to children and to adolescents as set out in the FTC's 2008 report, "Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation." *Working Group Proposal* at 18. However, the Working Group's citation to these definitions is presumably an error, as the FTC subsequently refined these definitions in its 2010 "Order to File Special Report" (the responses to which will serve as the basis for the FTC's forthcoming updated report on marketing food to children and adolescents). *See Order to File Special Report*, FTC Matter No. P064504 (August 12, 2010). Accordingly, this white paper cites to the FTC's refined definitions included in its "Order to File Special Report."

[13] *Working Group Proposal* at 18. These audience share figures were apparently arrived at by doubling the percentage of the population that consists of children 2-11 and adolescents 12-17 respectively. *Id.* Of course, by breaking children and adolescents into two groups like this, the restrictions are vastly stricter than they would be if the two age ranges were combined, and the standard were 50% ages 2-17. The intellectual basis for not combining the groups is not entirely clear, though the result is convenient if the goal is to restrict the maximum amount of commercial speech. In other contexts, such as online marketing, the audience share of children 2-11 that yields the automatic determination that one is "marketing to children" declines to a mere 20%. *Order to File Special Report* at B-3–5. The intellectual basis for this disparity is even less clear.

[14] *Working Group Proposal* at 18. For a more detailed description of the Working Group's breakdown of the word, "targeted," see generally *id.* at 18-19.

[15] *Order to File Special Report* at B-2.

ban, the presence of an animated character on product packaging is definitive proof that the product is being marketed to children or adolescents. [16] Therefore companies would be prohibited from featuring even their own logo characters on product packages (for products not meeting the nutrition standards) regardless of even when the product is intended to be marketed to adults. Companies would similarly be prohibited from using the words "child" or "adolescent" (or similar terms) on packaging or from featuring children or adolescents on packaging, even in communications directed to parents.[17] Indeed, companies would be prohibited from making statements such as "your child would love this."[18]

For purposes of assessing the constitutionality of the regulations, it is important to take special note of several factors. Most important is what the regulations do *not* reference. For example, the regulations in no way demand or assume that the regulated advertising be false or misleading in any way. The Working Group is thus willing to proceed on the assumption that the advertising which it "urges" the manufacturers to suppress is completely truthful—indeed, perhaps even informative. Moreover, the Working Group quite clearly contemplates letting nothing at all turn on the legality of the activity being promoted. Instead, it seeks to manipulate lawful behavioral choices of its citizens solely through the selective suppression of truthful and lawful expression. For reasons that will soon be made clear, such an approach is wholly inconsistent with the foundations of the First Amendment guarantee of free expression in general and the constitutional protection of commercial speech in particular.[19] Before reaching the heart of the constitutional defects in the proposed regulations, however, it is first necessary to explain why they will have an immediate and negative impact on the First Amendment rights of both commercial speakers and listeners. As a result, they will be subject to judicial review the moment they are finally promulgated, despite their superficially "voluntary" nature.

II. THE SUPPOSED "VOLUNTARINESS" OF THE WORKING GROUP'S REGULATIONS DOES NOT PRECLUDE THEIR CREATION OF AN IMMINENT, JUSTICIABLE THREAT TO FIRST AMENDMENT RIGHTS

By framing their promulgated regulations as merely "voluntary," the Working Group effectively seeks to gain the benefit of its suppression of lawful expression while simultaneously insulating that suppression from judicial review. But government cannot be permitted to establish a regulatory framework, *the sole intent and effect of which will be to suppress speech*, while such framework remains immune from judicial review. To the contrary, these regulations will be ripe for judicial review as soon as they are finally promulgated.

It is impossible to ignore the coercive effect imposed by these regulations, as well as their starkly restrictive impact on speech. The regulations will impose costly and impossible choices on those subject to the regulation. Food companies will be forced to choose between, on the one hand, abandoning

[16] *Id.* at B-5.
[17] *Id.* at B-6.
[18] In addition, other activities that are deemed to constitute marketing to children (such that food companies would be precluded in engaging in these activities, except with the rare product that meets the stringent standards) include: sponsorship of charities that benefit children (like Special Olympics, March of Dimes, Make-A-Wish, etc.); sponsorship of a public entertainment event (like a sporting event or state fair) that may involve kid-oriented activities; sponsorship of the U.S. Olympic Team (or any other team involving kids under 18); using an animated figure, like Santa Claus or the Easter Bunny, on a package of holiday-oriented food; employing a celebrity or famous athlete who is "highly popular" with kids. *See, e.g., Order to File Special Report* at B-5, 8, 12, 14, 16-17.
[19] *See* Section III, *infra.*

marketing efforts central to the success of their businesses and, on the other hand, facing a parade of wholly untenable consequences, including: (i) risking even harsher regulation which will almost inevitably follow absent compliance with these regulations); (ii) risking enforcement actions; (iii); garnering the opprobrium of the agencies that have the greatest power over virtually every aspect of the food companies' businesses; (iv) subjecting themselves to continued, and more intrusive, investigations relating to advertising practices; (v) opening themselves up to class action lawsuits (which, in the current environment, are essentially a certainty in the event of noncompliance); and (vi) causing disastrous reputational consequences for food companies who choose to continue to market products that the government has formally deemed to be unworthy for consumption. This sort of "choice" is inherently coercive and thus not really a choice at all. Moreover, even in the event that manufacturers choose to ignore the government's directive, if media outlets, retailers, and others refuse to run the advertising materials that the government seeks to restrict, as they are similarly being coerced to do, food companies will be left without even a semblance of a choice to reject the Working Group's standards. For a number of constitutionally dictated reasons, each of these factors renders the regulations ripe for judicial review.

First of all, governmental regulations that seek only "voluntary" compliance will nonetheless give rise to a ripe lawsuit where those who have been subjected to the supposedly voluntary regulation have been made aware that their failure to comply will likely lead to imposition of mandatory regulation.[20] Here, explicit threats of coercive action in the event of the industry's failure to comply have already been made.[21] The White House Report expressly recommended that "[i]f voluntary efforts to limit the marketing of less healthy foods and beverages to children do not yield substantial results, the FCC could consider revisiting and modernizing rules on commercial time during children's programming."[22] Indeed, simply as a matter of common sense, it is all but inconceivable that the federal government would incur the burdens and expense involved in establishing the Interagency Working Group and preparing the advertising regulations, only to have the food industry summarily ignore them. The voluntary nature of

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[20] *C.f.*, Arent v. Shalala, 866 F. Supp. 6, 11 (D.D.C. 1994), *aff'd in part and rev'd in part on other grounds,* 70 F.3d 610 (D.C. Cir. 1995); Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51 (D.D.C. 1998), *rev'd on other grounds sub nom.* Washington Legal Found. v. Henney, 202 F.3d 331 (D.C. Cir. 2000). Where imposition of mandatory regulation stands as a reasonable threat in the face of failure to comply with voluntary regulations, the situation is analogous to cases in which criminal prosecution has been threatened if individuals were to take specified actions. In such situations, the threatened individual has routinely been permitted to seek declaratory relief in federal court challenging the legality of the threatened prosecution, even though no actual prosecution has yet been filed. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974) (individual threatened with criminal prosecution if he continued to distribute anti-war literature was allowed to seek declaratory judgment in federal court finding future prosecution a violation of the First Amendment.). The exact same reasoning that justifies the allowance of such suits applies to the proposed "voluntary" regulations.

[21] *See, e.g., Sizing Up Food Marketing and Childhood Obesity,* at 261, 263 (12/15/09) (Statement of David Vladeck, Director of Bureau of Consumer Protection of Federal Trade Commission, commenting that: "We would not be talking about government regulation if industry self-regulation had made greater strides," and then further noting that if industry does not "make great strides in limiting children-directed marketing" in compliance with these regulations, Congress is likely to "decide for all of us what additional steps are required.") Director Vladeck also noted at the more recent IOM Workshop on Legal Strategies For Childhood Obesity Prevention, that the FTC could, if it so chose, pursue non-complying food companies under the unfair or deceptive advertising provisions of the FTC Act (10/21/2010). *See also White House Report, supra* note 5, at 31-32 ("[t]he prospect of regulation or legislation has often served as a catalyst for driving meaningful reform in other industries and may do so in the context of food advertising" and then noting that, in this context, government can "promulgat[e] laws and regulations when other methods prove insufficient.").

[22] *White House Report, supra* note 5, Recommendation 2.9, at 32.

the regulations is therefore appropriately deemed to be nothing more than a precursor to coercive enforcement in the event that the industry fails to comply.

In addition, though such enforcement may well come in the form of the subsequent issuance of mandatory regulations or direct enforcement actions by the government, the coercion does not end with the danger of either of these consequences. It must be recalled that the agencies involved in the Interagency Working Group include those agencies that wield the most significant regulatory authority over most other aspects of food companies' businesses, and that have the demonstrated power to conduct intrusive and burdensome investigations of industry practices, including inquiries into marketing activities aimed at children.[23] Moreover, when the government inquires or opines about nearly anything in today's environment, costly class action lawsuits quickly follow.[24] Thus, the mere existence of the regulations, and certainly any failure to comply with them, will result in harsh consequences for food companies – not only from the government itself, but from private parties as well. And in some cases, the government is explicitly urging key business partners of food companies to mete out such harsh consequences. Indeed, the government has asked that media companies refuse to run advertising that fails to comply with the regulations.[25] This would clearly amount to the imposition of a governmental penalty on non-complying companies. The fact that it is indirect makes it no less real.

These threats would render the regulations sufficiently non-voluntary and ripe for judicial review even if the First Amendment were not implicated, but ripeness is even more clear in this instance because of the regulations' obvious impact on free expression. It is well established that regulatory threats to freedom of expression justify facial challenges due to the chilling effect on speech created by the specter of government sanction.[26] Judicial fears of self-censorship have led to recognition of a far more lenient approach to ripeness requirements when First Amendment rights are implicated.[27] The Supreme Court has long recognized the common sense reality that government pronouncements about the legitimacy of speech inevitably have a coercive effect. For example, in *Bantam Books v. Sullivan*, the Supreme Court invalidated the government's practice of notifying publishers that certain books met the definition of obscenity.[28] That decision squarely rejected the government's argument that mere agency exhortations, unaccompanied by "formal legal sanctions," did not violate the First Amendment where the targets of the governmental statements inevitably felt compelled to alter their speech activities.[29] *Bantam Books* is consistent with a long line of cases holding that the government cannot use its regulatory authority and

[23] For instance, the FTC has, in 2007 and again in 2010, ordered over 40 food companies to produce exhaustive records and information relating to products directly or indirectly marketed to kids. *See, e.g.,* United States Federal Trade Commission, Order to File Special Report dated August 12, 2010.

[24] For example, a May 5, 2009 letter from the FDA's Minneapolis regional office to General Mills regarding Cheerios labeling practices resulted in the filing of six purported class actions against General Mills (parroting the FDA letter) within a matter of a few weeks.

[25] *See, e.g., White House Report, supra* note 5, at 32 (Recommendations 2.6-2.9).

[26] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278–79 (1964) (expressing concerns about speech regulations that lead to "self-censorship"); Wolfson v. Brammer, 616 F.3d 1045, 1058 -1059 (9th Cir. 2010) (reviewing numerous cases holding that "one need not await 'consummation of threatened injury' before challenging a statute restricting speech, to guard against the risk that protected conduct will be deterred).

[27] Martin H. Redish, 15 Moore's Federal Practice ¶. 101.61[5][b] (3d ed.; rev'd 2010).

[28] Bantam Books v. Sullivan, 372 U.S. 58, 66-67 (1963).

[29] *See also* Entertainment Software Ass'n v. Blagojevich, 469 F.3d 641, 651-52 (7th Cir. 2006) (invalidating labeling requirements for "violent" video games because government was attempting to suppress speech by imposing the government's opinion).

police power as a veiled threat to discourage speech.[30] There can be no doubt that the regulations here will suppress speech in the same manner—*indeed, that is their entire point.*

Moreover, preventing companies which have been subjected to supposedly voluntary regulations from bringing a constitutional challenge until explicitly mandatory regulations have actually been promulgated would cause substantial hardship to those companies. Once mandatory regulations have been promulgated, the affected companies would be placed in the precarious position of choosing between declining to exercise their First Amendment rights until they are able to obtain legal relief on the one hand, and risking incurring penalties for failure to comply with those mandatory regulations, on the other hand. The existence of such potential hardship from delayed adjudication has long been recognized as an appropriate ground on which to find a suit ripe for adjudication.[31] The threat to free speech rights caused by promulgation of the voluntary regulations therefore constitutes an imminent and cognizable violation of the advertiser's First Amendment rights.

The Supreme Court recognized in *Bantam Books* that "[i]t is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments."[32] Government cannot be permitted to establish a regulatory framework in which the constitutional rights of the subjects of its regulation are infringed as a practical matter, while that framework remains immune from judicial review. The inherently coercive nature of the regulatory process is in no way diluted by labeling the regulations "voluntary." Under established precedents, the nominally voluntary nature of the regulations will not prevent immediate judicial review of their constitutionality.

III. THE PROPOSED REGULATIONS VIOLATE THE FIRST AMENDMENT'S PROTECTION OF COMMERCIAL SPEECH

A. The First Amendment Prohibits Government from Suppressing Truthful Advertising for Lawful Products in an Effort to Keep Consumers Ignorant about Their Economic Choices.

The First Amendment's protection of commercial speech, no less than its protection of other categories of expression, is designed to prevent government from manipulating citizen behavior through the selective suppression of speech advocating lawful action. Such indirect manipulation of private choices is inherently inconsistent with the essential premises of the social contract between government and citizen necessarily implicit in any liberal democratic society. When government acts in such a manner, it undermines the ability of citizens to make lawful choices, not by imposition of legislatively authorized restrictions on conduct or through processes of free and open debate, but rather indirectly by the manipulative and selective suppression of truthful expression. In the words of constitutional scholar

[30] *See, e.g.,* Rattner v. Netburn, 930 F.2d 204, 209 (2d Cir. 1991) (finding triable issues as to whether a local official's disapproval of advertisement constituted an "intimat[ion] that some form of punishment or adverse regulatory action would follow" absent compliance); White v. Lee, 227 F.3d 1214 (9th Cir. 2000) (holding that informal government actions violate the First Amendment when likely to chill free speech and enjoining a government investigation); Rossignol v. Voorhaar, 316 F.3d 516, 526 (4th Cir. 2003) (finding that the need for business owners to maintain good relations with local police resulted in intimidation from police presence designed to suppress speech); Playboy Enters., Inc. v. Meese, 639 F. Supp. 581 (D.D.C. 1986) (enjoining Attorney General from publicly disseminating a list of publications that purportedly constituted pornography).

[31] Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967) (hardship held to be important consideration in deciding ripeness question.). *See also* Martin H. Redish, 15 Moore's Federal Practice ¶101.76.

[32] 372 U.S. at 66.

Burt Neuborne in his discussion of commercial speech protection, "government has no legitimate interest in manipulating ostensibly free choice by cutting off the flow of information.... When society provides its members with lawful choices, respect for individual dignity compels that the choices be the autonomous expression of individual preference. It is impossible to respect individual autonomy with the left hand while selectively controlling the information available to the individual with the right hand. A purportedly free individual choice premised on a government controlled information flow is a basic affront to human dignity."[33]

In its decision in *Edenfield v. Fane,* the Supreme Court recognized the relevance of this foundational precept of liberal democratic theory to the protection of commercial speech:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.[34]

In his opinion for the plurality in *44 Liquormart v. Rhode Island,* Justice Stevens wrote that bans of truthful advertising of lawful products designed to protect consumers from commercial harms "rarely protect consumers from such harms. Instead, such bans often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech."[35] Justice Stevens added that "[i]n this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy."[36] Justice Stevens found such regulations unconstitutional because they

> usually rest on the offensive assumption that the public will respond 'irrationally' to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.[37]

As early as in its first decision extending substantial First Amendment protection to commercial speech, *Virginia State Board of Pharmacy v. Virginia Citzens Consumer Council*, the Court reminded us that "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it if freely available, that the First Amendment makes for us."[38]

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[33] Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets,* 55 Brook. L. Rev. 5, 37 (1989).
[34] 507 U.S. 761, 767 (1993).
[35] 517 U.S. 484, 502–03 (1996) (citation omitted).
[36] *Id.* at 503.
[37] *Id.* (internal citation omitted). *See also* Thompson v. Western States Medical Center, 535 U.S. 357, 374 (2002) ("We have... rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.").
[38] 425 U.S. 748, 770 (1976). *See also* Central Hudson Gas & Electric Corp. v. Public Servic Commission, 447 U.S. 55, 566 n. 9 (1980)("We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy.").

It is true that advertisements, much like the speech of political candidates or many other examples of fully protected non-commercial communication, are a form of advocacy. As such, they usually will present only one side of an argument. That fact standing alone, however, does not categorically characterize them as "inherently misleading." Indeed, if advertising's strategic selectivity were to render it inherently misleading, the whole concept of commercial speech protection would have to be rejected. Given the Supreme Court's vigorous protection of commercial speech in recent years, it is clear that the Court has rejected such a view. In those relatively few instances in which government validly concludes that, absent the provision of additional information, the consumer is likely to be given a misimpression by commercial advertising, it may require that the advertiser communicate such additional information.[39] Moreover, unambiguously false claims may be regulated. But the strategically selective nature of the arguments inherent in advertising (or in any form of advocacy, for that matter), standing alone, does not provide a sufficient basis on which to justify the direct suppression of commercial communication.

The regulations of advertising and promotion proposed by the Interagency Working Group sweep far and wide to disrupt significantly consumers' ability to learn about lawful economic choices. Their restrictions reach advertising aimed at minors who are fully capable of rationally making their own lawful purchasing choices, as well as advertising seen primarily by adults.[40] Moreover, there is no requirement that the advertisements in question first be found false or misleading for the ban to be triggered. The regulations thus directly contravene the core premises of commercial speech protection recognized by both the Court itself and its individual members over the years in a series of decisions beginning in 1976. They are therefore unambiguously inconsistent with the First Amendment's protection of commercial speech.

B. The Fact that the Proposed Regulations Purport to Suppress Only Advertising Aimed at Children Does Not Reduce the First Amendment Problems to Which They Give Rise.

Supporters of the regulations would no doubt argue that the precepts of liberal democratic theory on which the First Amendment in general and its protection of commercial speech in particular are based have no relevance in the present situation. The regulations, the argument proceeds, suppress only advertising aimed at children, who are incapable of rational thought at a level sufficient to enable them to make free commercial choices in the same way in which adults are capable of making them. However, this argument fails for several reasons.

Initially, it is inaccurate, as a matter of both First Amendment theory and doctrine, to assume that children—as either speakers or listeners—are categorically excluded from the scope of that constitutional protection. The Supreme Court has consistently recognized that children possess First Amendment rights,[41] and that "[i]n most circumstances, the values protected by the First Amendment are no less

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[39] *See, e.g.,* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

[40] *See, e.g., Order to File Special Report* at B-2-B-10 (requesting advertiser's information concerning marketing to children 2-11 via television, Internet, packaging, videogames, movies, public events, sponsorship of individual athletes, and numerous other activities); id. at C-1-C-15 (same as to minors 12-17).

[41] *See, e.g.,* Tinker v. Des Moines Indep. Community School District, 393 U.S. 503, 506 (1969) (invalidating prohibition on student expression and declaring that children do not "shed their constitutional rights . . . at the schoolhouse gate."); id. at 511 (children are "'persons' under our Constitution . . . . possessed of fundamental rights which the State must respect."); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (upholding First Amendment right of grade school student not to say the Pledge of Allegiance).

applicable when government seeks to control the flow of information to minors."[42] As Judge Richard Posner succinctly put it on behalf of the United States Court of Appeals for the Seventh Circuit, "[c]hildren have First Amendment rights."[43] Judge Posner also explained the rationale for such protection. "It is obvious," he noted, that minors "must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise."[44] He persuasively argued further that "[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."[45] Because adults have been afforded the constitutional right to receive commercial advertising as well as political communication, it logically follows that children should be recognized to possess similar rights.

It is true, of course, that the Supreme Court has recognized certain exceptions to the general proposition that children possess full First Amendment rights. For example, the Supreme Court has on occasion recognized that minors' constitutional right to view sexually indecent material is not the equivalent of an adult's right to do so.[46] But courts have generally confined this exception to the narrow context of sexually indecent speech.[47] It is also arguable that minors may, under limited circumstances, be protected from speech advocating commercial activity when that activity would be illegal when engaged in by minors.[48] However, it should be obvious that neither exception is applicable here. The speech at issue here has nothing to do with sexually indecent (or other psychologically harmful) speech. Rather, it relates to advertising of food – something that is not only legally permissible for children to consume, but that is required for survival.

It has been argued that minors under the ages of 7 or 8 possess an inability to distinguish television advertisements from actual programming, and they are therefore unable to understand advertising's inherently biased nature. Advertisements seen by these children, the argument proceeds, are thus rendered inherently misleading.[49] Even if the assertion concerning the abilities of children under the ages of 7-8 were assumed to be accurate (which it is not), it surely would fail to justify the severe restriction of food advertising aimed at all children between the ages of 2 and 17, as the proposed regulations seek to impose.[50] The regulations thus would employ a hatchet when at most a scalpel would be needed—something the First Amendment does not permit when speech advocating lawful purchase is the subject of the regulation. In any event, there is serious question concerning the scientific accuracy of the

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[42] *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 (1975).
[43] Am. Amusement Machine Ass'n v. Kendrick, 244 F.3d 572, 576 (7th Cir. 2001) (Posner, J.).
[44] *Id.* at 577 (emphasis in original).
[45] *Id. See also* MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN 258 (2001) ("Youngsters need access to information and ideas, not indoctrination and ignorance ... precisely because they are in the process of identity formation.... They are also in the process of becoming functioning adults in a democratic society....").
[46] *See* Ginsberg v. New York, 390 U.S. 629 (1968).
[47] *See, e.g.*, Am. Amusement Machine Ass'n, 244 F.3d at 574.
[48] Not even this exception to First Amendment protection has been recognized in all contexts. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (holding unconstitutional state's restriction of tobacco advertising viewed by minors because it unduly invaded ability of adults to view the advertisements).
[49] *See, e.g.*, Jennifer L. Pomeranz, *Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate*, 38 J. L. MED. & ETHICS 98, 99 (2010).
[50] While it is true that the current proposal seeks public comment on whether the regulations should draw some distinctions between children under the age of 12 and older adolescents, it is still constitutionally unacceptable to treat an 11 year old in the same manner in which a 2 year old is treated.

accepted wisdom that children's ability to distinguish advertisements from programming actually ends as late as the age of 7 or 8. Substantial scientific research supports the view that the age at which children recognize the difference between advertising and programming is actually as young as 3 or 4.[51]

Moreover, it is important to keep in mind that any child too young to grasp the difference between a television advertisement and a program[52] is also too young to make unsupervised purchases. Thus, there will always be a filtering mechanism by which unwise choices can be prevented—namely, the parent or guardian who must make the actual purchase.[53] Therefore the normal concerns that arguably justify categorical excisions of speech aimed at minors from the scope of the First Amendment—for example, fear of direct psychological harm or participation in activities illegal for or uniquely harmful to minors—cannot justify the proposed regulations. To the contrary, these regulations sweep within their reach countless minors who are wholly undeserving of the government's paternalistic concerns. These are minors who, both doctrinally and normatively, deserve the intellectual respect that the First Amendment commands that they, as well as adults, receive.

Finally, even if one were to concede even the most dubious factual claims concerning children's inability to understand advertising claims which have been relied upon to support the broad sweep of the proposed regulations' restrictions, the regulations would nevertheless violate the First Amendment because of their extensive restriction on the ability of adults to view the advertisements. It should be recalled that in their current form, the Working Group's proposed regulations restrict advertising when the percentage of children in the audience is estimated at no more than 20 or 30%.[54] That means that manufacturers would be prevented from communicating truthful information concerning lawful products to audiences that are made up of 70 or 80% adults. Moreover, as described earlier, the proposed regulations would prohibit numerous communications even when they are seen exclusively by adults.[55] The Supreme Court has never allowed such a practice in the regulation of either commercial or non-commercial speech. Indeed, even in a case where the activity promoted by advertising was illegal for

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[51] John C. Luik, *Ideology Masked as Scientific Truth: The Debate About Advertising and Children* 16 (Washington Legal Foundation 2006) ("[T]he research record is much more mixed than the APA Report allows, such that it is simply not true to claim that the 'evidence as a whole indicates that most children younger than about age 7-8 years do not typically recognize that the underlying goal of a commercial is to persuade the viewer.'"). Luik quotes Melissa Ditman in the American Psychological Association's *Monitor on Psychology* in November 2002 as noting that "'by age three or four, most children are able to differentiate an ad from a program.'" Id. at 11. *See also* DAVID COHEN, HOW THE CHILD'S MIND DEVELOPS 71 (2002) (questioning whether early studies of children's understanding "are still wholly valid today given the many social and cultural changes that affect children."); id. at 105 (citing studies demonstrating that "there is a major qualitative shift in thinking between the ages of 5 and 7 . . . as the child masters more complex relational structures.").

[52] It should be emphasized that in any event it is questionable whether anything should turn on a child's inability to distinguish advertisements from programming. Assuming there is nothing false or misleading in the substance of the advertisement, it is by no means clear that a child's inability to distinguish advertisements from programs in any way misleads the child in his or her understanding of the advertisement.

[53] It might be suggested that, despite the existence of an adult filtering mechanism prior to purchase, exposing young children to the advertisements in question will nevertheless give rise to a "pestering" phenomenon where the parents feel they must give in to the child's strongly held desires, regardless of the wisdom of such choices. But if accepted, such an argument would prove far too much. If the goal is avoiding parental pestering, logically all advertisements for toys should be prohibited as well. It is not unreasonable to assume that at various points in a child's growth a parent will have to resist the child's expressed desires because of the parent's conclusion that such a choice would be unwise.

[54] *See* Section I, *supra.*

[55] *See* discussion, *supra,* notes 16-19 (and accompanying text).

minors (tobacco use), the Supreme Court struck down a state's sweeping effort to restrict advertising seen by minors because the Court recognized "that the sale and use of tobacco products by adults is a legal activity" and "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 products."[56] In other instances, the Court has struck down regulations of commercial or indecent expression when "[t]he incidence of [the] enactment is to reduce the adult population...to reading only what is fit for children."[57] Because, in their effort to insulate children, the proposed regulations would, as detailed below, necessarily disrupt the ability of sellers to communicate with adult consumers, they would contravene the constitutionally grounded directive that government not restrict truthful advertising for lawful products.[58]

C. The Proposed Regulations Fail to Satisfy the Supreme Court's *Central Hudson* Test for the Protection of Commercial Speech.

1. The proposed regulations fail the *Central Hudson* test.

In recent years, several members of the Supreme Court have adopted the position that governmental suppression of truthful advertising for a lawful product or service in an effort to keep consumers uninformed categorically violates the First Amendment. Though not all members of the Court have expressly gone that far,[59] it is important to note that at no time in recent years has a majority of the Court ever upheld suppression that fits this description. Where it has failed to invoke the categorical prohibition on the suppression of truthful advertising for lawful products, the Court has instead grounded its finding of unconstitutionality in the four-prong test for the protection of commercial speech established in *Central Hudson Gas & Elec. Corp. v. Public Service Commission.*[60] In the case of the Working Group's proposed regulations, even if the Court were to rely on the *Central Hudson* test in lieu of finding the regulations categorically invalid, there is little doubt that the proposed regulations would be found unconstitutional.

The Court in *Central Hudson* established a four-step process by which to determine whether commercial speech could constitutionally be regulated or suppressed. First, where the speech promotes sale of an unlawful product or service or is found to be false or misleading, the regulation of commercial speech is to be automatically upheld. Assuming the speech in question has passed this first hurdle, the next three questions scrutinize the nature of the regulation of that speech. For the regulation of

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[56] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001).

[57] Butler v. Michigan, 352 U.S. 380, 383 (1957). In the specific context of commercial speech regulation, see Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."). As to indecent speech, see also Reno v. ACLU, 521 U.S. 844, 875 (1997) (holding that "the governmental interest in protecting children from harmful materials [on the Internet] . . . . does not justify an unnecessarily broad suppression of speech addressed to adults."); Sable Communc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (holding unconstitutional ban on "dial-a-porn" because in its efforts to protect children the ban unduly interfered with First Amendment rights of adults).

[58] *See also* the discussion in Section II(C)(3)(b), *infra*.

[59] It should be noted, however, that even when applying a narrower test, the Court has expressly adopted this view. *See* Thompson v. Western States Medical Center, 535 U.S. 357, 374 (2002).

[60] 447 U.S. 557 (1980). Decisions invalidating regulations under *Central Hudson*, rather than categorically rejecting all paternalistically motivated suppression, include Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001), Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999) and 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

commercial expression to be upheld, it must pass *all three* of the remaining prongs; failure to satisfy *any one* of these requirements results in a finding of unconstitutionality.

Under the second prong of the test, government must establish that its regulation of commercial speech serves a "substantial" governmental interest.[61] Once that test has been satisfied, the court must determine "whether the regulation directly advances the governmental interest asserted…."[62] The regulation will be invalidated if the regulations "only indirectly advance the state interest involved."[63] Moreover, the regulation must *materially* advance the interest. Government has the burden of establishing, beyond mere speculation, that its regulation does so.[64] Even if the first three requirements have been satisfied, the regulation must still be found to be "[no] more extensive than is necessary to serve [the substantial governmental] interest." Although in the early years of the test's use one might have been able to accurately characterize the Court's protection of commercial speech as somewhat inconsistent, there is no doubt that over at least the last 15-20 years the Court has enforced the test vigorously, consistently invalidating regulations of commercial speech for their failure to satisfy the third prong, the fourth prong, or a combination of the two. The proposed regulations of advertising for supposedly low nutrition foods—especially when applied to nutrient-dense foods like ready-to-eat breakfast cereals and yogurts—clearly fail both the third and fourth prongs of the *Central Hudson* test, and are therefore unconstitutional. This is so, even in the event the Court were ultimately to eschew reliance on a categorical invalidation of paternalistically motivated suppression of truthful commercial speech.

2. The proposed regulations fail materially to advance the government's interest in reducing childhood obesity.

The Court's rationales for invalidating regulations of commercial speech under *Central Hudson*'s third prong generally fall into one of two categories: (1) the regulation leaves unregulated so large a portion of the problem sought to be remedied that it cannot be deemed to "materially" advance the government's interest in preventing the asserted harm;[65] or (2) the government is unable adequately to

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[61] 447 U.S. at 566.
[62] *Id.*
[63] *Id.* at 564.
[64] Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) ("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.").
[65] *See, e.g.,* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 190 (1999) (invalidating federal law prohibiting "some, but by no means all, broadcast advertising of lotteries and casino gambling" because "'[t]he operation of [the challenged statute] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 506 (1996) (emphasis in original) (invalidating prohibition of liquor price advertising as a means of promoting the government's interest in temperance because "the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce marketwide consumption."); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (federal law prohibiting beer labels from displaying alcohol content held unconstitutional because under the law distilled spirits are permitted to display their alcohol content); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (invalidating ban on commercial news racks on city streets in the city by an attempt to improve esthetics, because the remaining non-commercial newspaper racks rendered "marginal indeed" the esthetic benefits gained from the regulation); Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 99–100 (2d Cir. 1998) (state's prohibition of beer label with frog extending its middle finger could not be justified as an effort to protect children from obscenities, because of continuing wide-spread availability of obscenities in society).

support the proposition that the regulated speech gives rise to the problem sought to be remedied.[66] Careful scrutiny of the proposed regulations at issue here demonstrates that while they are definitely designed to foster a "substantial" governmental interest (i.e., avoidance of childhood obesity), they cannot be deemed to "materially" advance that interest. For reasons to be discussed, this is particularly true when these regulations are applied to advertising for ready-to-eat breakfast cereals and other nutrient-dense foods like yogurt, but ultimately the regulations will be found to violate the First Amendment in *all* of their potential applications. The simple fact is that, in the words of one group of commentators, "there has been little theoretical or empirical analysis of the central questions related to the 'advertising causes obesity' thesis."[67] Indeed, even the Federal Trade Commission itself has recently acknowledged that "[w]hile the urgency of the childhood obesity problem is obvious, the solution is less so."[68] Scholarly commentators have expressed views similar to the Commission's assessment. In the words of one scholar, '[t]here is no compelling evidence that restricting the advertising of 'junk food' to children would advance the goal of protecting their health;"[69] to the contrary, "the pervasiveness of the obesity problem in America suggests that more fundamental causes [than advertisements aimed at children] are at work."[70] These more fundamental causes include broader societal conditions that have resulted in reduced physical activity and reduced access by those in certain geographic and economic segments to affordable, high-quality food.

The proposed regulations fail to satisfy the requirement of *Central Hudson*'s third prong for three reasons: (1) Strong evidence exists to support the proposition that reductions in exercise by children bears significant responsibility for the recent increase in childhood obesity; thus, even the total success of the proposed ban on advertising would leave substantial portions of the childhood obesity problem unaffected. (2) Whether or not reduced exercise is the primary cause, no persuasive evidentiary basis exists to support the view that advertising by the food industry aimed at children has contributed significantly to the increase in childhood obesity; thus, suppression of such expression would fail to materially advance the asserted governmental interest. (3) Ready-to-eat cereals represent the largest share of food advertised to children and therefore would be the category of products most affected by the regulations; yet the proposed regulatory restriction on the advertising of these cereals would fail miserably in advancing the interest in reducing childhood obesity, for the simple reason that cereals do

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[66] *See, e.g.,* Edenfield v. Fane, 507 U.S. 761 (1993) (state ban on in-person solicitation by certified public accountants held unconstitutional because accountants "are not trained in the art of persuasion" there was no danger of overbearing or misleading in-person solicitation). *See also* Bad Frog Brewery, Inc., 134 F.3d at 100 ("The truth of these propositions [that the regulation of speech will advance the government's substantial interest] is not so self-evident as to relieve the state of the burden of marshalling some empirical evidence to support its assumptions.").

[67] Todd J. Zywicki, Debra Holt & Maureen K. Ohlhausen, *Obesity and Advertising Policy*, 12 GEO. MASON L. REV. 979, 991–92 (2004).

[68] Statement of the Federal Trade Commission Concerning the Interagency Working Group on Food Marketed to Children Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts, at 1.

[69] J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 GEO. MASON L. REV. 873, 890 (2004).

[70] *Id.* at 891. It should be noted that while on occasion the Supreme Court has been willing to proceed on the assumption that advertising leads to increased sales of a product [see, e.g., Lorillard Tobacco Co. v. Reily, 533 U.S. 525, 557 (2001); Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 189 (1999)], that is a far different causation question from the one facing the government in the present situation. Here, the government's substantial interest is not in reducing sales, but in reducing childhood obesity. Thus, in addition to establishing a connection between advertising and sales, the government is required to establish a connection between advertising and obesity. This the government is completely unable to do.

not contribute to the obesity problem. [71] Indeed, overwhelming evidence establishes that children who eat ready-to-eat cereals more often have far healthier body weights than those who eat cereal less often. [72] Thus, far from materially advancing a government interest, banning the advertising of cereal would work directly *against* the governmental interest in reducing obesity. In and of itself, this fact sounds the death knell for the proposed regulations under *Central Hudson*'s third prong.

a. There is substantial support for the proposition that reduced physical exercise is a significant cause of the recent increase in childhood obesity.

Although no one disputes either the recent increase in childhood obesity or the serious resulting threat to public health and welfare, there remains considerable doubt as to the causes of that increase. One fact, however, appears clear: while the problem has intensified in recent years, there is a "lack of evidence of a general increase in energy intake" over the same period. [73] If there has been no noticeable increase in intake of calories during the time period in which childhood obesity has increased, it is logical to look for other causes. The most likely candidate is reduced physical activity on the part of the nation's youth. The recently issued White House Task Force Report on Childhood Obesity advises that "[u]nfortunately, our young people live in a social and physical environment that makes it easy to be sedentary and inconvenient to be active."[74] While the reasons for this dramatic reduction in physical activity—on the part of children as well as adults—are not entirely clear, it does appear that long-run technological changes have led to an increase in the relative cost of exercise. [75] According to the recently issued White House Task Force Report, today "fewer than one in five high school students meet the current recommendations of 60 minutes of daily physical activity, and a recent study showed that adolescents now spend more than seven hours per day watching television, DVDs, movies or using a computer or mobile device like a cell phone or MP3 player."[76]

Reduced physical activity is today a serious problem among the nation's children. According to the United States Department of Health and Human Services, "[o]nly about one half of U.S. young people (ages 12-21 years) regularly engage in vigorous physical activity. Daily participation in high school

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[71] Similarly, yogurt is one of the products advertised relatively frequently to children, and nearly all such advertising would be banned by the proposed regulations. Yet there is no evidence whatsoever that yogurt contributes to obesity. To the contrary, yogurt is a nutrient dense food that provides important nutrients (protein, calcium, magnesium, vitamin A, and vitamin D) that children need for normal growth and development. Fewer than half of the children ages 2-12 get the calcium they need each day. However, kids who eat yogurt are twice as likely to meet the calcium intake recommendation as kids who do not eat yogurt. *See* National Center for Health Statistics (NCHS). National Health and Nutrition Examination Survey Data ("NHANES") 1999-2002: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention.

[72] *See* discussion *infra* at notes 81-91 and accompanying text.

[73] Luik, supra note 51, at 53 (quoting R. Troiano, Energy and Fat Intakes of Children and Adolescents in the United States: Data from the National Health and Nutrition, Examination Surveys, AM. J. CLINICAL NUTRITION 72: 1343S-53 (2000)). *See also* Zywicki, et al., *supra* note 67, at 982 ("While it is clear that the rise of obesity is the result of ca change in net calorie balance, it is not clear to what extent increased consumption and decreased energy expenditure have respectively contributed to the change.").

[73] *White House Report*, *supra* note 5, at 66.

[74] *Id.* at 66.

[75] Tomas J. Philipson & Richard A. Posner, *The Longer-Run Growth in Obesity as a Function of Technological Change* 7-10 (Natl. Bureau of Econ. Research, Working Paper No. W7423; 1999); available at http://ssrn.com (abstract-227586).

[76] *White House Report*, *supra* note 5, at 66 (footnote omitted).

physical education classes dropped from 42% in 1991 to 29 percent in 1999."[77] The problem of insufficient physical activity on the part of children would remain a serious cause of childhood obesity, even if the proposed regulations of television advertising were to have full effect. The problem would continue to exist despite the regulations' promulgation. Where the problem sought to be remedied would continue to exist to a significant degree even following the regulation of commercial speech, both the Supreme Court and lower courts have regularly invalidated that regulation under *Central Hudson*'s third prong because of its failure to materially advance the substantial governmental interest.[78]

b. Food advertising aimed at children has decreased, while childhood obesity has increased.

While there is good reason to believe that the increasingly sedentary lifestyle of American youth is a primary cause in the recent rise in obesity, there is no reason to believe that advertising plays any role in the matter. Indeed, the notion is belied by the fact that, at the same time that childhood obesity has been on the rise, exposure of children to television advertising for supposedly low nutrition foods has not risen and may well have been on the decline.[79] The government cannot therefore meet its burden of demonstrating that prohibiting such advertising would materially advance its goal of reducing childhood obesity.

c. Because ready-to-eat cereals do not contribute to the childhood obesity problem (and indeed help alleviate the problem), restricting their advertising would not materially advance the goal of reducing the problem.[80]

When the proposed regulations are applied specifically to advertising for ready-to-eat cereals, their relevance to the problem of childhood obesity becomes even more remote. This is for the simple reason that according to indisputable supporting research, *ready-to-eat cereals do not contribute to the childhood obesity problem.* In fact, the exact opposite is true.

Research has demonstrated that ready-to-eat cereals (including those that are presweetened) account for only 5 percent of children's sugar intake (compared to 28 percent from beverages) and only 4 percent of total caloric intake.[81] Indeed, cereal is lowest calorie option among common breakfast choices.[82] And while providing only 4 percent of children's caloric intake, cereal is extraordinarily dense in key nutrients, providing children with 17% to 34% of their intake of Vitamin A, Thiamin, Niacin, Vitamin

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[77] As quoted in Luik, *supra* note 51, at 64.

[78] *See, e.g.,* sources cited *supra* note 65.

[79] According to the Federal Trade Commission, in recent years "food ad exposure has not risen and is likely to have fallen modestly." 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), at ES-5. *See also* id. at ES-7 ("[O]ur data do not support the view that children are seeing more advertising for low nutrition foods."); Zywicki, et al., *supra* note 67, at 995 ("An analysis of Nielsen data fails to find any substantial increase in either expenditures on food advertisements or exposure to food advertising over the last ten years.").

[80] The discussion in this section relates to how the regulations, as applied to cereal, are clearly counterproductive and unconstitutional. The focus here on cereal is not intended to diminish the point that the regulations are similarly unconstitutional when applied to other products as well, but cereal presents an excellent example for purposes of discussion.

[81] *Cereal and Obesity,* at 7, 11 (prepared by General Mills, June 9, 2010).

[82] *Id.* at 11, citing U.S. Department of Agriculture, Agricultural Research Service. 2009. USDA National Nutrient Database for Standard Reference, Release 22.

B6, Folate, Iron, and Zinc.[83] Researchers have found that "[c]hildren who consume cereal, relative to eating other breakfast foods, evidence lower body mass index,"[84] and that "a pattern of regular cereal consumption through adolescence is associate with significantly lower percent body fat, lower total cholesterol, less television viewing, and higher rates of physical activity."[85] In addition, because cereal is nearly always consumed with milk, cereal is also responsible for 39% of the milk in children's diets.[86] It is therefore not surprising that researchers at the Children's Nutrition Research Center, Department of Pediatrics at Baylor College of Medicine have concluded that "[n]utrition/health professionals should encourage the consumption of a healthy breakfast (e.g., one that includes a ready-to-eat cereal), especially among young adults."[87]

It should be clear, then, that the notion that suppressing consumption of cereal through an advertising ban would somehow advance any legitimate public health interest is simply wrong. In fact, according to Dr. Ronald Kleinman, Chief of the Pediatric Gastroenterology and Nutrition Unit at Massachusetts General Hospital and Professor of Pediatrics at Harvard Medical School, "[r]esearch confirms an association between ready-to-eat cereal for breakfast and less overweight and obesity; also with better nutrient intake. This is true, whether or not the cereal is presweetened."[88] Indeed, studies have universally concluded that children who eat cereals (including pre-sweetened cereals) more frequently have lower body weights than those who do not – and by very wide margins.[89] This result obtains for any age range. To pick one example, children age 7-9 who eat cereal 8 or more times per 14 days are over three times less likely to be overweight than those who eat cereal 0-3 times per 14 days.[90] A recent study looked solely at children eating sweetened cereal and found the same results.[91]

Despite these indisputable facts, children's advertising for essentially all breakfast cereals would be prohibited by the proposed regulations. As applied to these cereals, then, the proposed regulations fail *Central Hudson*'s third prong even more strikingly than do the regulations as a whole.

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[83] *Id.* at 13, citing Centers for Disease Control and Prevention (CDC). National Center for Health Statistics (NCHS). National Health and Nutrition Examination Survey Data. Hyattsville, MD: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention ("NHANES 2005-2006").

[84] Albertson, Thompson, Franko, Holschuh, Bauserman & Barton, *Prospective Associations among Cereal Intake in Childhood and Adiposity, Lipid Levels, and Physical Activity during Late Adolescence,* Journal of the American Dietetic Ass'n (2009), at 1775.

[85] *Id.* at 1779.

[86] *Cereal and Obesity,* at 14, citing NHANES 2005-2006. *See also* Albertson, Thompson, Franko, Kleinman, Barton & Crockett, *Consumption of breakfast Cereal is Associated with positive health outcomes: evidence from the National Heart, Lung, and Blood Institute Growth and Health Study,* 28 Nutrition Research 744 (2008) (same).

[87] Deshmukh-Taskar, Radcliffe, Liu & Nicklas, *Do Breakfast Skipping and Breakfast Type Affect Energy Intake, Nutrient Intake, Nutrient Adequacy, and Diet Quality in Young Adults? NHANES 1999-2002,* 29 Journal of the American College of Nutrition 407, 416 (2010).

[88] As quoted in *Cereal and Obesity, supra* note 81, at 9.

[89] Albertson, et al., *Ready-to-Eat Cereal Consumption: Its Relationship with BMI and Nutrient Intake of Children aged 4 to 12 years.* J Am Diet Assoc 2003; 103:1613-1619.

[90] *Id.*

[91] Albertson, Thompson and Franko, *The Relationship between Ready-to-Eat Cereal Consumption Categorized by Sugar Content and Body Measures in American Children: Results from NHANES 2001-06.* Abstract #550.22. *The FASEB Journal.* 2009.

3. Even assuming, solely for purposes of argument, that the proposed regulations materially advance the government's substantial interest in reducing childhood obesity, they are far more extensive than necessary to serve that interest.

Even if one were to suspend disbelief and somehow conclude that the proposed regulations of advertising actually would materially advance the governmental interest in reducing childhood obesity, it is nevertheless clear that they contravene *Central Hudson*'s fourth prong, which demands that the regulation of truthful commercial speech be no more extensive than necessary to serve that interest. On a number of occasions, the Supreme Court has invalidated commercial speech regulations either because alternative non-speech means of achieving the government's goal were available or because the regulation swept too far, impinging upon protected speech that failed to give rise to the harm sought to be prevented.[92] In the present instance the proposed regulations fail *Central Hudson*'s fourth prong on both grounds: first, means far less invasive of free expression exist to achieve the goal of reducing childhood obesity; second, the regulations sweep well beyond their limited goal of restricting advertising seen by children and adolescents, substantially disrupting the free speech rights of commercial advertisers to communicate with adults, and adults to receive those communications.

a. Numerous less-invasive means of advancing the goal of reducing childhood obesity are available.

In its recently issued report, the White House Task Force on Childhood Obesity described a wide variety of potential means to battle the problem of childhood obesity other than the restriction of advertising. These included (1) increased provision of health care services,[93] (2) improvement in nutritional value of school meals,[94] as well as of other foods offered in school and in afterschool programs,[95] (3) improvement in the provision of access to quality foods or eradication of "food desserts,"[96] (4) altering existing governmental food subsidy policies,[97] and (5) increasing physical activity in schools while simultaneously encouraging a general increase in childhood physical activity.[98] In addition, as the Supreme Court has recognized in other contexts,[99] the availability of educational

[92] *See, e.g.,* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996) (invalidating prohibition on price advertising of liquor because "[i]t is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance....); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 565 (2001) (state's restrictions of outdoor advertising of tobacco violate fourth prong of *Central Hudson*); Fla. Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995) (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993)) ("[T]he existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.'").
[93] *White House Report*, *supra* note 5 at 33-34.
[94] *Id.* at 37-46.
[95] *Id.* at 46-48.
[96] *Id.* at 49-50.
[97] *Id.* at 58-59.
[98] *Id.* at 65-73 ("Schools are a key setting to focus on, given the significant portion of time children spend there. Schools can undertake a combination of strategies and approaches to help children be more active....").
[99] *See, e.g.,* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001); 44 Liquormart v. Rhode Island, 517 U.S. 484, 530 (1996).

campaigns to inform the public of the dangers of childhood obesity and the means to fight the problem renders the direct suppression of commercial speech unconstitutional.[100]

There has been absolutely no showing that the government has seriously attempted any, much less all, of these alternative measures prior to its effort to suppress television advertising. Although it is true that, in order to satisfy *Central Hudson*'s fourth prong, the regulation of speech need not be shown to be the absolute least restrictive alternative, it does require the government to first make meaningful attempts to deal with the problem using methods that do not threaten free expression. Yet to this point, the government has failed to demonstrate that it has made sufficient efforts to implement any of these recently recommended alternatives. Thus, a reviewing court would necessarily find the proposed regulations unconstitutional, in accord with the Supreme Court's explicit holding that government may not suppress commercial expression when narrower restrictions "would serve its interest as well."[101]

b. The proposed regulations unduly impact the First Amendment right of commercial advertisers to communicate with adults.

Let us assume, solely for purposes of argument, that the government has satisfactorily established that (1) restricting advertising aimed at children would materially advance the government's interest in reducing childhood obesity, and (2) the beneficial impact of these restrictions could not be achieved by alternative means less invasive of free speech rights.[102] Even under these dubious assumptions, the constitutionally fatal flaw in the proposed regulations is that, in addition to affecting communication seen by young children, they intentionally sweep within their reach substantial amounts of commercial communication seen by adults or minors who are of sufficient age to make independent choices.

On numerous occasions—involving both commercial speech and so-called "indecent" speech—the Supreme Court has unambiguously held that regulations of expression designed to protect children may not simultaneously disrupt communication between speakers and adult listeners or viewers.[103] Yet the proposed regulations here suffer from the very same constitutional defect. While they purport to restrict only advertising aimed at children, they nevertheless extend their reach to advertising on shows where up to 80% or more of the audience is made up of adults, as described earlier.[104] In addition, the proposed regulations restrict numerous forms of advertising and marketing in a variety of other contexts,

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[100] *See also White House Report*, *supra* note 5, at 68 ("Most physical activity for students can be provided through a comprehensive school-based physical activity program.... complemented by activities before, during, and after school, as well as in recess, other physical activity breaks, intramural and physical activity clubs, interscholastic sports, and walk and bike to school initiatives.").

[101] *Central Hudson*, 447 U.S. at 565.

[102] As prior discussion has clearly demonstrated, however, these assumptions would be wholly inaccurate, both as to the regulations on their face and even more starkly when applied to ready-to-eat cereals. *See* discussion *supra* at Section III C (2) (c).

[103] *See, e.g.* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 653–64 (2001) (state law designed to protect minors from tobacco advertising held unconstitutional because it interfered with communication between tobacco seller and adult purchasers); Reno v. ACLU, 521 U.S. 844, 875 (1997) (prohibition on indecent communications on the Internet held unconstitutional); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) (prohibition of commercial mailings concerning use of prophylactics to prevent venereal disease held unconstitutional, despite possibility that minors might view the advertisements); Butler v. Michigan, 352 U.S. 380, 383 (1957) (government cannot constitutionally "reduce the adult population . . . to reading only what is fit for children."); *see generally* Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing,* 1997 SUP. CT. REV. 141.

[104] *See* text at nn. 15-16, *supra.*

negatively impacting adults' access to the communication. For example, the definitions of the types of activities that supposedly constitute "marketing to children" (and that therefore would be constrained by the regulations) include the use of the word "child" on a food package to indicate that the product is "intended for children."[105] The fact that a product may be intended *for* children does not mean that it is being marketed *to* children. For example, many products are marketed to parents as products "your child will love." But the proposed regulations would include within its prohibitions this sort of marketing to parents, even though the speech in this case is directed exclusively to adults.

Clearly, the government may not bootstrap its assumed justification for restricting communication to children into a near-pervasive restriction on communication seen by substantial numbers of adults.[106] Moreover, to the extent that the regulations are grounded in a concern that children who view the advertisements will lack sufficient cognitive development to comprehend the differences between an advertisements and normal programming,[107] the fact that in many instances they prohibit commercial communication to minors up to the age of 17 clearly demonstrates the extent to which the regulations reach far beyond their purportedly legitimate purpose. It is therefore indisputable that even if the proposed regulations survive scrutiny under other aspects of commercial speech protection, they fail the fourth prong of the *Central Hudson* test.

CONCLUSION

Years of Supreme Court doctrine have established that the First Amendment's protection of commercial speech bars governmental restrictions of expression that either fail to advance a substantial interest directly and materially, or interfere with protected expression more than necessary to achieve that interest. Moreover, many Justices have gone further and concluded categorically that government may not constitutionally employ suppressive measures to manipulate consumers' behavior by preventing them from receiving truthful information and advocacy promoting sale of lawful products and services. The proposed regulations designed to suppress certain advertising for so-called low nutrition foods—particularly when applied to ready-to-eat cereals, which give rise to none of the dangers sought to be avoided—unambiguously violate all of these constitutional directives; the proposed regulations therefore violate the First Amendment right of free expression, without doubt or question. The First Amendment protection of commercial speech clearly dictates that government must pursue options for dealing with the problem of childhood obesity that do not trample on rights guaranteed by the Constitution in a futile effort to find a seductive quick fix for an extremely complex problem.

That the regulations are labeled "voluntary" in no way camouflages their inherently coercive nature. The force of powerful governmental agencies stands behind them, fortified by the explicit threat

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[105] *See Order to File Special Report.* These definitions include, among many other problematic definitions, the one quoted. *See id.* at B-6.

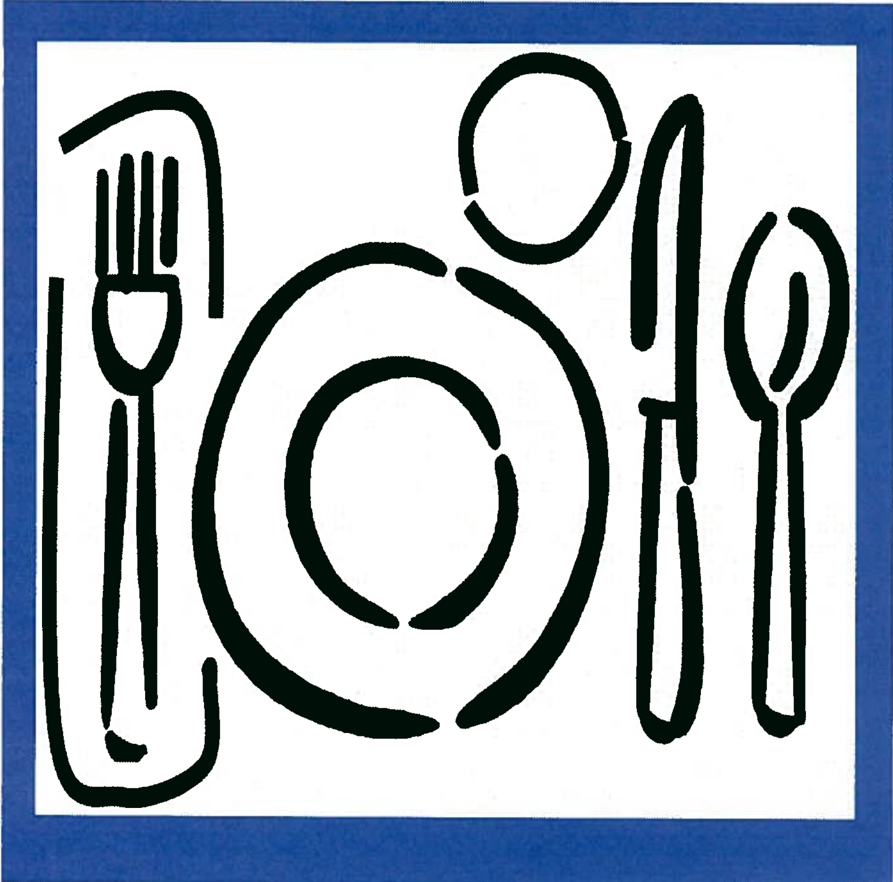
[106] It should be noted that the government may not constitutionally justify its suppression of speech as a time-place-manner regulation, for two reasons. First, the regulation by its nature is content-based, and therefore disqualified as a time-place-manner regulation. Second, even if one were (incorrectly) to view the suppression purely as a time-place-manner regulation, where the asserted justification for that regulation is inapplicable to 80% of those participating in the expressive activity the regulation cannot be constitutionally justified.

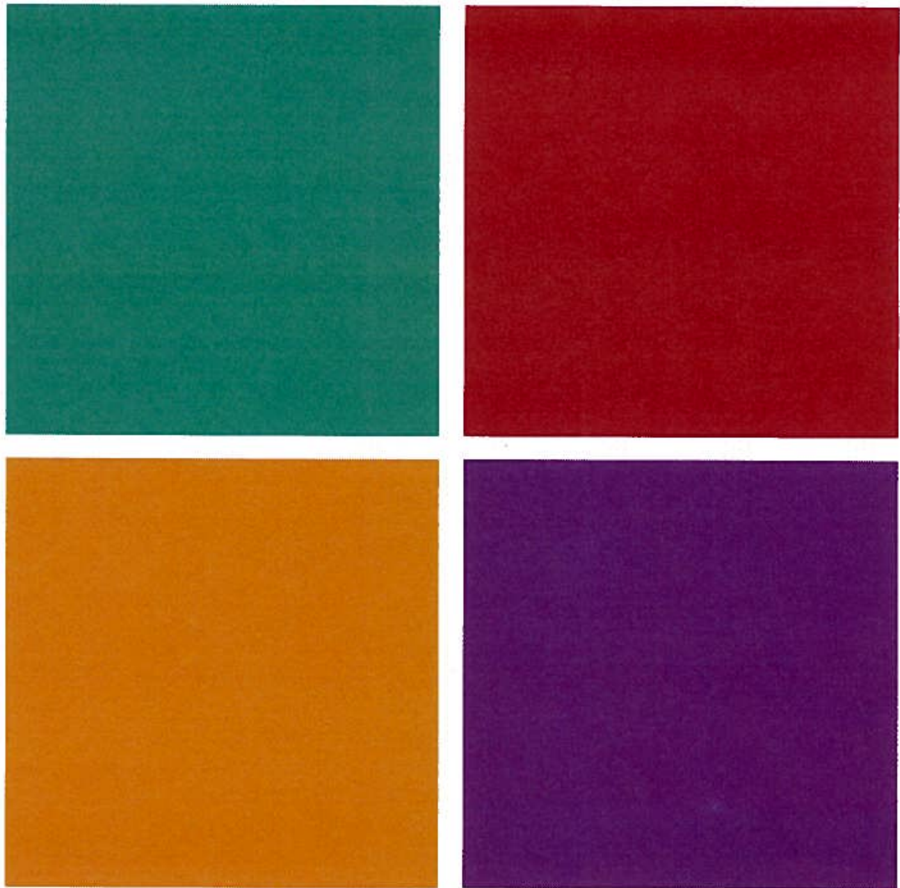
[107] *But see* discussion *supra* at Section III B.

of mandatory regulations should voluntary compliance measures prove unsuccessful. Government may not achieve through indirection what it is not constitutionally authorized to impose directly.

For all of the compelling reasons described throughout this paper, the federal agencies contemplating promulgation of these regulations should avoid the inevitable judicial finding of unconstitutionality by deciding not to promulgate the proposed regulations in the first place.

EXHIBIT 2

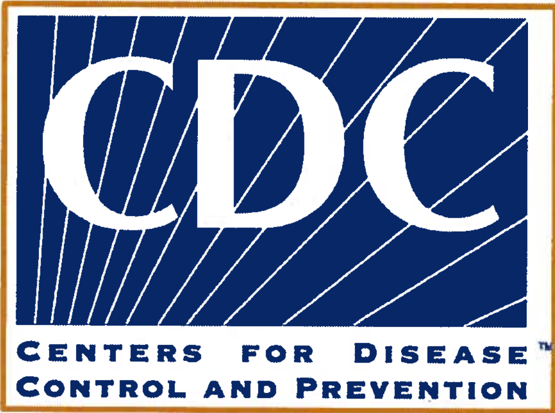




Beth Johnson, MS, RD

Food Directions LLC

+ IWG Food Marketing Restrictions

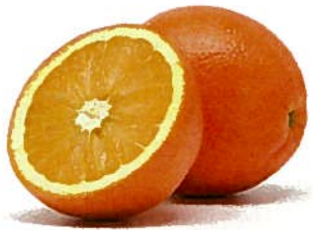


IWG Food Marketing Restrictions

- **Nutrient Limits**
  - Saturated Fat: 1 gram or less
  - Trans Fat: 0 grams
  - Added Sugar: No more than 13 grams
  - Sodium: No more than 210 milligrams
- **Meaningful Contribution**
  - Fruits and Vegetables
  - Whole Grains
  - Fat Free or Low-Fat Milk
  - Fish, Extra-Lean Meat and Poultry
  - Eggs
  - Nuts, Seeds, and Beans

IWG Food Marketing Restrictions

IWG Food Marketing Restrictions



IWG Standards vs. Other Standards

	Proposed Rule for School Lunches	Healthier US Schools	2010 Dietary Guidelines	FDA Definition of Healthy	WIC
Trans Fat	✓	✗	✗	✗	✗
Saturated Fat	✗	✗	✗	✓	✗
Sugar	✗	✗	✗	✗	✗
Sodium	✗	✗	✗	✗	✗

+

IWG Standards v. Dietary Guidelines for Americans

- "Foods containing . . . added sugars are no more likely to contribute to weight gain than any other source of calories in an eating pattern that is within calorie limits."

- "[T]he body's response to sugars does not depend on whether they are naturally present in foods or added to foods."

Source: USDA/HHS, Dietary Guidelines 2010 P 28, USDA/HHS, Dietary Guidelines 2010 P 27.

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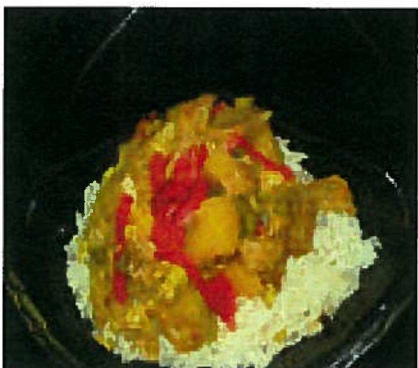
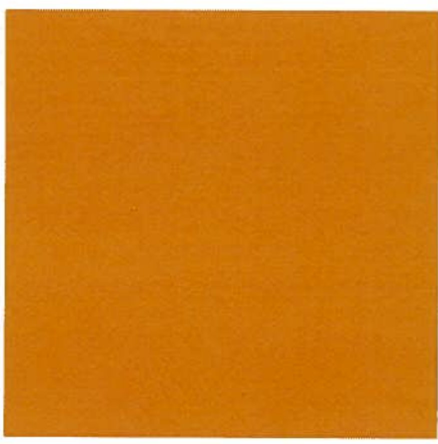
IWG Standards vs. Healthy Definitions & WIC

	Proposed Rule for School Lunches	Healthier US Schools	2010 Dietary Guidelines	FDA Definition of Healthy	WIC
Trans Fat	✓	✗	✗	✗	✗
Saturated Fat	✗	✗	✗	✓	✗
Sugar	✗	✗	✗	✗	✗
Sodium	✗	✗	✗	✗	✗

USDA Recipes for Healthy Kids





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IWG Ignores Calories

"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.'"

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

IWG Ignores Calories

" Both sides of energy balance—intake and expenditure—are important for obesity control. Macronutrient composition (i.e., percentage of fat, carbohydrate, and protein) is less important than calorie reduction for weight control."

Source: NIH, *Strategic Plan for NIH Obesity Research: A report of the NIH Obesity Task Force, P 23, 2011*

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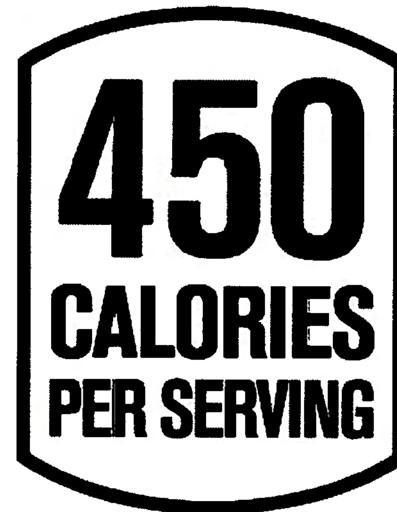
IWG Ignores Nutrients to Encourage

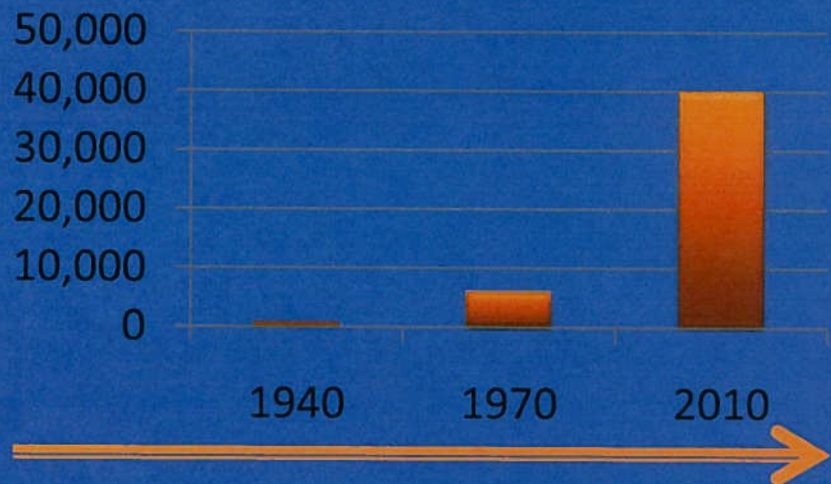
- Calcium
- Potassium
- Fiber
- Magnesium
- Vitamins A
- Vitamin C
- Vitamin E

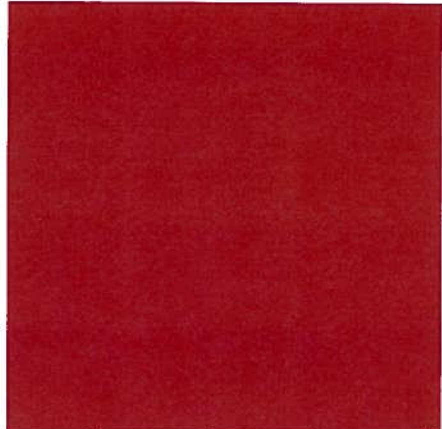
+

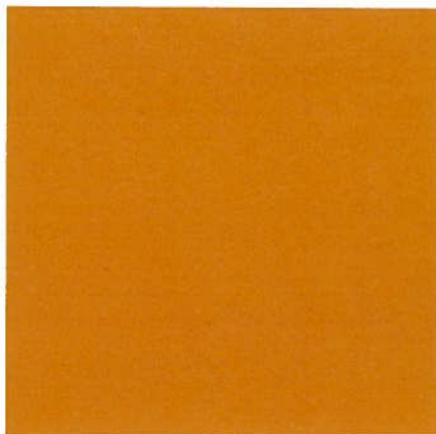
IWG Overlooks Industry Progress

- New Recipes
- Calorie Commitment
- *Front of Package* Labels









Convenience & Choice

Food & Beverage Ads Viewed per Average Child
Age 2-11 - Children's TV

3,000
2,500
2,000
1,500
1,000
500
-

2004
2010

Source: Nielsen Media Research, Monitor-Plus. The Monitor-Plus data contained herein are the property of The Nielsen Company, © 2011 The Nielsen Company. Unauthorized use of this copyrighted material is expressly prohibited.

Includes GES estimates for cable TV networks not in the database in 2004.

Percentage Change in Children's TV Ad Views per Average Child (2-11) for Cookies, Snacks, Candy & Gum, 2004 - 2010

Percent Change 2004 - 2010

0%
-20%
-40%
-60%
-80%
-100%
-120%

Cookies
Snacks
Snack Bars
Candy
Gum and Mints

Source: Nielsen Media Research, Monitor-Plus. The Monitor-Plus data contained herein are the property of The Nielsen Company, © 2011 The Nielsen Company. Unauthorized use of this copyrighted material is expressly prohibited.

Percentage Change in Children's TV Ad Views per Average Child (2-
for Beverages, 2004 - 2010

250%
200%
150%
100%
50%
0%
-50%
-100%
-150%

Percent Change 2004 - 2010

Soft Drinks
Dietary Soft Drinks
Fruit and Other Drinks and Mixes
Fruit and Vegetable Juices

Source: Nielsen Media Research, Monitor-Plus. The Monitor-Plus data contained herein are the property of The
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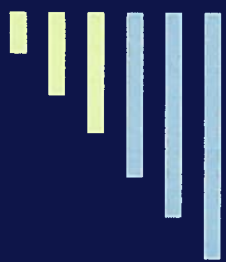
Summary

- The IWG standards challenge nutrition science;
- The IWG standards contradict other federal nutrition standards; and
- IWG standards ignore progress of the industry.

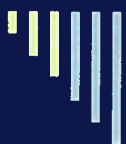
EXHIBIT 3



The Impact of the Interagency Working Group's Proposed Restrictions on Advertising

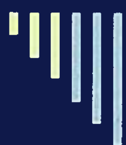
J. Howard Beales III
Professor, Strategic Management and Public Policy
George Washington School of Business

June, 2011



Background

- Professor of Strategic Management and Public Policy at George Washington School of Business, since 1988
- Director, Bureau of Consumer Protection, Federal Trade Commission, 2001-2004
- Member of Institute of Medicine Committee on Food Marketing and the Diets of Children and Youth, 2005
- Staff Economist on the FTC's original Children's Advertising Rulemaking



The IOM Conclusions

Short term food consumption:

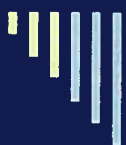
- "Strong evidence" of advertising effects for children 2-11; "insufficient" evidence for 12-18

Usual Dietary Intake

- Moderate evidence for kids 2-5; weak evidence for 6-11; weak evidence does *not* influence 12-18

Television viewing is associated with adiposity.

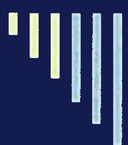
"The current evidence is not sufficient to arrive at any finding about a causal relationship from television advertising to adiposity."



Subsequent Studies Do Not Establish a Causal Relationship

Studies that just measure television viewing need to control for alternative hypotheses about what causes the relationship.

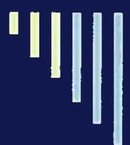
Studies that use more direct measures of advertising need to control for the advertiser's decision about where to advertise.



Chou et al., Fast Food Restaurant Advertising on Television

Their measure of the probability of seeing an ad really measures television viewing, not advertising.

When advertising and television are allowed to have different effects, television viewing is associated with obesity, but advertising is not.



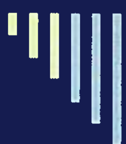
Advertising Restrictions Are Likely to Have Adverse Effects

On Prices

On new products

On incremental product improvements

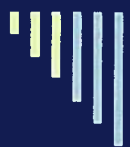
On differences between demographic groups



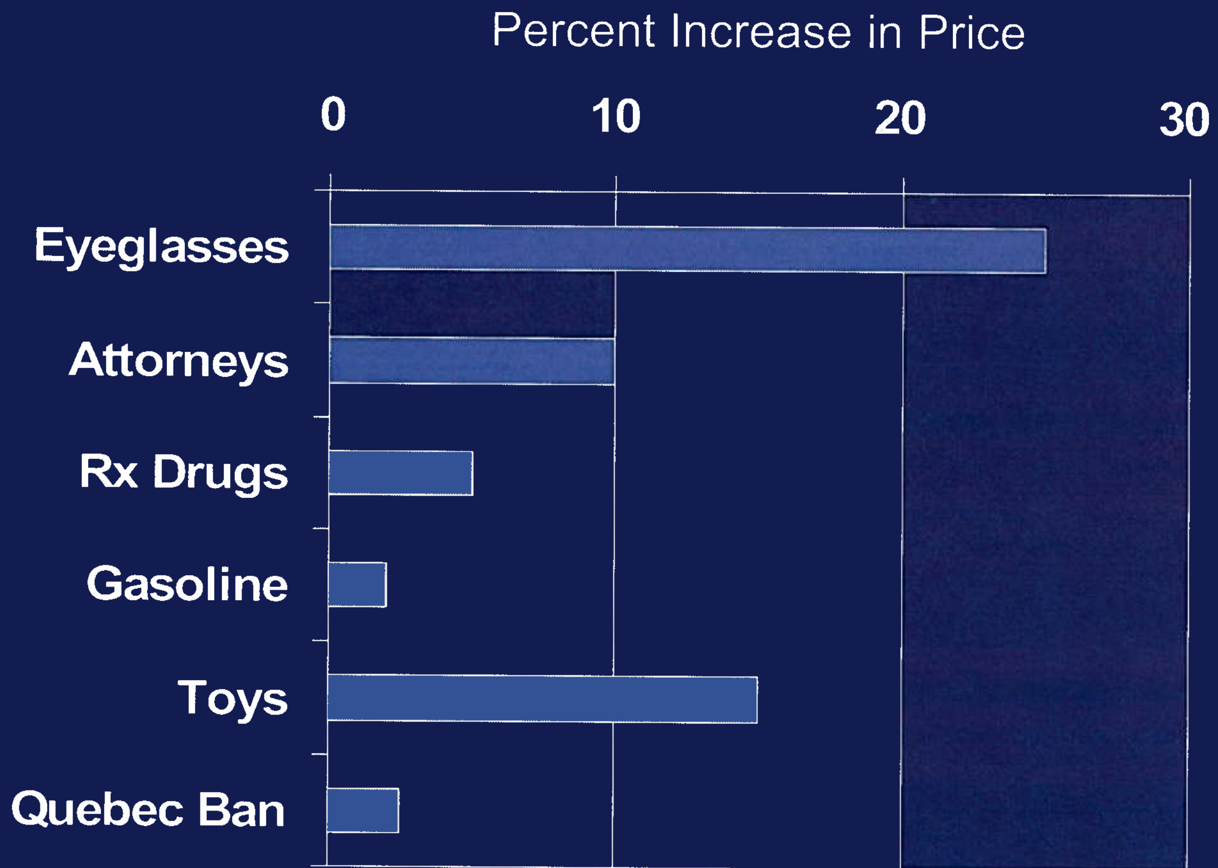
The Quebec Ban on Advertising to Children Increased Prices

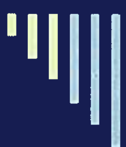
- "…prices of children's cereals are higher than in the rest of Canada," about 2.5 percent higher.
- "… average prices … are higher in Quebec for 13 of the 17 brands."
- "…in the adult/family cereal market, which is unaffected by the advertising legislation, prices in Quebec are not higher."

C. Robert Clark, Advertising Competition and Competition in the Children's Breakfast Cereal Industry," 50 Journal of Law and Economics 757 (2007).



Price Increases From Advertising Restrictions





Advertising Bans Entrench Established Brands

"… the market shares of nonestablished brands are 38 percent lower in Quebec than in the rest of the country."

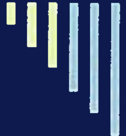
"…the market shares of established and nonestablished adult/family brands do not appear to be significantly different in Quebec…"

Without Tony, Sugar Frosted Flakes are even *more* likely to remain a Tiger.

C. Robert Clark, Advertising Competition and Competition in the Children's Breakfast Cereal Industry," 50 Journal of Law and Economics 757 (2007).

Findings: Significant Increase In Market Share-Weighted Fiber Content Of Cereals

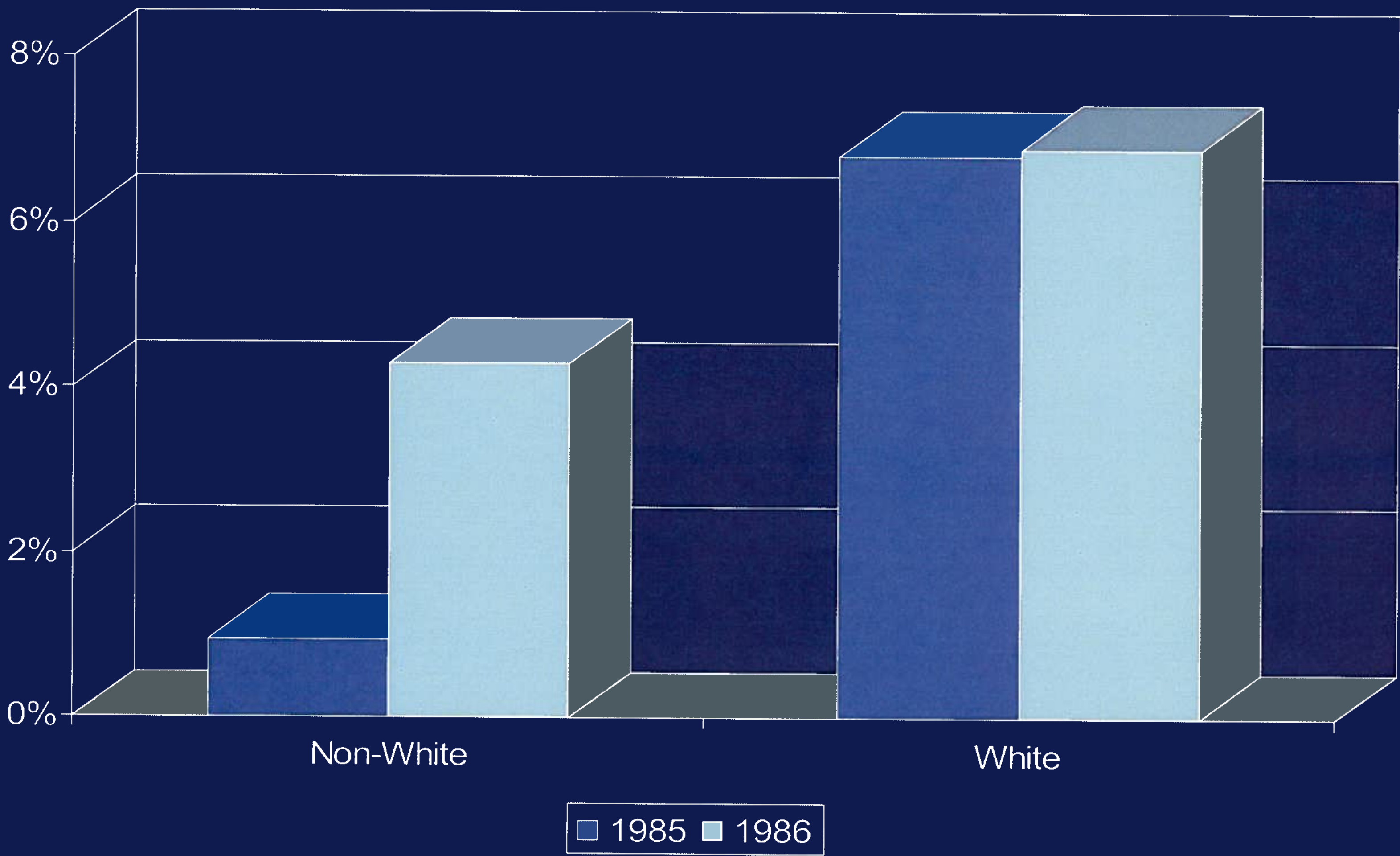
Source: Health Claims in Advertising and Labeling: A Study of the Cereal Market, Bureau of Economics Staff Report, Federal Trade Commission, August 1989, Figure 3-1.



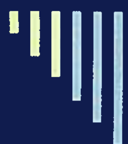
Percent Eating Fiber Cereals: Households With & Without Male Head

Source: Health Claims in Advertising and Labeling: A Study of the Cereal Market, Bureau of Economics Staff Report, Federal Trade Commission, August 1989, Figure 4-2.

Percent Eating Fiber Cereals: By Race



Source: Health Claims in Advertising and Labeling: A Study of the Cereal Market, Bureau of Economics Staff Report, Federal Trade Commission, August 1989, Figure 4-3.



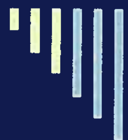
Manipulating Information is a Flawed Regulatory Strategy

- The regulations implementing the Nutrition Labeling and Education Act sought to focus consumers' attention on fat, not calories.
- The theory was that because fat is high in calories, reducing fat would also reduce calories.
- The percentage of magazine food ads discussing total fat doubled between 1990 and 1997, from 18% to 37%.

Percent of Ads with Calorie or Dieting Claims

Calorie/Diet Claims Declined 47 percent, 1991-97

Source: Advertising Nutrition & Health: Evidence from Food Advertising 1977 - 1997, Bureau of Economics Staff Report, Federal Trade Commission, September 2002, Page E6.



“It’s deja vu all over again.”

Yogi Berra

- The problems that doomed the FTC’s failed Children’s Advertising Rulemaking are just as real today.
  - Defining “good” and “bad” foods is exceedingly difficult and will create anomalous results.
  - Defining advertising directed to children remains problematic.
- Parents have far more options to avoid exposure to advertising if they so choose.
- Children’s exposure to food advertising on television is less than it was in 1977.

Remote User

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EXHIBIT 4

An Analysis of the Economic Impact of the Dietary Specifications of the Interagency Working Group on Food Marketed to Children

Michael T. Kerwin

Gregory J. Rohling

GEORGETOWN ECONOMIC SERVICES, LLC

June 2011

Overview

- The Interagency Working Group on Food Marketed to Children (composed of the Federal Trade Commission, the Food & Drug Administration, the U.S. Department of Agriculture, and the Centers for Disease Control) recently proposed a series of nutrition standards for foods marketed to children and teens. Foods not meeting the standards were characterized by the Interagency Working Group ("IWG") as "of little or no nutritional value." The stated purpose of the standards is to discourage the consumption of those foods.

- Georgetown Economic Services ("GES") undertook an analysis to determine the economic impacts if Americans switched to a diet consisting of foods meeting the IWG's standards (the "IWG Diet").

- GES also examined the economic costs associated with additional food preparation time under with the IWG Diet, which is significantly more weighted toward unprepared foods than the current American diet.

- Finally, because the mix of foods permissible under the IWG Diet is much more heavily weighted toward fresh fruits and vegetables (which are disproportionately sourced from outside the United States) and away from grain-based foods (which are almost exclusively sourced from domestic sources) than the current diet, GES calculated the impact on American agriculture of varying degrees of adoption of the IWG Diet.

Summary

- GES's analysis indicates adoption of the IWG Diet would conservatively result in a 60.3% increase in the cost of a 2000 calorie daily diet.
- On a per capita basis, the average American consuming the IWG Diet would spend an additional $1,632 per year on food. For the American population as a whole, the increased cost of feeding the population, including both food for at-home consumption and food service consumption, is estimated to range from $101 billion (at a 20% adoption rate of the IWG Diet) to $503 billion (at a 100% adoption rate) per year.
- Using a conservative estimate of increased food preparation time of 20 minutes per day for the average American adult age 18 or older, the IWG Diet would require between 5.7 billion hours (20% adoption rate) and 28.4 billion hours (100% adoption rate) of in-home food preparation time at an estimated cost to the American economy of between $129 and $643 billion per year
- Summing the increased costs related to dietary shifts and increased preparation time, the total economic cost of a 100% shift to the IWG Diet is estimated at $1.15 trillion per year for American consumers. If the IWG Diet were adopted by 50% of American consumers, the total annual cost would stand at $573 billion, and at a 20% adoption rate, total costs would reach $229 billion.
- If fully adopted, the IWG Diet would result in a 71.8% reduction in the value of consumption of grain-based foods (versus today's diet), a 1,009% increase in fruit consumption, and a 226% increase in vegetable consumption. Even under a 20% adoption rate, current fruit and vegetable expenditures would more than double while those for cereal and bakery products would fall 14%.
- A full shift to the IWG Diet would result in $30.3 billion in reduced demand for American grain, and the need for the American economy to expend an additional $489 billion on imported fruits and vegetables.

Cost to Consumers of the IWG Diet

- GES determined the potential economic impact of the IWG's standards on American consumers by comparing the cost of the 100 most frequently consumed foods and beverages in the American diet today (the "Top 100 Foods") versus the cost of a diet composed of the most frequently consumed foods that would meet the IWG's proposed guidelines (the "IWG Diet"). Alcoholic beverages were excluded from the analysis.

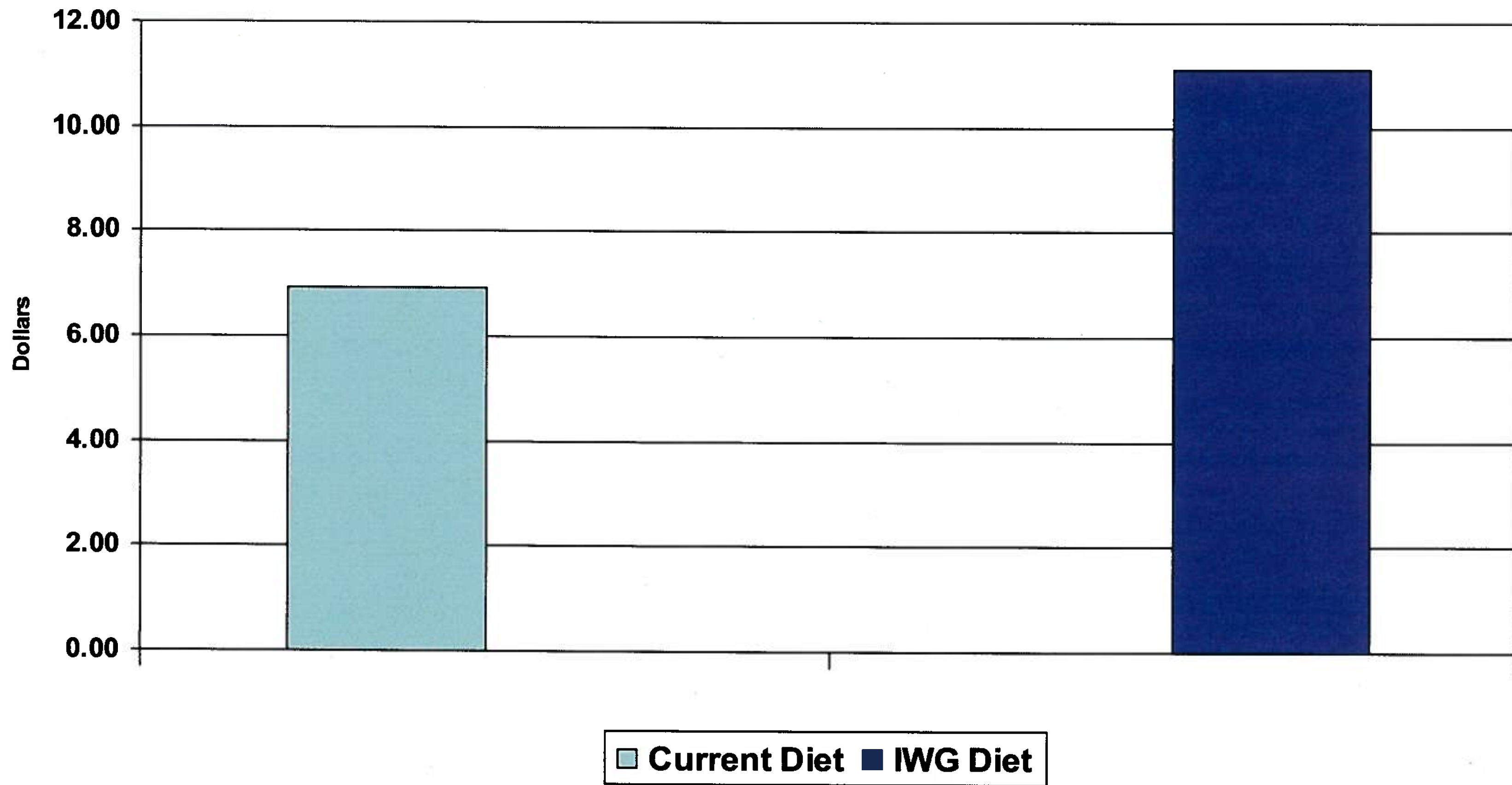
- The list of the Top 100 Foods was obtained from an independent market research firm, the NPD Group, Inc. (an alphabetized list of the Top 100 Foods and detailed information regarding the content of the NPD rankings and the processes used to analyze the NPD data are summarized in the methodological notes at the end of this report).

- Only 12 of the NPD Top 100 Foods met the nutritional standards set by the IWG. In order to achieve a reasonably balanced diet, the IWG Diet was defined to include additional foods from the NPD Top 150 list as well as qualifying variations of products under the NPD Top 100 (see methodological notes).

- Once the content of the Top 100 Diet and IWG Diet were established, GES applied NPD's proprietary "eating occasion" data to apply a weighting to each food to correspond with its relative prevalence in the diet. GES also determined current market pricing for each food item and applied the appropriate serving sizes, weights and calories to calculate the cost that each food item contributes to the two diets on a cost-per-calorie basis.

- Finally, GES reviewed the collective cost of the food items to determine the average cost-per-calorie for the Current Diet and the IWG Diet ($.00346, and $.00555, respectively) which amounts to $6.92 versus $11.10 for a daily diet of 2000 calories. The shift to the IWG diet, therefore, would result in a 60.3% increase in consumer food costs, as summarized in the following chart. These cost estimations are actually conservative because they do not account for the likely price increases that would be associated with increased demand for fresh fruits and vegetables under the IWG Diet.

Cost of 2000 Calories



Increased U.S. Food Expenditures Under the IWG Diet

- GES then used the 60.3 percent increase in daily consumer food costs under the IWG Diet to estimate the economy-wide costs of adoption of the diet. GES employed data from the Bureau of Economic Analysis of the U.S. Department of Commerce ("BEA") on annual consumer expenditures on food purchased for in-home consumption and food purchased outside the home via food services.

- Because the BEA data for food service expenditures reflected the full cost of those purchases, GES endeavored to estimate the food cost element of the total expenditures on food services. GES used information from the food service industry on average restaurant food costs as a percentage of total sales (31.5%) and applied that figure to the BEA total expenditure figure for food services,

- As shown in the following table, if the IWG Diet were to be adopted by 100% of the U.S. population, the 60.3 percent increase in individual food costs would result in an estimated economy-wide increase in expenditures on food for consumption at home of $412 billion and in food for consumption away from home of $91 billion, for a total increase in U.S. food expenditures of $503 billion.

- Assuming lesser degrees of adoption of the IWG diet, the total food expenditure costs associated with a 20% adoption rate would be $101 billion, while those at a 50% rate of adoption would reach $252 billion (see slide 10).

Estimated Impact of IWG Diet on Total U.S. Consumer Expenditures on Food and Nonalcholic Beverages 100% Adoption

(in millions of dollars)

	2010 Actual	% Change	Post-IWG Diet	$ Change from Current Diet
Food and non-alcoholic beverages purchased for off-premises consumption (total)	683,072	60.3%	1,094,964	411,892
Food services				
Purchased meals and nonalcoholic beverages	463,019			
Food furnished to employees (including military)	15,140			
Total food service food and nonalcoholic beverages	478,159			
Estimated cost of food and nonalcoholic bevs. as % of purchase price	31.5%			
Estimated expenditures on food service food and nonalcoholic beverages	150,620	60.3%	241,444	90,824
Total food and nonalcoholic beverages expenditures	833,692	60.3%	1,336,408	502,716

Source: 2010 Data, Table 2.4.5U. Personal Consumption Expenditures by Type of Product, U.S. Bureau of Economic Analysis and GES estimation of cost impact of IWG diet. Estimated cost of food and nonalcoholic beverages as % of food service purchase price average of range (28-35%) reported in Restaurant Report (www.restaurantreport.com/features/ft_inventory.html).

The Cost of Additional Consumer Preparation Time Under the IWG Diet

- The IWG Diet encourages increased consumption of unprocessed, raw foods, and discourages consumption of commercially processed foods. Because commercially processed foods allow consumers to reduce preparation time for meals while raw foods require additional at-home preparation, any move away from commercially processed foods will result in an economic cost to American consumers.

- GES endeavored to estimate the economic cost associated with a dietary shift toward unprocessed foods. Given the relatively high incidence of raw foods in the IWG Diet and the absence of prepared foods, it was estimated that adoption of the diet would result in an additional 20 minutes of preparation time per day per consumer over 18 years of age (estimated as 234 million citizens in 2010, based on the data of the U.S. Bureau of the Census).

- The average hourly wage rate for the U.S. economy as a whole for 2010 ($22.61/hour, as provided by the U.S. Bureau of Labor Statistics) was used to value the additional food preparation time required by the IWG Diet. If the IWG Diet were to be adopted by 100% of the American public, it is broadly estimated that consumers would devote an additional 28.4 billion hours to food preparation at a total economic cost of $643 billion annually.

- At lesser degrees of adoption of the IWG diet, additional food preparation costs to consumers would range from $129 billion (20% adoption rate) to $322 billion (50% adoption rate), as summarized in the following table.

Total Cost of the Shift to the IWG Diet at Various Levels of Adoption

in billions of dollars

	20%	50%	100%
Added Cost of Food	100.6	251.5	503.0
Added Cost of Preparation Time	128.6	321.5	643.0
Total Added Cost	229.2	573.0	1,146.0

Impact of the IWG Diet on U.S. Agriculture

- GES took the analysis of the increased costs of the IWG Diet using the BEA data a step further in order to estimate the impact on U.S. agriculture. This analysis compared the food-group composition of the current American diet to the food-group composition as projected under the IWG Diet.

- BEA data on expenditures on food for home consumption were used to gauge the percentage of the American diet currently devoted to each major food group (the BEA data on food service expenditures are not similarly broken out by food group, so they could not be included in the analysis). GES then reviewed its analysis of the weighted IWG Diet to determine the percentage of each major food group's representation in the IWG Diet.

- GES determined the total cost of the IWG Diet by multiplying the current BEA expenditure data by the calculated percentage increase in daily food costs (60.3%). Applying the percentage figures derived under the GES analysis of the costs by food group under the IWG diet, changes in consumption in terms of percentages and dollar values devoted to food groups were calculated.

Impact of the IWG Diet on U.S. Agriculture

- As summarized in the following table, 100% adoption of the IWG diet would have a dramatic effect on the types of foods consumed and the consumer dollars spent on food groups.

- Most notably, the IWG diet would increase the percentage of total food expenditures devoted to fruits from 5.2% to 35.8%, while expenditures on vegetables would jump from 8.6% to 17.4%.

- Conversely, expenditures on grain-based cereal and bakery products would drop from the current level of 17.6% of food expenditures to just 3.1%.

- On a dollar basis, spending on fruit would increase ten-fold while expenditures on vegetables would more than triple. Dollar expenditures on grain-based cereal and bakery products would fall by $86 billion, or 71.8%.

- Under a 20% adoption rate for the IWG Diet, fruit and vegetable expenditures would increase by $98 billion, while those for cereals and bakery products would decline by $17 billion.

- A 50% adoption rate would result in an increase of $244 billion spent on fruits and vegetables and a contraction in spending on cereals and bakery products of $43 billion.

Estimated Impact of IWG Diet on U.S. Consumer Expenditures by Food Product Category
100% Adoption
(in millions of dollars)

	2010 Actual	% of Total	Post-IWG Diet	% of Total	$ Change from Current Diet	% Change
Food and non-alcoholic beverages purchased for off-premises consumption (total)	683,072		1,094,964		411,892	60.3%
Cereals and bakery products	120,381	17.6%	33,944	3.1%	-86,437	-71.8%
Meats and poultry	136,225	19.9%	39,419	3.6%	-96,806	-71.1%
Fish and seafood	13,531	2.0%	90,882	8.3%	77,351	571.7%
Milk, dairy products, and eggs	61,534	9.0%	89,787	8.2%	28,253	45.9%
Fats and oils	14,913	2.2%	-	0.0%	-14,913	-100.0%
Fruit (fresh)	27,036					
Fruit (processed) (e)	8,310					
Total Fruit	35,346	5.2%	391,997	35.8%	356,651	1009.0%
Vegetables (fresh)	44,691					
Vegetables (processed) (e)	13,736					
Total Vegetables	58,427	8.6%	190,524	17.4%	132,097	226.1%
Sugar and sweets	42,265	6.2%	-	0.0%	-42,265	-100.0%
Food products, not elsewhere classified	117,933	17.3%	-	0.0%	-117,933	-100.0%
Nonalcoholic Beverages	82,516	12.1%	259,507	23.7%	176,991	214.5%

Food consists of food purchased for off-premises consumption; food services, which include purchased meals, are not classified as food by BEA. Post-IWG Diet food and non-alcoholic beverages total figure is equal to 2010 figure with 60.3% increase in expenditures, as calculated in Top 100 vs. IWG Diet cost comparison.

Source: 2010 Data, Table 2.4.5U. Personal Consumption Expenditures by Type of Product, Bureau of Economic Analysis (BEA) US Department of Commerce. Processed fruits and vegetables allocated to fruit and vegetables categories based on total expenditure ratios of fresh fruit (37.7%) and fresh vegetables (62.3%) to all fresh fruits and vegetables.

Impact of the IWG Diet on U.S. Agriculture

- GES then endeavored to determine the impact of the shift in consumer food expenditures under the IWG Diet on U.S. agriculture, specifically to estimate the costs and benefits to growers of grain and fruits and vegetables.
- Assuming that the decline in consumer expenditures on cereal and bakery products under the IWG Diet (71.8%) would proportionately affect demand for grain, GES calculated the decline in the value in U.S. grain for domestic food use.
- GES used data from the U.S. Department of Agriculture ("USDA") on the value of grain production and uses of that output. Based on these data, GES derived an estimate of the value of U.S. grain for food use by grain type. The 71.8% decline was then applied to derive the value of grain for domestic food use if the IWG Diet were to be adopted by the U.S. population.
- Based on this methodology, the total impact of the IWG Diet on the value of grain production was derived. As shown in the following table, at a 100% rate of adoption, the IWG Diet would result in a $30.3 billion decline in the value of grain produced for food consumption by U.S. growers.
  - At an adoption rate of 20% for the IWG Diet, the value of grain for food use would fall by $6.1 billion, while under a 50% adoption rate, such decline would total $15.2 billion.
- These estimates are conservative in that they do not account for the price declines that would likely be associated with a major contraction in U.S. grain consumption.

Estimated Value of US Grain Production for Domestic Food Use, 2010 and Post-IWG Diet 100% Adoption

(in thousands of dollars)

	Total 2010 Value	% Domestic Food Use	Estimated Value Dom. Food Use	Estimated Decline Post IWG Diet	Estimated Value Post IWG Diet
Barley	691,131	88.9%	614,339	-441,113	173,225
Corn for grain	66,650,160	51.4%	34,270,188	-24,607,004	9,663,184
Oats	213,570	93.8%	200,387	-143,884	56,503
Rice	3,074,990	53.3%	1,639,320	-1,177,080	462,240
Rye	39,036	71.9%	28,052	-20,142	7,910
Wheat, all	12,992,156	42.1%	5,472,240	-3,929,229	1,543,010
Total	83,661,043		42,224,524	-30,318,452	11,906,072

Source: USDA Crop Values, 2010 Summary (Feb. 2011). Percentage reduction in value of grain for domestic food use (71.8%) derived from table "Estimated Impact of IWG Diet on U.S. Consumer Expenditures by Food Product Category" (All Cereals and Bakery Products).

Impact of the IWG Diet on U.S. Agriculture

- GES finally considered whether the losses to U.S. grain growers under the IWG Diet would be compensated by commensurate growth in demand for fresh fruits and vegetables grown in the United States.

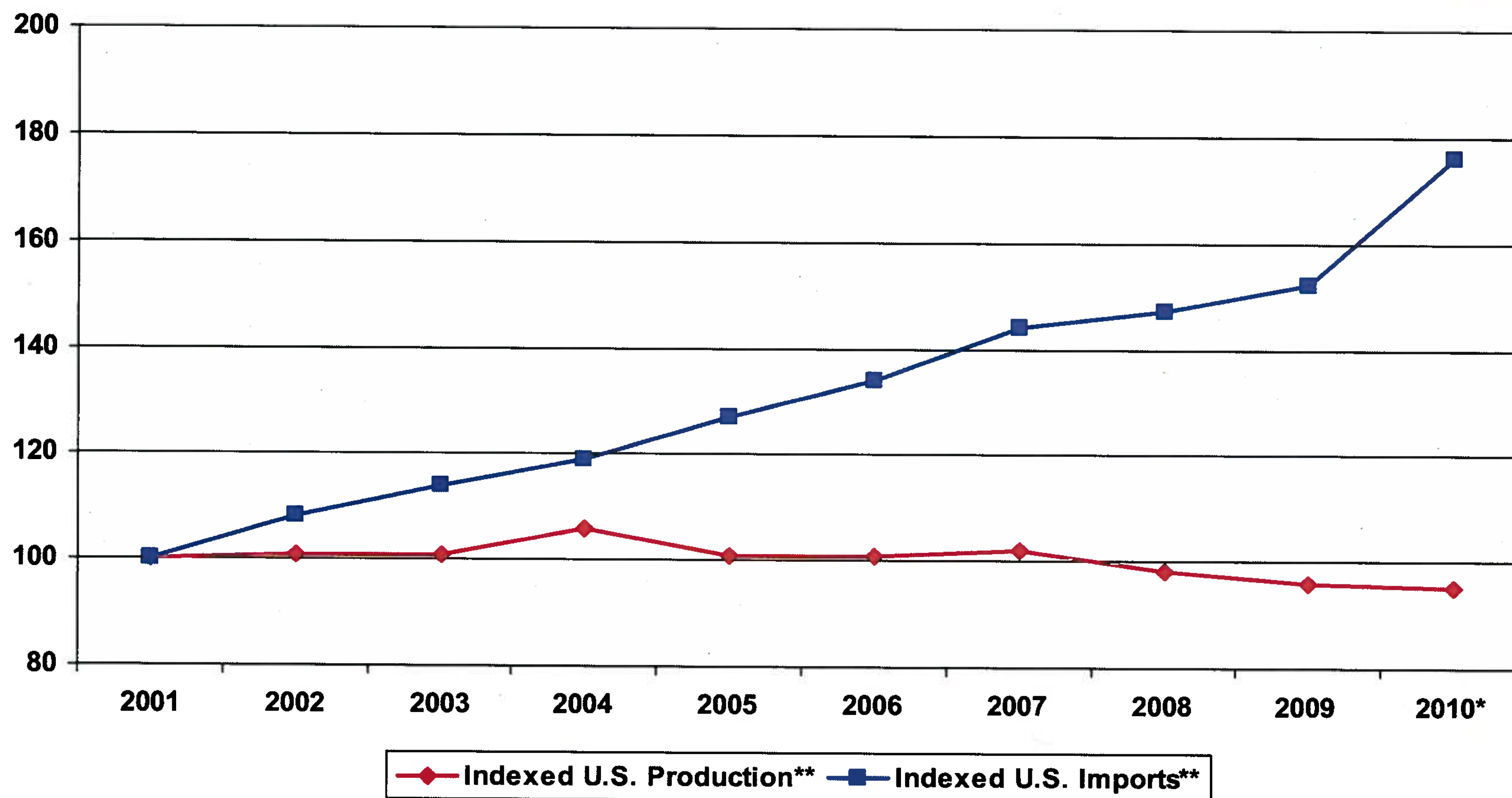
- Review of USDA data on U.S. production, consumption, and imports of fresh fruits and vegetables indicates that U.S. growers would not be able to meet increased demand for fruits and vegetables under the IWG Diet. As shown in the following graphs, since 2001, U.S. output of fresh fruits and vegetables has declined, while imports have increased significantly.

- Based on these trends, it is clear that growth in U.S. consumption of fresh fruits and vegetables in recent years has not been served by U.S. growers of these products, but by foreign growers whose products must be imported into the United States.

- Given these facts, most of the increased demand for fruits and vegetables under the IWG Diet would likely be sourced from outside the United States. As a result, consumption changes under the IWG Diet would likely add to the U.S. trade deficit.

- In contrast to the market for fresh fruits and vegetables, the U.S. market for grain has been and remains predominantly domestically sourced (see slide 18). Unless farmers found new markets, the decline in grain consumption that would result from adoption of the IWG Diet would be a direct loss to the U.S. economy.

Indexed Volume of U.S. Fresh Market Vegetable Production and Imports

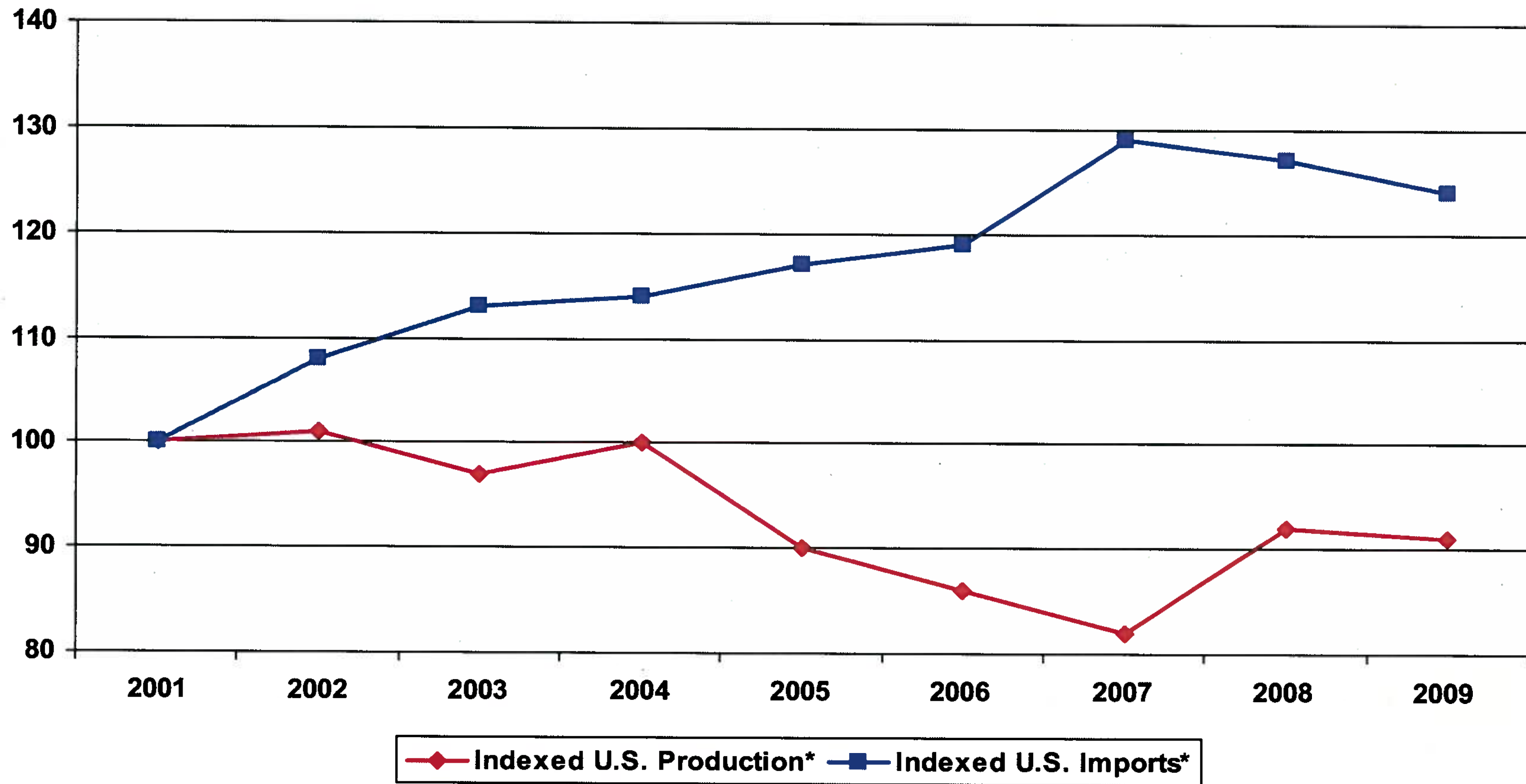


*- preliminary data

**- base year is 2001

Source: USDA Vegetable and Melon Outlook

Indexed Volume of U.S. Production of Fruit and Fresh Market Imports



*- base year is 2001

Source: USDA Fruit and Nut Outlook

Import Market Share of Total US Domestic Grain Use

(in millions of bushels and 1000's of metric tons except as noted)

	Barley	MT Equiv.	Corn	MT Equiv.	Oats	MT Equiv.	Rice*	MT Equiv.	Wheat	MT Equiv.	Total Grain, MT
Production	180	3,919	12,447	316,166	81	1,176	243	11,027	2,208	60,093	334,496
Imports	10	218	25	635	83	1,205	18	816	100	2,722	2,974
Exports	8	174	1,900	48,262	3	44	114	5,171	1,295	35,245	54,946
Change in Stocks	(22)	(479)	(978)	(24,842)	(14)	(203)	20	907	(167)	(4,545)	(24,784)
Total Domestic Use	204	4,441	11,550	293,382	175	2,540	127	5,765	1,180	32,115	307,308
Import Market Share	4.9%	4.9%	0.2%	0.2%	47.4%	47.4%	14.2%	14.2%	8.5%	8.5%	**1.0%**

* Rice volume in millions of hundredweight. Data for rye not available.

Source: Data and metric ton conversion factors, USDA World Agricultural Supply and Demand Estimates (June 9, 2011).

Methodological Notes

A public summary of the NPD Top 100 Foods list follows these notes. Because the specific rankings and the numerical prevalence weightings of the individual food items in the list of Top 100 Foods are the proprietary information of the NPD Group, an alphabetized list of these products is employed.

The original data source for this information is The NPD Group, Inc. National Eating Trends® (NET®) in-home food consumption for the two years ending February 2011. NET® classifies all base dish foods and beverages into 88 standard categories; e.g. Vegetables, Fruits, Sandwiches, etc. (Base dish is defined as the final dish consumed). For this study, because there are differences between foods within given categories within the 88 standard categories, further sub-classifications of foods were required (e.g., ham sandwich vs. peanut butter & jelly sandwich; carrots vs. corn; etc.), resulting in over 400 expanded categories.

This list of over 400 commonly consumed foods, as provided by NPD, reflects not only the names of these foods, but their relative prevalence in the American diet, expressed in total share of "eatings." From the final list of over 400 foods, ranked in order of prevalence, the determination was readily made of the top 100 most commonly consumed food types.

The NPD Top 100 Foods listing was used as a proxy for the composition of the current American diet ("Current Diet"). In addition to providing the list of the Top 100 most commonly consumed foods, ranked by prevalence in the diet, NPD was able to provide further detail about the most commonly consumed form of each food (with respect to those foods that may take a variety of forms). For instance, the NPD data establishes that most corn is from canned corn (vs. frozen or fresh) whereas most apples are fresh. This additional data allowed for the most commonly consumed form of a given food type to be examined against the IWG requirements. From the general food type listed in the NPD rankings (Column A), the most commonly consumed specific food product was chosen for analysis (Column B) to determine whether it met the IWG's nutrition standards (note that the specific foods within Column B, often brand-name foods, were chosen as popular foods that well represent the most common form within the given food type as determined from NPD data, but the specific branded foods and products were not listed in the NPD data). This analysis compared readily available information on the nutrition and composition of these food items to the 2021 IWG standards. The results of this analysis are shown in Column C, with a "yes" signifying that the food listed meets the IWG standards and a "no" indicating that the food fails the IWG standards. For those foods that fail the standards, the grounds for the failure are provided in Column D, although the reasons shown are not necessarily exhaustive.

GES endeavored to compare the retail cost of the Current Diet to a diet of foods that meet the IWG standards (the "IWG Diet"). Because only 12 of the NPD Top 100 Foods met the nutritional standards set by the IWG, however, in order to achieve a reasonably balanced diet, the IWG Diet was defined to include additional items, including less-popular forms of certain foods in the Top 100 (e.g., fat-free milk, rather than 2% milk, the most popular form of milk consumed) and other foods from NPD's expanded top 150 foods list to ensure that the IWG Diet would include items from all major food groups. Also included in the diet were any other IWG-compliant items within the top 150 list. As a result, the following items were added to the 12 items originally meeting the IWG criteria: boiled eggs, boneless skinless chicken breast, brown rice, cantaloupe, fat free milk, fresh green beans, fresh corn, frosted shredded wheat cereal, frozen green peas, pears, salmon, squash, sweet potatoes, tomatoes, and watermelon (resulting in a total of 27 items in the IWG Diet)

Attachment 1: NPD Top 100 Table

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet 2021 target criteria***
Alcoholic Beverages	Beer (regular)	No	<50% of a food group
All Family Cereal	Honey Nut Cheerios	No	sodium, added sugar
AO Italian Dishes – Pasta, Macaroni, Noodles, Parmesan etc (Ex Can/Frz)	Lasagna	No	sat fat, sodium
Baby Food	*Too varied to assess*	N/A	N/A
Bacon	Bacon (pork, cooked)	No	sat fat, sodium
Bagels	Bagel, plain	No	sodium
Baked Beans & Pork n Beans	Baked beans, canned, with pork and sweet sauce	No	sodium
Beef Burger	Beef buger, hamburger (95% lean, 1 patty cooked) + bun	No	sat fat
Biscuits	Biscuits (plain/buttermilk, commercially prep)	No	sat fat, sodium
Bottled Water Non-Carb	Bottled water	No	<50% of a food group
Bran+Natural Cereal	Kellogg's Raisin Bran	No	sodium
Bread: All Other Flavors	Bread (rye)	No	sodium
Bread: Pan Tostado revise	Bread (wheat, toasted)	No	sodium
Brkfst/Gran/Fruit/Cereal Bars	Strawberry Nutrigrain Bar	No	<50% of a food group
Buns/Rolls	Hamburger bun, plain	No	sodium

Attachment 1: NPD Top 100 Table

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet 2021 target criteria***
Cakes	White cake (prepared from recipe without frosting-9" diameter)	No	sat fat, sodium, added sugar
Cheese (Ex Crm Cheese)	Kraft American cheese	No	sat fat, sodium
Chicken Breast:Bone-In (Default)	Chicken breast, bone in & skin on	No	sat fat, sodium (added in prep)
Chicken:Nuggets/Stick/Fingers	Chicken nugget, frozen-cooked (Schwan's Chicken Pattie Nuggets)	No	sat fat, sodium
Chips	Lay's Original Potato Chips	No	sat fat, sodium
Chocolate Candy Bars	Hershey's chocolate bar	No	sat fat, added sugar
Chocolate Covered Candy	M&M's (chocolate)	No	sat fat, added sugar
Coffee	Coffee, Black	No	<50% of a food group
Commercial Frozen Novelties	Nestle Drumstick	No	sat fat
Cookies (Ex Rte Treat Bars)	Nabisco Oreo	No	sat fat, sodium, added sugar
Diet/Low-Cal Carbonated Soft Drink)	Diet Coke (12 oz can)	No	<50% of a food group
Donuts	Donuts (yeast-leavened, glazed)	No	sat fat, sodium
Eggs:Fried	Egg, fried w/ added fat	No	sat fat/trans (added in prep)
Eggs:Scrambled	Eggs, scrambled (made w/ added fat & salt)	No	sat fat, sodium (added in prep)
Flavored Rice	Rice-a-Roni, Herb & Butter	No	sat fat, trans, sodium

Attachment 1: NPD Top 100 Table

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet 2021 target criteria***
Frozen Dinners/ Entrees	Stouffer's Mac n Cheese (frozen meal)	No	sat fat, sodium
Fruit Drinks/Ades/Lemonade	Fruitade/fruit drink - orange bkfst drink, RTD	No	added sugar
Fruit Juice	100% Apple Juice	Yes	MEETS
Fruit: Total Apples (fresh is most common)	Apple, raw w/ skin	Yes	MEETS
Fruit: Total Applesauce (canned is most common)	Applesauce (sweetened)	Yes	MEETS
Fruit: Total Bananas (fresh is most common)	Banana, medium raw	Yes	MEETS
Fruit: Total Grapes (fresh is most common)	Grapes, Red or Green, raw	Yes	MEETS
Fruit: Total Oranges (fresh is most common)	Orange, raw navel	Yes	MEETS
Fruit: Total Peaches (fresh is most common)	Peach, raw	Yes	MEETS
Fruit: Total Strawberries (fresh is most common)	Strawberries, raw	Yes	MEETS
Garlic Bread	Frozen, ready-to-heat garlic bread (Schwan's garlic Texas Toast)	No	sat fat, sodium

Attachment 1: NPD Top 100 Table

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet 2021 target criteria***
Ground Beef/Hamburger Dish	Hamburger Helper (Cheeseburger Mac)	No	sat fat, trans, sodium
Ham/Ham Lunchmeat	Ham/Ham lunchmeat (sliced, regular ~11% fat)	No	sat fat, sodium
Homemade/Mix Variety:AO Appl	Microwaveable Casserole (Italian Pasta & Beef Bake: pasta, ground beef, tomato sauce, mushrooms, cheese)	No	sat fat, sodium
Hot Cereal	Quaker Raisin Spice instant oatmeal, prepared with water	No	sodium, added sugar
Hot Dog Sandwich	Hot dog (beef, pork) + bun	No	sat fat, sodium
Hot Dogs Not In Bun	Hot dog (beef, pork)	No	sat fat, sodium
Hot Tea	Brewed tea, prepared with water	No	<50% of a food group
Ice Cream	Breyer's All Natural (vanilla)	No	sat fat, added sugar
Iced Tea	Lipton Brisk iced tea, with lemon flavor	No	added sugar
Leaf Salad	Iceberg lettuce (chopped) w/ salad dressing (Light Ranch)	No	sodium (from dressing)

Attachment 1: NPD Top 100 Table

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet 2021 target criteria***
Mac/Pasta/Noodles(Plain)	Spaghetti noodles, plain (boiled in salted water)	No	sodium (added in prep)
Macaroni & Cheese (Ex Frz)	Kraft Original Macaroni & Cheese (prepared)	No	sat fat, sodium
Meat/Fish/Poultry/Egg Salad	Egg salad: home prepared with eggs, mayonnaise, onions, peppers, celery, salt	No	sodium
Mixed/Combination Vegetables (frozen is most common)	Mixed frozen vegetables (peas/corn/carrots/lima, boiled, drained, no additives)	Yes	MEETS
Nuts/Seeds	Mixed nuts/seeds (dry roasted, salted)	No	sodium
Other Legumes (canned is most common)	Beans, canned (Ortega Black Beans)	No	sodium
Pancakes	Pancake (plain, frozen, ready-to-heat)	No	sodium
Pies	Apple pie, commercially prepared	No	sat fat, trans, sodium, added sugar
Pizza: Restaurant	Pizza (cheese, reg crust)	No	sat fat, sodium
Pizza:Pepperoni (No Sausage)	Pizza (pepperoni, reg crust)	No	sat fat, sodium

Attachment 1: NPD Top 100 Table

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet 2021 target criteria***
Plain/Fluid Milk (Ex Alternatives)	2% Milk	No	sat fat
Popcorn	Orville Reddenbacher Butter Popcorn, microwave	No	sat fat, sodium
Pork Cut:Chops	Pork, center loin (chops), bone-in, cooked, pan-fried	No	sat fat
Potatoes:AO/Unidentified Types	Potato salad, home prepared	No	sat fat, sodium
Potatoes:Baked	Baked potato, flesh w/ skin, margarine added	No	sat fat (from margarine)
Potatoes:Fried	French fries, frozen, oven prepared	No	sodium
Potatoes:Mashed/Creamed	Mashed potatoes w/ milk or water, margarine & salt	No	sat fat, sodium (added in prep)
Pre-Sweet Cereal	Lucky Charms	No	sodium, added sugar
Pretzels	Pretzels, salted	No	sodium
Pudding/Custard/Tapioca	RTE Jell-O Pudding Snacks, Chocolate	No	sodium
Regular Carbonated Soft Drink	Coke (12oz can)	No	added sugar

Attachment 1: NPD Top 100 Table

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet 2021 target criteria***
Rice:Reg/White	Short grain white rice, made per instructions w/ salt	No	sodium (added in prep)
Saltines	Saltines, regular	No	sodium
Sandwich:Chicken	Chicken patty (frozen, cooked) + bun	No	sat fat, sodium
Sandwich:Chs/Crm Chs	Cheese (2 slices American) + wheat bread (2 slices)	No	sat fat, sodium
Sandwich:Ham	Ham & Cheese Sandwich (Fast Food)	No	sat fat, sodium
Sandwich:Pntbtr/PJ	2T PB + 1T jam + 2 slices bread (wheat)	No	sat fat, sodium, added sugar
Sandwich:Tuna/Salad	Tuna salad + wheat bread (2 slices)	No	sat fat, sodium
Sandwich:Turkey	Natural Choice Deli-Style Turkey (3 slices) + wheat bread (2 slices)	No	sodium
Sausage	Sausage (pork, cooked)	No	sat fat, sodium
Sandwich W/Proc Meat:Bologna	Oscar Mayer bologna: chicken/pork/beef (2 slices) + wheat bread (2 slices)	No	sat fat, sodium

Attachment 1: NPD Top 100 Table

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet 2021 target criteria***
Spaghetti/Angel Hr (Ex Can/Frz)	Spaghetti noodles (boiled in salted water) + pasta sauce (RTS)	No	sodium
Steak	Beef, short loin, top loin, steak, all grades, cooked, broiled	No	sat fat
Sweet Muffins	Muffins (blueberry, commercially prep)	No	sat fat, sodium, added sugar
Sweet Rolls/Danish/Coffee Cake	Sweet rolls/danish/coffee (danish pastry, fruit)	No	sat fat, sodium, added sugar
Tacos/Burritos	Beef taco, prepared from kit (2 shells, 1 tbsp taco sauce, 2 tsp seasoning mix)	No	sat fat, sodium
Toaster Pastries	Kellogg's Strawberry Poptart, unfrosted	No	sat fat, sodium, added sugar
Total Broccoli (fresh is most common)	Broccoli (cooked, boiled, drained, no additives)	Yes	MEETS
Total Carrots (fresh is most common)	Baby carrots (raw)	Yes	MEETS
Total Corn (canned is most common)	Green Giant Whole Kernel Sweet Corn, canned	No	sodium
Total Green Beans (canned is most common)	Green Giant Cut Green Beans, canned	No	sodium
Total Peas (canned is most common)	Green Giant Young Tender Sweet Peas, canned	No	sodium

Attachment 1: NPD Top 100 Table

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet 2021 target criteria***
Total Wheat Breads	Bread (wheat)	No	sodium
Unspecified Type Of Bread	English muffin, plain	No	sodium
Waffles	Waffle (homestyle, frozen, ready-to-heat)	No	sat fat, sodium
White/Butter(Milk) Bread	Bread (white)	No	sodium
Yogurt: All Other/Not Rprtd Yogurt	Dannon Activia, strawberry	No	added sugar
Yogurt: Non-Fat Yogurt	Yoplait Light, strawberry	Yes	MEETS
Yogurt: Reduced/Low Fat Yogurt	Original Lowfat Yoplait, strawberry	No	added sugar

Attachment 1: NPD Top 100 Table Footnotes

*Source: The NPD Group, Inc. National Eating Trends® (NET®) in-home food consumption for the two years ending February 2011. NET® classifies all base dish foods and beverages into 88 standard categories; e.g. Vegetables, Fruits, Sandwiches, etc. (Base dish is defined as the final dish consumed). For this study, further sub-classifications of foods were required (e.g. Carrots, Corn, Apples, Oranges, etc.), resulting in over 400 expanded categories. For further information, see accompanying Description of Methodology.

Note: Bolded terms indicate that the food product is one of NPD's standard 88 food categories. Remaining items are also based upon NPD data, but required more specific identification to facilitate nutritional and other analysis.

** Column B reflects the precise food (from within each food type) that was used for the IWG compliance analysis. Please note that these specific foods within Column B (often brand-name foods) were chosen as popular foods that well represent the most common form within the given food type (as determined from NPD data), but these specific foods and branded products were not specifically listed in the NPD data.

***Many foods are disqualified under the IWG guidelines for a variety of reasons. This list includes at least one reason that the specified food does not meet the guidelines, but is not exhaustive.

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