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Donald S. Clark, Secretary
Federal Trade Commission
Room H-113 (Annex W)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

The Alliance for American Advertising (the Alliance) appreciates the opportunity to submit these comments in response to the children's food marketing proposal offered by the Interagency Working Group (the Working Group). The Alliance is a nonpartisan coalition of associations and companies from the media, advertising, and food manufacturing industries. Alliance members have undertaken multiple initiatives and committed substantial resources toward efforts to reduce childhood obesity in our nation. This is a goal that Alliance members share with the agencies that comprise the Working Group.

The organizations and the companies in the Alliance have been working for years, often in coordination with federal government agencies, to identify and promote effective strategies to reduce the rate of childhood obesity in America. They are proud of their accomplishments thus far. These include the creation of the Children's Food and Beverage Advertising Initiative (CFBAI), formation of the Healthy Weight Commitment, sponsorship of community wellness programs and the introduction of innovative nutrition and physical education curricula in elementary and middle schools. Recently, the National Association of Broadcasters Education Foundation teamed up with Beyoncé and First Lady Michelle Obama to sponsor a live national broadcast of the "*Let's Move!* Flash Workout" in middle schools across the country.

Nevertheless, Alliance members are very concerned about the proposed principles announced by the Working Group as well as the cavalier admonition to critics of this proposal to "switch to decaf" because the principles are just "voluntary" recommendations.¹

Alliance members have built a much-heralded record of effective self-regulation for more than 35 years, a record that has been applauded by many former chairs of the

¹ David Vladeck, What's on the Table, FTC BCP Business Center Blog (July 1, 2011 9:46 AM), <http://www.business.ftc.gov/blog/2011/07/whats-table>.

Federal Trade Commission. Industry accomplishments include an advertising industry partnership with the Better Business Bureau to create the National Advertising Division (NAD) and the Children's Advertising Review Unit (CARU). The food manufacturing industry further expanded the role of advertising self-regulation in the past four years. Thus far, 17 food companies have pledged support to nutrition-based standards for advertising to children under age 12 that are administered by CFBAI.

These comments will squarely address the substantive concerns about the flawed Working Group proposal and the profound legal and economic impact it would have on affected industries.

1. The scope of the proposal would restrict speech to large audiences of adults.

The Working Group has described its proposal as being designed to shield "children" from advertising of food products it has deemed to be unhealthy. On closer examination, the restrictions on advertising would affect the advertising on more than 1,700 television programs, many of which have far more adult viewers than children or teens under 18.

The Working Group would apply its proposed restrictions to programs whose audiences are comprised of 30 percent of children age 2 through 11, and/or 20 percent of teenagers 12 through 17.² The other 70 or 80 percent of these audiences for many shows is likely to be adults. The June 27, 2011 U.S. Supreme Court decision, Brown v. Entertainment Merchants Ass'n, squarely rejects a government attempt to impose a "free-floating power to restrict the ideas to which children may be exposed."³

The Court offered more lessons in Brown which apply to the Working Group advertising ban. "At the outset, [California] acknowledges that it cannot show a direct causal link between violent video games and harm to minors. . . . [T]he State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies."⁴ The Court rejected California's evidence as "not compelling" and emphasized that the research on which the state relied is based on correlation, not evidence of causation.⁵

The State claimed that the Act was justified to support parental authority.⁶ "By requiring that the purchase of violent video games can be made only by adults," California argued "the Act ensures that parents can decide what games are appropriate."⁷

² Interagency Working Group on Food Marketed to Children Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts and Request for Comments, Fed. Trade Commission, 8 (Apr. 28, 2011),

<http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>.

³ Brown, No. 08-1448, 2011 WL 2518809, at *5 (U.S. June 27, 2011).

⁴ Id. at *7.

⁵ Id. at *8.

⁶ Id. at *9.

⁷ Id.

The Court expressed serious doubts "that punishing third parties for conveying protected speech to children just in case their parents disapprove of that speech is a proper governmental means of aiding parental authority."⁸

Finally, even if you concede the most dubious factual claims by the Working Group concerning the ability of children 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. The Working Group's proposed regulations would restrict advertising when the percentage of teens and children in the audience is estimated at no more than 20 percent or 30 percent.⁹ That means that manufacturers would be prevented from communicating truthful information concerning lawful products to audiences that are made up of as much as 70 percent or 80 percent adults. Moreover, as described earlier, the proposed regulations would prohibit numerous communications even when advertisements are seen largely by adults. 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."¹⁰

2. Nutrition principles are unnecessarily restrictive.

One of the most troubling aspects of the Working Group proposal is the sheer scope of its impact on food products sold throughout the country. The nutrition principles exclude most common and everyday foods from being advertised to anyone under age 18. Only 12 out of the top 100 foods and beverages consumed in this country would make the final cut.¹¹ Banned foods under these guidelines would include:

- Ready-to-eat cereals, including nearly all commonly consumed cereals, even unsweetened cereals like Cheerios, either immediately or after five years;
- Salads in their most common form (leaf salad with low-fat dressing);
- Hot cereal (even plain (non-sweetened) oatmeal, if cooked according to standard package directions, fails the standards);

⁸ Id.

⁹ Interagency Working Group on Food Marketed to Children Preliminary Proposed Nutrition Principles, supra note 2.

¹⁰ 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 Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 131 (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)." Martin H. Redish, *Childhood Obesity, Advertising and the First Amendment* 12 (June 8, 2011).

¹¹ Beth Johnson, Principal and Founder, Food Directions, Address at the U.S. Chamber of Commerce Regulatory Affairs Committee Spring Meeting (June 30, 2011).

- Unflavored, noncarbonated, pure bottled water;
- Corn (canned);
- Green beans (canned);
- Peas (canned);
- Whole wheat bread;
- Reduced fat yogurt;
- Rice.

The 12 commonly consumed foods that satisfy the standards are 100 percent fruit juice, bananas, raw apples, raw carrots, raw oranges, raw grapes, broccoli, nonfat yogurt, raw peaches, applesauce, frozen mixed vegetables, and raw strawberries. We do not dispute the nutritional merit of these. Yet taken on their own, they hardly complete a balanced diet. These foods represent only a small portion of three out of five of the food groups established by the U.S. Dietary Guidelines. The Working Group principles fail to include any grains or meats from the National Eating Trends® top 100 foods. This comparison underscores the severity of these guidelines.

Similarly, the Alliance is concerned by the inconsistency of the proposal with nutrition standards presently used in federal food programs. Many of the 88 foods that could not be advertised actually meet FDA's definition of "healthy," bear FDA-authorized health claims, satisfy USDA's standards for the Women, Infant, and Children (WIC) food assistance program, are encouraged for consumption under the 2010 U.S. Dietary Guidelines, and are purchased with federal funds by countless families through the SNAP (food stamp) program.¹² Is the Working Group prepared to label the foods in those programs as unhealthy? We believe that this disconnect further demonstrates why this proposal must be withdrawn. The Working Group proposal is so drastically inconsistent with U.S. government nutrition policies that it would undermine public confidence in our federal food assistance programs.

3. Proposal does not adhere to congressional or administration requirements.

The congressional directive that provided the basis for the Working Group was limited but quite specific. It is contained not in the bill but in the report accompanying the Omnibus Appropriations Act of 2009. The report clearly states that the Working Group was charged with developing recommendations following the completion of a study:

The Working Group is directed to conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children.¹³

Notwithstanding this guidance, the principles were drafted without presenting Congress or the public with a study that might offer some insight into the inferences and

¹² Id.

¹³ Staff of H. Comm. on Appropriations, 111th Cong., Omnibus Appropriations Act 984 (Comm. Print 2009).

assumptions that led to the Working Group's principles. The lack of a study or any rationale to explain these guidelines raises serious questions about whether they are grounded in any science that would demonstrate that the proposed restrictions on advertising will have any impact on childhood obesity. In fact, a recent assessment of the scholarship has concluded the opposite. The Institute of Medicine in a 2005 report determined that "current evidence is not sufficient to arrive at any finding about a causal relationship from television advertising to adiposity among children and youth."¹⁴ The Working Group not only did not address the conclusion of that prestigious study, it offered no data or findings that would justify a government designed overhaul of the way food products are marketed.

If the Working Group had followed some semblance of process, it could have helped the affected industries and the public better understand the science and the strategy that influenced the four agencies. For example, the Working Group did not submit its proposal to the Office of Management and Budget for review by the Office of Information and Regulatory Affairs. If it had it would have been expected to meet the standards of President Obama's Executive Order, Improving Regulation and Regulatory Review.¹⁵ This order makes clear that when proposing or adopting a regulation, an agency must perform a cost-benefit analysis, find and evaluate "available alternatives to direct regulation," and identify broad goals as opposed to specific behavior that entities must adopt.¹⁶ This Executive Order was updated on July 11, 2011 to include independent agencies.¹⁷

The failure of the Working Group to develop its principles without the benefit of an open process in which complex issues, and their unintended consequences, may be vetted underscores a serious weakness in the final product. Congress has reacted. Two annual appropriations bills have cleared committee and one has passed the House of Representatives. The FY12 Agriculture Appropriations bill, which passed the House on June 16, 2011, includes report language requiring the Working Group to complete a study specifically examining the effect that food marketing to children may have on long-term eating patterns.¹⁸ The FY12 Financial Services Appropriations bill contains similar language. It mandates that any children's food marketing guidelines, released by either the FTC or the Working Group, must be preceded by a study that explains how

¹⁴ Institute of Medicine, Food Marketing to Children and Youth: Threat or Opportunity? 292 (J.M. McGinnis et al. eds., 2005). In a report from the same year on childhood obesity, IOM concluded that "[t]here is presently insufficient causal evidence that links advertising directly with childhood obesity and that would support a ban on all food advertising directed to children." Institute of Medicine, Preventing Childhood Obesity: Health in the Balance 201 (Jeffrey P. Koplan et al. eds., 2004).

¹⁵ Improving Regulation and Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3,821-23 (Jan. 18, 2011).

¹⁶ Id. at 3,821.

¹⁷ Press Release, The White House Office of the Press Secretary, Executive Order -- Regulation and Independent Regulatory Agencies (July 11, 2011) (<http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies>).

¹⁸ Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012 H.R. 2112, 112th Cong. (2011).

advertising restrictions would be effective in reducing obesity.¹⁹ This legislation was approved by the House Committee on Appropriations on June 23, 2011.

4. Voluntary versus mandatory – the Working Group is caught up in myths.

The Working Group, and in particular the FTC, would have the public believe that its proposed principles are merely part of a report to Congress and do not constitute a ban on the marketing of any foods. "The proposal simply recommends that the products companies choose to market *directly* to kids – as opposed to the products marketed to their parents – meet the nutrition principles outlined in the report."²⁰ This statement is simple and straightforward, but it ignores reality. A number of factors would pose high risks to a food manufacturer or a media company that chose to ignore the Working Group principles.

- The four agencies currently possess substantial statutory authority to regulate food products and the manner in which they are marketed.
- Food companies always must be conscious of reputational risk, particularly regarding any disagreement they may have with their federal regulators.
- The pronouncement of standards of any kind, but particularly standards for marketing food products, serves as a benchmark for potential legal challenges by plaintiffs.
- The principles, unless they are withdrawn, invite criticism and public ridicule from advocacy organizations.
- The FTC alone has broad authority to subpoena any records it may require to examine the marketing practices of a national advertiser, and it has issued two such subpoenas to scores of food companies in the past four years.
- The FTC possesses statutory authority to investigate and seek sanctions against any advertising it determines to be unfair or deceptive.
- The decision by a broadcast network or station to carry advertising for a food product subject to an advertising ban, would be subject to review under the Children's Television Act and the broader FCC license requirement to operate in the public interest.

Government agencies have a broad sphere of influence over any company within their jurisdiction. If a company manufactures prescription drugs, it is unlikely to ignore a warning letter from the Food and Drug Administration concerning its advertising, even if the company believes the criticism of its marketing is not supported by the law. In the final analysis, the FDA may approve or disapprove the use of the company's drug

¹⁹ Financial Services and General Government Appropriations Act, 2012 H.R. 2434, 112th Cong. (2011).

²⁰ David Vladeck, supra note 1.

products. USDA develops and implements the U.S. Dietary Guidelines, determines the foods eligible for the WIC program, and may order removal of a food product from a list of foods eligible for sale in the U.S. if there is a question about food safety. Thus, a company subject to such oversight and regulation will feel compelled to comply with an agency directive.

In addition to these considerations, common sense casts doubt on the proposition that four federal agencies would devote the time and expense over 23 months to prepare these advertising regulations only to have the food, advertising and media industries ignore them. It would appear unlikely that these agencies, in the face of industry refusal to follow their guidance, would emulate the reaction of Roseanne Roseannadanna and simply respond, "Nevermind."

Apart from these real world examples of how any company would view a "recommendation" from one, let alone four, federal agencies as an instruction it could not ignore, the U.S. Supreme Court has held that in a similar instance, noncompliance was not an option. In Bantam Books v. Sullivan, the Court ruled that the State of Rhode Island could not unilaterally notify publishers that certain books were obscene for distribution to children under age 18, thereby coercing publishers into removing books from circulation under threat of legal penalty.²¹ The Court decided that mere agency exhortations, unaccompanied by 'formal legal sanctions,' did . . . violate the First Amendment where the targets of the governmental statements inevitably felt compelled to alter their speech activities.²² The Court said that government cannot create a set of principles that place into question an entity's constitutional rights without being subject to judicial review.²³ It concluded those governmental actions would still intimidate entities into action even if any regulations set forth were voluntary in nature, and therefore must be closely examined.²⁴

The ruling in this case clearly applies to the actions of the Working Group and the effects they would have on food companies, advertisers, and broadcasters. These entities undeniably would feel compelled to follow any standards, even those listed as voluntary, which their regulators set forth.

An editorial in the July 7, 2011 edition of The Wall Street Journal best summed up the dilemma for any company subject to the jurisdiction of federal agencies. "Does anyone think a cop's suggestion to 'move along' is merely a suggestion?"²⁵

5. Proposal would not pass a First Amendment analysis.

The Working Group's proposal raises serious concerns as to whether it would impair a company's free exercise of its right to advertise under the First Amendment. The

²¹ Bantam, 372 U.S. 58, 66-67 (1963).

²² Martin H. Redish, supra note 10.

²³ Bantam at 66.

²⁴ Id.

²⁵ Not So Grrreat!, Wall St. J., July 8, 2011 at A14.

Supreme Court very clearly defined its standards for judicial review of restrictions on commercial speech in Central Hudson Gas & Elec. Corp. v. Public Service Commission.²⁶ It found that speech may be regulated if it is false or misleading, if the restriction serves a “substantial” government interest, if it “directly advances the governmental interest asserted,” and if the restriction is not more excessive than what is required to serve that interest.²⁷

The Working Group proposal is in conflict with the third and fourth provisions of Central Hudson. At no point has the Working Group presented evidence that the proposed ban on advertising of food products would directly (not indirectly) advance the government interest in reducing childhood obesity. The 2005 Institute of Medicine report establishes a high bar of proof, and the Working Group did not even attempt to cite evidence that would challenge that report's finding of a lack of causality in its review of a quarter century of research.²⁸

There are numerous factors contributing to childhood obesity in this country. For example, reports by the Administration have highlighted a decrease in physical activity and the subsequent increase in sedentary lifestyles amongst our children.²⁹ The FTC has documented that advertising of foods to kids has fallen in recent years while our country has seen an uptick in childhood obesity.³⁰ These conclusions, complimented by the lack of any independent study conducted by the Working Group, create doubt as to whether the proposed guidelines would directly reduce the rate of childhood obesity in this country.

The fourth requirement of Central Hudson asks whether there are other, less burdensome means available for addressing this public health issue. The White House Task Force on Childhood Obesity identifies a range of policy options for addressing childhood obesity. These include the provision of better health care services, improving school food quality, increasing physical education in schools, and changing federal food subsidy programs.³¹ This range of alternatives suggests that the Working Group's proposal would not meet the Court's standard for restricting commercial speech.

6. Working Group proposal would eliminate at least 74,000 jobs.

If the Working Group guidelines were put into effect in 2011, and the food manufacturing industry was unable to meet the very rigid standards for nutrient content, it

²⁶ Central Hudson, 447 U.S. 557, 566 (1980).

²⁷ Id.

²⁸ Institute of Medicine, supra note 14.

²⁹ Exec. Office of the President, Solving the Problem of Childhood Obesity Within a Generation: White House Task Force on Childhood Obesity Report to the President (May 2010), http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf.

³⁰ Fed. Trade Commission, Bureau of Econ. Staff Rep., Children's Exposure to TV Advertising in 1977 and 2004: Information for the Obesity Debate (2007).

³¹ Exec. Office of the President, supra note 29.

is estimated by IHS Global Insight that food and beverage advertising expenditures would decrease by 20 percent in response to implementation of the guidelines.³²

IHS Global Insight explains that most consumer purchases are based on personal needs, wants, and preferences, but a small percentage of food and beverage sales are driven by advertising.³³ Less advertising will translate into reduced sales and production of the restricted products.³⁴ Less food and beverage production would radiate through the food and beverage manufacturing supply chains.³⁵ Lower consumption would result in lower retail sales of the restricted products.³⁶

The analysis by IHS Global Insight projects that the Working Group principles could reduce current food and beverage advertising expenditures by 20 percent.³⁷ This would result in a decrease in total annual sales of \$28.3 billion and eliminate 74,000 jobs in 2011.³⁸ From 2011 through 2015, the cumulative lost sales would be \$152 billion and the cumulative lost person years of work would total 378,000.³⁹

An issue as complicated and as important as the search to identify the multiple keys to reversing the obesity trends among our nation's youth is certain to produce strongly held views from government agencies, private businesses, and various advocacy groups. For this and many other reasons it is vital that we develop our strategies around precepts that have been tested and that are widely supported.

It is just as important that the energy in the campaign to reduce childhood obesity not be dissipated by quixotic campaigns to attack windmills that have little or no relationship to the ultimate objective. There is much that the federal state and local governments can accomplish working in concert with private businesses and public service organizations to change the national perception of what constitutes a healthy lifestyle and a healthy diet.

The Alliance urges the Working Group to withdraw the proposed principles. Too much time has been lost and resources devoted to this proposal. The energy and resources that have been devoted to its development should be redirected to much more effective national strategies that involve partnerships with state and local governments, with food manufacturers, and the advertising and media industries. Working from a shared understanding of the challenge and combined impact of all of the potential resources, much effective work can be accomplished to assure a healthier future for America's children.

³² Economic Impact Assessment, IHS Global Insight, Assessing the Economic Impact of Restricting Advertising for Products That Target Young Americans (July 8, 2011).

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ Id.

Thank you for the opportunity to present our views on this important matter.

Respectfully submitted,

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