

**INTERAGENCY WORKING GROUP ON FOOD MARKETED TO CHILDREN:
GENERAL COMMENTS AND PROPOSED MARKETING DEFINITIONS**

FTC Project No. P094513

COMMENTS OF:

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The Promotion Marketing Association, Inc. (“PMA”) and the American Advertising Federation (“AAF”) respectfully submit these comments to the Interagency Working Group on Food Marketed to Children (“IWG”) regarding the preliminary proposed nutrition principles to guide industry self-regulatory efforts to improve the nutritional profile of foods marketed to children (the “Proposal”).¹

Established in 1911, the PMA is the premier not-for-profit organization and resource for research, education, and collaboration for marketing professionals. Representing the over \$1 trillion integrated marketing industry, the PMA is comprised of Fortune 500 companies, top marketing agencies, law firms, retailers, service providers, media companies and academia, representing thousands of brands worldwide. Championing the highest standards of excellence and recognition in the promotion and integrated marketing industry globally, the PMA’s objective is to foster a better understanding of promotion and integrated marketing and its role in the overall marketing process.

The AAF, headquartered in Washington, D.C., acts as the “Unifying Voice for Advertising.” The AAF is the oldest United States advertising trade association, representing 40,000 professionals in the advertising industry. The AAF has a national network of 200 ad clubs located in communities across the country. The AAF represents 7,500 advertising students on 225 college campus. The AAF also has 130 blue-chip corporate members that are advertisers, agencies, and media companies, comprising the nation and the world’s leading brands and corporations.

I. Executive Summary

Childhood obesity is a serious and costly health threat facing the United States. The PMA and the AAF fully support the goals of the IWG of combating childhood obesity and promoting public health. The PMA and the AAF also agree with the Federal Trade Commission (“FTC”) that “While the urgency of the childhood obesity problem is obvious, the solution is less

¹ Interagency Working Group on Food Marketed to Children, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts Request for Comment*, April 2011.

so. Tackling childhood obesity is a complex task that will require effort from many segments of society.”²

Although the PMA and the AAF support the IWG’s efforts in response to the 2009 Omnibus Appropriations Act (H.R. 1105),³ we respectfully submit that the Proposal is significantly flawed and problematic.

First, the Proposal does not carry out the IWG’s mandate from Congress to “study” the problem of childhood obesity and prepare a report.

Second, the Proposal is based on the unfounded assumption that there is a causal relationship between food advertising and childhood obesity.

Third, the Proposal has overly broad definitions of “marketing to kids.” As we describe in these Comments, the Proposal would severely cripple food manufacturers’ and restaurants’ abilities to market food products to anyone, not only children and teenagers. The Proposal effectively bans advertising of foods that do not meet the proposed Nutritional Principles to audiences that consist of 70% or 80% adults, even where that advertising is intended to be directed to adults or is for products themselves that are appealing only to adults. The Proposal prevents advertisers from using their own trademarks or trade dress if they are deemed appealing to children, from featuring celebrities or athletes that are “highly popular” with children or teens even if they are also extremely popular with adults, from sponsoring Little League teams, or from engaging in any activity that could be seen as appealing to children or teens. Not only does the Proposal sharply encroach on advertisers’ abilities to market food products to adults, the definitions themselves are impossibly vague and unworkable.

Fourth, the Proposal raises serious First Amendment issues. If implemented, we strongly believe that the Proposal would contravene the First Amendment protection of commercial speech clearly established by Supreme Court decisions, particularly the decisions issued this Term. On June 23, 2011, the Supreme Court reaffirmed its longstanding principle that “The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the

² Statement of the Commission Concerning the Interagency Working Group on Food Marketed to Children: Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts, April 28, 2011, <http://www.ftc.gov/os/2011/04/110428foodmarketstmt.pdf>.

³ Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, ___ (2009).

dark for what the government perceives to be their own good.”⁴ Although the Proposal is described as “voluntary” by the IWG, it would not actually be voluntary if implemented and would have severe consequences to food companies, as discussed below. It would have a chilling effect on the advertising and marketing of foods that do not meet the proposed nutritional standards, including numerous foods such as cereals that are actually beneficial to public health and important weapons in the war against obesity.

Fifth, we believe that if the Proposal is implemented, it would have serious, far-reaching, adverse consequences not only on the food industry, but on other industries such as media, talent entertainment and non profits that on the support of the food industry, without materially advancing the goal of combating childhood obesity. The IWG recognized that “if the proposed nutrition principles were fully implemented by industry as proposed, a large percentage of food products in the marketplace would not meet the principles.”⁵ In fact, even foods defined as healthy under current Food and Drug Administration (“FDA”) standards, foods encouraged by the United States Department of Agriculture (“USDA”) and U.S. Department of Health and Human Services (“HHS”) 2010 Dietary Guidelines, and foods included in the USDA’s Women, Infants and Children (“WIC”) program would not meet the standards.

Sixth, if implemented, the Proposal would violate the Administrative Procedure Act (“APA”) because it is a substantial policy change requiring formal notice and comment, and it would create bad precedent by permitting federal agencies to bypass the formal rulemaking process by simply calling the regulations “voluntary.” Moreover, even if the standard rulemaking process were followed, the Proposal would directly contravene Executive Order 13563, which posits that federal regulations must “identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.” It would also directly contravene Executive Order 13579, which states that regulatory “decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).”

Seventh, the Proposal ignores the substantial strides that the food industry has made in advertising healthy foods and beverages to children under 12 and in reformulating products to improve their nutritional profile.

⁴ *Sorrell v. IMS Health Inc.*, 564 U.S. __, __ (2011) (slip op., at 22).

⁵ Proposal at 5.

In sum, we believe that the Proposal is so flawed that it cannot be fixed. In our view, the IWG should withdraw the Proposal and carry out the assignment given to it by Congress: to conduct a study of childhood obesity and its causes, and develop recommendations for standards for the marketing of food to children in a report to Congress.

II. THE PROPOSAL DOES NOT CARRY OUT THE IWG'S CONGRESSIONAL MANDATE

With all due respect to the IWG, we do not believe that the IWG has done what Congress directed it to do. The 2009 Omnibus Appropriations Act calling for the establishment of the IWG provided the following description of the Working Group's mandate:

The FTC, together with the Commissioner of the Food and Drug Administration, the Director of the Centers for Disease Control and Prevention, and the Secretary of Agriculture, who have expertise and experience in child nutrition, child health, psychology, education, marketing, and other fields relevant to food and beverage marketing and child nutrition standards shall establish the Interagency Working Group on Food Marketed to Children (Working Group). 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. In developing such standards, the Working Group is directed to consider (1) 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 nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children. The Working Group will determine the scope of the media to which such standards should apply. The Working Group shall submit to Congress, not later than July 15, 2010, a report containing the findings and recommendations of the Working Group.⁶

The IWG was authorized to “conduct a study” and prepare a “report” to Congress. The IWG has done neither of these. Instead, the IWG has taken upon itself to propose a comprehensive set of nutritional standards which constitute significant restrictions on commercial speech. Additionally, the IWG ignored its Congressional mandate: to study the issue of childhood obesity, including “evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children” and the “positive contributions” of foods to the diets of children. In addition, the IWG

⁶ Note 2 *supra*.

failed to consider the role that calories – both consumed and expended, such as with physical activity – play in the childhood obesity problem or that many foods that are defined as “healthy” under FDA standards would not meet the standards of the proposed Nutritional Principles.

Accordingly, the Proposal is far outside the scope of the IWG’s authority and should not be adopted.

III. THERE IS NO PROOF THAT FOOD ADVERTISING HAS CAUSED CHILDHOOD OBESITY

The Proposal’s focus on food advertising is misplaced, and ignores the decline in physical activity and other factors that are the real cause of the childhood obesity problem. There is no clear evidence that advertising has caused the childhood obesity problem. Congress directed the IWG to conduct a study of this issue, and it has failed to do so. Congress did not direct the IWG to propose restrictions on constitutionally protected commercial speech based on mere conjecture. In fact, “there has been little theoretical or empirical analysis of the central questions related to the ‘advertising causes obesity’ thesis.”⁷ The FTC has acknowledged this, as noted above: “While the urgency of the childhood obesity problem is obvious, the solution is less so. Tackling childhood obesity is a complex task that will require effort from many segments of society.”⁸ Commentators have expressed views similar to the FTC’s assessment. One scholar has stated, “There is no compelling evidence that restricting the advertising of ‘junk food’ to children would advance the goal of protecting their health.”⁹ To the contrary, “the pervasiveness of the obesity problem in America suggests that more fundamental causes [than advertising aimed at children] are at work.”¹⁰

In 2005, Congress commissioned the Institute of Medicine to determine whether there is a causal relationship between advertising and obesity. The Institute of Medicine report reached the following conclusion: “Evidence is not sufficient to arrive at any finding about a causal

⁷ Todd J. Zywicki, Debra Holt & Maureen K. Ohlhausen, *Obesity and Advertising Policy*, 12 GEO. MASON L. REV. 979, 991–92 (2004).

⁸ 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.

⁹ 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).

¹⁰ *Id.* at 891.

relationship from television advertising to adiposity among children and youth.”¹¹

The more fundamental causes of childhood obesity include reduced physical activity and other factors. Reduced physical activity results in fewer calories being burned. The Centers for Disease Control (“CDC”) states on its obesity website: “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.’”¹²

CDC and USDA data on caloric intake among children aged 2-19 in 1994 compared to 2008 shows that caloric intake has gone down.¹³ According to this data, caloric intake by American children during this period dropped by 3%. Yet during the same time period, obesity among this age group sharply increased.¹⁴ Obesity among children in this age range went from 10.0% (in 1988-1994) to 16.9% (in 2007-2008) – a 69% increase.¹⁵

In addition, the FTC Bureau of Economics has found that children’s exposure to advertising has decreased over the past few decades, as obesity has increased.¹⁶ Therefore, the data shows that the problem of childhood obesity is not related to increased consumption of calories or increased food advertising to children, as the IWG appears to assume. Rather, the data shows that childhood obesity has increased as calorie consumption and food advertising to children have both decreased.

¹¹ Institute of Medicine Report, *Food Marketing to Children and Youth: Threat or Opportunity?* (2006), at 379-380.

¹² Centers for Disease Control and Prevention, *Overweight and Obesity: Causes and Consequences*, available at <http://www.cdc.gov/healthyweight/calories/index.html>.

¹³ U.S. Department of Agriculture, Agricultural Research Service. 1997. Data tables: Results from USDA’s 1994-96 Continuing Survey of Food Intakes by Individuals and 1994-96 Diet and Health Knowledge Survey. On: 1994-96 Continuing Survey of Food Intakes by Individuals and 1994-96 Diet and Health Knowledge Survey. CD-ROM, NTIS Accession Number PB98-500457.

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, [2000-2008].

¹⁴ Ogden et al., *Prevalence and Trends in Overweight Among US Children and Adolescents, 1999-2000*. 288 *Journal of the American Medical Association*, 2002, 1728-1732.

¹⁵ *Id.*

¹⁶ According to the FTC, 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 7, 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.”)

Strong evidence suggests that reduced physical activity by children in the United States is a major contributing factor in childhood obesity. According to the Department of Health and Human Services, “Only about one half of U.S. young people (ages 12-21 years) regularly engage in vigorous physical activity. Daily participation in high school physical education classes dropped from 42% in 1991 to 29% in 1999.”¹⁷

A recent White House report on childhood obesity discusses the increasingly sedentary lifestyle of American children and adolescents. It states: “Unfortunately, our young people live in a social and physical environment that makes it easy to be sedentary and inconvenient to be active.”¹⁸ The report discusses the fact that American youth are spending an increasing amount of time with media for entertainment, communication, and social interaction, and less time for physical activity. According to the report, “Fewer than one in five high school students meet the current recommendation 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.”¹⁹

Since there is no scientific proof that food advertising has caused childhood obesity, there is no reason to believe that the suppression of food advertising will reduce obesity rates if the Proposal is implemented. This is borne out by the experience in foreign countries. Advertising bans in foreign countries have had no effect on childhood obesity rates. For example, a ban on advertising to children under the age of 13 was imposed in the Canadian province of Quebec in 1980, but the rates of childhood obesity in Quebec are similar to those in other Canadian provinces.²⁰ Likewise, Sweden introduced a ban on advertising in children’s programming in 1991, and Swedish childhood obesity rates are similar to those in the rest of western Europe.²¹ In light of the absence of any credible scientific evidence establishing a causal link between food advertising directed to children and childhood obesity and the enormous chilling effect the Proposal will have on the marketing and advertising of food products, this Proposal cannot

¹⁷ John C. Luik, *Ideology Masked as Scientific Truth: The Debate About Advertising and Children* 16 Washington Legal Foundation 1, 64 (2006).

¹⁸ White House Task Force on Childhood Obesity Report to the President, solving the Problem of Childhood Obesity Within a Generation at 66 (May 2010).

¹⁹ White House Report at 66.

²⁰ J.D. Willms, M.S. Tremblay, and P.T. Kazmarzyk, *Geographical and Demographic Variation in the Prevalence of Overweight Canadian Children*, 11 *Obesity Research* 668 (2003).

²¹ T. Lobstein & M.-L. Frelut, *Prevalence of Overweight Among Children in Europe*, 4 *Obesity Rev.* 195 (2003).

withstand First Amendment scrutiny.

IV. THE MARKETING DEFINITIONS ARE OVERBROAD, UNWORKABLE, AND IMPROPERLY RESTRICT COMMUNICATIONS DIRECTED AT ADULTS

The Proposal applies to ten food categories marketed to children and adolescents ages 2-17 years. There are very few products that meet IWG's standards, whether they are primarily consumed by adults or children. Thus, the IWG Proposal would apply very broadly to nearly all food products that are not sold "raw" or unprocessed. The impact of the Proposal based on food categories alone would be wide ranging, reaching a large percentage of products that are currently sold in American supermarkets.

In addition to the broad scope of impacted food products, the Proposal would create an insurmountable burden for advertisers seeking to market food products to adults. The IWG's proposal targets teens ages 12-17 in addition to children ages 2-11, the age group that advertisers traditionally consider to be "children."²² Teens engage in many of the same media activities as adults. They often view the same television shows, watch the same movies, visit the same websites and listen to same radio programs as adults. Thus, in targeting teens as subjects of the marketing restrictions, the IWG proposal would have the effect of restricting marketers' abilities to advertise many food products to substantial numbers of adults.

Furthermore, IWG's proposed definitions of "marketing to children and adolescents" are consistently overbroad, impossibly vague, and unworkable. As described in this section, the Proposal reaches into every facet of advertising and marketing, redefining advertising to cover virtually any marketing activity that could possibly be viewed by children or teens, even where audiences are 100% adult.

The Proposal cites to the FTC's definitions of marketing to children and adolescents in the 2008 report, "Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation" ("Marketing Food Report").²³ However, we note that this citation is confusing for industry. First, the definitions in the 2008 Marketing Food Report were based on definitions announced in the FTC's 2006 Marketing Food Report. These

²² For example, the Children's Food and Beverage Advertising Initiative targets children under 12.

²³ Available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreportappendices.pdf>

definitions have been modified numerous times. Furthermore, although the IWG cites the 2008 report, those definitions were subsequently modified in the FTC's 2010 "Order to File Special Report."²⁴ We assume that the IWG intends for the more recent 2010 definitions to apply and not solely the 2008 definitions.

Where an advertiser does not have a marketing plan that specifically expresses intent to market to children or teens ages 2-17, the Proposal would require an advertiser to rely on a potpourri of objective and subjective criteria to determine whether an advertisement is in fact directed at children or teens. The definitions include multiple ways in which an advertisement is considered "targeted," leaving advertisers with few options for escaping the Proposal's reach, even when advertising is intended to target only adults.

The Proposal defines advertising as "targeted" if the advertisement reaches a small audience of children or teens. For media in which audience share can be calculated – including television, radio, print, and some Internet advertising – advertising is considered to be "targeted" if 30% of the audience is comprised of children ages 2-11 or 20% is comprised of adolescents ages 12-17. For Internet advertising, the 20% criteria would apply to both age groups. This means that even where the audience is comprised of 80% adults, based on the IWG's definitions, advertisements would be deemed as targeted to children or teens even if the advertisement is intended to reach adults or is for a product that primarily appeals to adults. Based on this criterion, food marketers and restaurants would be unable to advertise to adults during programming that appeals to families, including *American Idol*, *Dancing with the Stars*, the Super Bowl, *Glee*, *Modern Family*, and other top-rated programs. In fact, it is difficult to imagine a popular television program without an audience of 20% teenagers, as there is substantial overlap in television viewing between teens and adults, drastically limiting the programs during which food can be marketed.

This problem is not unique to television advertising. Many Internet websites, social media pages, and radio shows have audiences that are comprised of fewer than 80% adults. Indeed, under the Proposal, food marketers and restaurants could not purchase banner ads on Google, sponsor a Facebook page, or advertise on People.com, TMZ, or a host of other websites

²⁴ Available at www.ftc.gov/os/6b_orders/foodmktg6b/P094511/P094511order.pdf.

that appeal to children, teens, and adults alike. Thus, food advertisers would be essentially banned from advertising in numerous lucrative venues, regardless of any discernable intent to advertise to children or teens.

Even worse, in the context of television, radio, and product placement in television programs, the definitions actually refer to dayparts or programming blocks which are divisions of time (e.g. “Prime Time”) that encompass several hours. Thus, even where an individual program has a 100% adult audience, an advertiser would be prevented from marketing restricted food products to adults if that program is part of a daypart or programming block with an audience comprised of 30% children between 2-11 or 20% teens ages 12-17. This further restricts advertisers’ ability to market food products to adults.

Adding to the confusion, we note that there is *no uniform way* to calculate audience composition. Assumptions are required and methodologies can and will differ among advertisers. It would be extremely costly and burdensome to conduct an audience composition analysis for each television program in each local market for each time slot, which would lead to inconsistent approaches among advertisers. For print advertising, websites, and other Internet or digital advertising, accurate demographic data is typically not available for children or adolescents.

Moreover, even where the audience composition consists of 100% adults (for example, a news program at 2 a.m.), advertising may still be restricted based on other factors such as whether a product is marketed by a celebrity or athlete that is “highly popular” with teenagers or children – even if that celebrity is also extremely popular with adults. In fact, many of the most popular athletes and entertainers have cross-appeal with a diverse fan base that includes children, teens, and adults. In addition, it is unclear what “highly popular” means. The FTC definitions do not give any guidance on how to assess the correct threshold of popularity or what sources advertisers should consult in order to determine whether or not a celebrity is “highly popular” among children or teens. Fearful of violating the Proposal, advertisers would likely shy away from celebrity endorsements altogether because the most recognizable celebrities likely are “highly popular” with children or teens even if they are also popular with adults.

Other subjective criteria would preclude companies from using and enjoying highly

valuable trademarks and trade dress elements because they may appeal to children or teens. Advertising would be deemed targeted towards children or teens simply because iconic trade characters have appeared on product packaging and in commercials for generations, such as talking M&Ms, Ronald McDonald, Count Chocula, or Toucan Sam. Well-known athletes could no longer appear on Wheaties boxes simply because the athletes may be “highly popular” with children or teens – even if those same athletes are popular with adults. Such rules would force manufacturers to abandon age-old marketing strategies and give up substantial good will built around such trademarks or trade dress elements.

Advertisers could not use popular or time-honored culture characters in advertising either. Santa Claus, the Easter Bunny, Christmas elves, St. Patrick’s Day leprechauns, and even animated Thanksgiving turkeys may all be seen as appealing to children, precluding food manufacturers and restaurants from utilizing time-tested holiday marketing strategies. Even where the food product is unequivocally targeted at adults – for example, cranberry sauce sold during Thanksgiving – advertisers would be forced to shy away from using holiday linked animations or costumed characters even when the advertisements are shown during the adult-heavy evening news.

In addition to substantially depriving food marketers of the right to advertise their products to adults, the Proposal would have severe unintended consequences that would negatively impact public service initiatives that are clearly in the public interest. Based on the Proposal, advertisers would be unable to sponsor Little League games, Special Olympics teams, cheerleading competitions, charity concerts featuring teen idols, or a host of other events with many child or teenaged participants or that appeal to children or teens. Charities which serve children or teens would be unable to place sponsors’ logos or trade names on t-shirts, programs or posters as a thank you for donations simply because the sponsors market food products. The Proposal, in banning all promotions that appeal to children or teens, would ban food manufacturers from providing free storybooks for children in cereal boxes even though it is in the public interest to provide books to kids. It is difficult to imagine how restricting such beneficial activities is good for anyone.

In sum, the definitions of marketing activities go far beyond restricting advertising to

children and adolescents and would severely undermine the ability of food manufacturers and restaurants to market a large percentage of packaged or processed food products to *adults*.

In the sections below, we will describe the proposed definition for each of the marketing categories identified in the FTC Food Marketing Reports and the potential problems we anticipate advertisers would face if the definition is actually adopted.

A. Television

Television advertising is defined as directed at children or teens if (1) a marketing plan specifically indicates that the advertising is intended to reach children or teens from 2-17, (2) advertising that appears in any television program programming block, or daypart with a viewing audience consisting of 30% or more children ages 2-11 or 20% or more teens ages 12-17, or (3) the advertising occurs during programming rated TV-Y or TV-Y7.

The definition's reliance on viewing audience composition is unworkable and overbroad for several reasons. It is impossible to predict audience composition in advance. Moreover, audience composition varies greatly, based on local market, depending on factors such as when and where the program airs. Audience composition may vary based on local market. For some programs, audience composition may vary from week to week. For example, the audience composition for the ABC Family Friday Night Movie varies, depending on the actual program playing. Additionally, some programs may seem to be objectively children's programs, but the audience may be almost entirely adult (e.g., *Looney Tunes* at 1:00 a.m.). It would be incredibly burdensome for each advertiser to conduct an audience composition analysis for each television program for each local market for each particular time slot.

Adding to the confusion, we note that while the IWG references "programs" with a 30% audience of children ages 2-11 or 20% adolescents ages 12-17, the 2008 and 2010 FTC definitions actually state that television advertising is targeted to children "if it appeared in, during, or contiguous to any television program, programming block, or daypart that had a viewing audience" consisting of 30% or more children ages 2-11 or 20% or more of adolescents ages 12-17. This means that a company cannot advertise the restricted food products on a program with even a completely adult audience if it happens to run contiguous to children's shows! This limitation would cripple the ability of food manufacturers and restaurants to

advertise to adults. Many shows during peak viewing hours would fail the audience composition requirements, leaving food manufacturers and restaurants only able to advertise during off-peak hours – likely late at night – when audiences will be comprised of more than 80% adults or on stations such as C-SPAN, whose programming is completely unappealing to children and teens but whose audiences are substantially smaller than the broadcast giants.

This definition effectively precludes advertising of food products during family programming. For instance, advertisers of food products could not advertise during popular programs such as *American Idol*, game shows such as *Wheel of Fortune*, the Olympics or other sporting events, or other programs that are likely to be viewed by children and teens as well as adults.

B. Radio

Radio advertising is defined as directed at children if a marketing plan indicates that the advertising is intended to reach children or teens between 2 and 17 or if the advertising appears in a radio program, programming block, or daypart for which children ages 2-11 or teens ages 12-17 constitute 30% or 20% of the audience respectively.

Like the definition for television advertising, the FTC's definition for radio advertising actually references programming blocks and dayparts. Thus, programming with a 100% adult audience could be considered targeted to children or adolescents if it is in the same programming block or daypart as a children's show. Furthermore, like television advertising, it is impossible to predict audience composition in advance and there is substantial variation in composition from market to market.

Also like television advertising, many radio programs may appeal to a broad demographic. Advertisers would likely be precluded from advertising on Top-40 radio stations, during popular radio shows such as America's Top 40 With Ryan Seacrest, or other programming that appeals to teens and adults alike.

C. Print

Print advertising is defined as advertising placed in print publications, including magazines, comic books, newspapers, and free-standing inserts. Print advertising is defined as

targeted at children or teens if (1) the marketing plan indicates that it is intended to reach children ages 2-11 or teens ages 12-17 or (2) if the advertising appears in a publication in which 30% of the subscribers are 2-11 or 20% of the subscribers are 12-17. Accurate demographic data is typically unavailable for children or adolescents, making it difficult to ascertain whether print advertising is targeted to children or teens. As a result, the Proposal could amount to a defacto ban on the use of print advertising by food companies thereby compounding the economic distress already being suffered by many print media outlets.

D. Company-Sponsored Websites

Company-sponsored websites are defined as directed at children or teens when (1) marketing plans specifically indicate that the site or page is intended to reach children or teens between 2 and 17, (2) when the audience is 20% children or teens ages 2-17, or (3) when a website prominently features child- or teen-oriented animated or licensed characters, prominently features a celebrity “highly popular with adolescents” or children, uses language, such as “adolescent,” “teen,” “teenager,” “kid,” “child,” “tween,” or similar language, or features child or teenaged performers, models or characters, or promote child- or teen-oriented themes, activities, incentives, products, or media.

There are multiple problems with these definitions. Accurate demographic data is typically unavailable for children or adolescents. Moreover, companies cannot accurately track children and adolescents on the Internet or seek access to or maintain age or other demographic information. In fact, any effort to identify whether a viewer of a Web page is under 18 would potentially put the company in violation of privacy restrictions. Additionally, this definition requires advertisers to examine imagery, language, and themes in advertising that is heavily context dependent and highly subjective to determine whether a website is likely to be construed as directed to children or teens. This would lead to wildly inconsistent interpretations. For instance, the IWG and the FTC offer no definition of the term “highly popular,” leaving companies to sort out for themselves what the term *might* mean. There is no way to know what type of fan base is required to deem a celebrity or licensed character “highly popular,” what source of information to rely upon, or how an advertiser should go about obtaining such data before electing to feature a particular celebrity or character. Moreover, even if a company knows that a celebrity or character is popular with teens, that in itself is not an indication of intent to

advertise to children or teens. An entertainer or cartoon that is popular with children or teens may be equally popular with adults.

Equally confusing, the definitions state that the use of the word “child” alone, regardless of context, may indicate that a website was intended for children. Would an advertisement referring to child’s activities be targeted to children for purposes of the Proposal, even if the advertiser was directing the message to parents? Would advertisers be banned from saying “Your child will love this” about their product?

In addition to vagueness, the Proposal would have a profound impact on the use of a companies’ own characters or even universally known characters with universal appeal, such as Santa Claus, that are appealing to children. Because the definitions would even apply to key elements of trademark and trade dress, iconic characters, such as Count Chocula, could no longer be used on Internet websites targeted at adults because those characters may be “highly popular” with children or teens.

E. Other Internet/Digital Advertising

The “Other Internet/Digital Advertising” definition applies to company-sponsored promotional content, including but not limited to hyperlinks, banners, pop-ups, text messages, listservs, and other mobile or Internet advertising. Such advertising is deemed targeted to children or teens if (1) there is a marketing plan indicating that the advertising is intended to reach children or teens from 2 to 17, (2) the company knowingly seeks the participation of children or teens, (3) the advertising appears on a website with an audience comprised of 20% children or teens ages 2-17, or (4) the advertising prominently features child- or teen-oriented animated or licensed characters, prominently features a celebrity “highly popular with adolescents” or children, uses language such as “adolescent,” “teen,” “teenager,” “kid,” “child,” “tween,” or similar language, or features child or teenaged performers, models or characters, or promote child- or teen-oriented themes, activities, incentives, products, or media.

This definition is overly broad and difficult to implement in several ways. Like company websites, accurate demographic data is typically not available for children and teens on the Internet. Furthermore, companies cannot accurately track children or teens or seek access to or maintain age or other demographic information. However, where data regarding audience

composition is available, advertisers would be prevented from advertising food on popular, well-trafficked sites that also attract millions of adults – even where the advertising is intended to target adults. Recent estimates indicate that more than 20% of Facebook’s audience is between 12 and 17 which would leave food marketers unable to set up a Facebook page or purchase a banner ad on that site. Indeed, the Proposal if taken to its logical conclusion could render social media virtually unavailable to food marketers as a media outlet.

F. Packaging

Product packaging and labeling is defined as directed towards children or adolescents if (1) the marketing plan indicates that it is designed to appeal to children or adolescents ages 2-17 or (2) the packaging or labeling prominently features child- or adolescent-oriented animated or licensed characters, celebrities that are highly popular with children or teens, uses language such as “adolescent,” “teen,” “teenager,” “kid,” “child,” “tween,” or similar language, or features child or teenaged performers, models or characters, or promotes child- or teen-oriented themes, activities, incentives, products, or media.

Based on this definition, companies would have to scrap key trademark and trade dress elements from packaging. Popular athletes could no longer be featured on boxes of Wheaties, and iconic characters such as the Trix Rabbit, the Lucky Charms leprechaun, and Ronald McDonald would disappear. This loss of trade dress elements and trademarked characters would require costly re-branding for companies and the loss of product goodwill due to the inability to continue to use well-known characters that are closely associated to brands. Additionally, the definition would impact marketing that is not actually targeted at children or teens. Even if packaging contains cartoon characters or athletes that are popular with or attractive to children or teens, packaging in itself is not developed to appeal to children because adults make point-of-sale purchases.

G. Movie/Video Games

Advertising preceding a movie shown in a theater or on a video or within a video game is deemed directed at children or teens if (1) the marketing plan specifically indicates that the advertising is intended to target children or teens between 2 and 17, (2) the advertising appears in or contiguous to a motion picture that is distributed in movie theaters, on video, or digitally that

is rated G or for which children ages 2-11 or adolescents ages 12-17 constitute 30% or 20% of the audience respectively, (3) the advertising appears in or contiguous to a video game rated EC or for which children ages 2-11 constitute at least 30% of users, or (4) the advertising prominently features child- or adolescent-oriented animated or licensed characters, celebrities that are highly popular with children or teens, uses language such as “adolescent,” “teen,” “teenager,” “kid,” “child,” “tween,” or similar language, or features child or teenaged performers, models or characters, or promote child- or teen-oriented themes, activities, incentives, products, or media.

This definition is extremely overbroad. In addition, it is difficult to accurately ascertain audience composition for movie goers and users of video games.

H. In-Store

In-store advertising displays, including the offering of free samples, payment for shelf placement, or marketing displays are deemed targeted at children or teens if the advertising is designed to appeal to children. Design elements may include the height of a placement or display, the use of licensed characters, images of children, or the use of language, such as “kid,” “child,” “teen,” or similar.

This definition is extremely overbroad, as in-store advertising is not intended to target children. In-store advertising is intended to target adults who actually purchase food.

I. Premiums

Specialty or premium items that are not food but are distributed in connection with a sale of food are defined as directed at children or teens if (1) the marketing plan specifically indicates that the item or distribution is intended to reach children or teens ages 2-17, (2) the promotion of the item itself prominently features child- or teen-oriented animated or licensed characters, prominently features a celebrity “highly popular with adolescents” or children, uses language, such as “adolescent,” “teen,” “teenager,” “kid,” “child,” “tween,” or similar language, or features child or teenaged performers, models or characters, or promote child- or teen-oriented themes, activities, incentives, products, or media, or (3) the specialty or premium item is a toy, doll, action figure, or other product for children or teens.

Banning food manufacturers from offering premiums with food products covered by the IWG Proposal would have unintended consequences. Sometimes, the premiums included with food packaging are in the public interest. For example, manufacturers sometimes offer premium items such as free children's books either in product packaging or for redemption when purchasing a certain number of products. Offering free storybooks encourages early literacy development, a recognized public interest.

J. Events

Sponsorship of events such as concerts, sporting events, signage at events, posters, adding logos to t-shirts, and other similar activities is considered to be directed at children or teens if (1) the marketing plan specifically indicates that the item or distribution is intended to reach children or teens ages 2-17, (2) the company actively seeks the participation of children or teens, (3) the event involves child- or teen-oriented activities, themes, incentives, products, or media, (4) 30% of the audience is comprised of children ages 2-11 or 20% is comprised of teens ages 12-17, or (5) the advertising or promotions at the event prominently feature child- or teen-oriented animated or licensed characters, prominently features a celebrity "highly popular with adolescents" or children, uses language, such as "adolescent," "teen," "teenager," "kid," "child," "tween," or similar language, or features child or teenaged performers, models or characters, or promote child- or teen-oriented themes, activities, incentives, products, or media.

This definition would preclude "All Family" marketing efforts because any efforts to seek participation of children or adolescents would mean that the event was directed at children or teens. Furthermore, food manufacturers could not sponsor booths at a state fair because the event might involve rides, games, or other adolescent oriented activities. Food manufacturers would not be able to sponsor charity events with well-known celebrities who are popular with children or teens such as the Little League World Series, the Special Olympics, high school track meets or numerous other events that rely on corporate sponsorships.

K. Product Placement

Product placements in television or radio programs, movies, music recordings, video games, or other forms of entertainments are defined as targeted at children based on all of the other defined advertising or promotional activities.

This definition raises the same concerns discussed in the preceding sections, including the sections regarding television, radio, and movie/video games advertising.

L. Character Licensing

Character licensing, toy co-branding, and cross-promotions are defined as targeting children or teens based on all of the other defined advertising or promotional activities.

This definition raises the same concerns discussed in the preceding sections, including the sections regarding television, radio, and movie/video games advertising. Food advertisers would effectively be banned from featuring popular characters such as Sponge Bob, Spider Man, and Dora the Explorer on healthy food products that do not meet the proposed nutritional standards

M. Athletic Sponsorship

Sponsorship of professional or amateur sports teams or individual athletes in a range of sports, excluding primary and secondary school athletic teams, is defined as targeted to children or teens if (1) a marketing plan specifically indicates that the sponsorship is intended to reach or appeal to children or teens between 2 and 17, (2) the sponsored athlete or members of the sponsored team are children or teens, (3) a marketing plan or data indicates that the sponsored team or athlete is highly popular with children or teens, or (4) demographic data indicates that 30% of fans are 2-11 or 20% of fans are 12-17.

These restrictions would prevent food manufacturers who market restricted foods from sponsoring the U.S. Olympic Team because many Olympic athletes are under 18, numerous professional sports teams because their fan base is comprised of 30% children or 20% teens, and countless athletes, even where the associated marketing is unquestionably directed to adults.

N. Word-of-Mouth/Viral Marketing

Word-of-mouth and viral marketing campaigns are defined as directed at children if (1) a marketing plan indicates that the campaign is intended to reach children or teens ages 2-17, (2) the company knowingly seeks the participation of children or teens in the campaign, (3) the campaign prominently features child- or teen-oriented animated or licensed characters, prominently features a celebrity “highly popular with adolescents” or children, uses language,

such as “adolescent,” “teen,” “teenager,” “kid,” “child,” “tween,” or similar language, or features child or teenaged performers, models or characters, or promote child- or teen-oriented themes, activities, incentives, products, or media, or (4) 20% of participants are children under 12 or adolescents between 12 and 17.

As noted in the sections discussing Websites and other Internet Advertising, accurate demographic data is typically unavailable for children and adolescents and companies may not track children or teens or seek access to or maintain age or other demographic information. This definition would also preclude advertisers from conducting all family marketing activities due to the restriction of efforts seeking the participation of children and teens.

O. Celebrity Endorsements

Celebrity endorsements are defined as directed at children if (1) a marketing plan indicates that the endorsement is intended to reach children or teens ages 2-17, (2) the celebrity endorser is a child or adolescent, is commonly recognized as “highly popular” with children or teens, or promotes child-oriented themes, activities, incentives, products or media, or (3) demographic data or other information in the company’s possession, custody, or control indicates that 30% of the celebrity’s fan base are children 2-11 or 20% are adolescents between 12 and 17.

This definition would sharply cripple food marketing companies’ abilities to rely on celebrity endorsers even in advertising that is unquestionably directed at adults. Many celebrities are “highly popular” with children and teens while also being “highly popular” with adults. For example, advertisers could not hire as endorsers any musicians with Top 40 hits, any of the actors in the *Twilight* movie series, or any Teen Choice awards winner – thus excluding entertainers who are highly popular with adults simply because they are popular with teens.²⁵ Based on the Proposal, Tina Fey, Ashton Kutcher, Sandra Bullock, Megan Fox, and Leonardo Di Caprio could not endorse a food product that is popular with adults because they won Teen Choice Awards in 2010.

P. In-School

The definition of in-school marketing includes the use of trade marks, logo displays,

²⁵ See 2010 Teen Choice Awards winners. <http://www.mtv.com/news/articles/1645401/2010-teen-choice-awards-winners-list.jhtml>

signage or other branded materials in or around cafeterias, vending machines, or gymnasiums, at school events, youth athletic events, athletic fields or arenas, school buses, or closed circuit television channels. This does not include advertising that is at a preschool or elementary school at a time when no children are present.

This definition would preclude advertisers from any in-school marketing when children are present.

Q. Philanthropy

Advertising in conjunction with philanthropic endeavors, including the use of trade names, logos, displays, signage, or other branded materials at or in connection with child-oriented clubs, parks, activities, or community programs or events, is defined as directed at children or teens when (1) a marketing plan indicates that the campaign is intended to reach children or teens ages 2-17, (2) the company actively seeks the participation of children or teens, (3) the program or event involves child or teen oriented themes, activities, products or media, (4) 30% or more of the participants in, attendees, or beneficiaries of the organization, program or event are children under 12 or 20% are teens between 12 and 17, or (5) the advertising or promotional activity prominently features child- or teen-oriented animated or licensed characters, prominently features a celebrity “highly popular with adolescents” or children, uses language, such as “adolescent,” “teen,” “teenager,” “kid,” “child,” “tween,” or similar language, or features child or teenaged performers, models or characters, or promote child- or teen-oriented themes, activities, incentives, products, or media, or (4) 20% of participants are children under 12 or adolescents between 12 and 17.

There are numerous philanthropic organizations that benefit children that would be unable to offer incentives of advertising to food marketing companies as a benefit for procuring sponsorship or donations. A food manufacturer could donate funds to build a new park in an inner city neighborhood, but its logo or trade name could not appear in the park because the park itself would be used by many children and teens. A local fast food franchise could donate money to sponsor a group of high school students traveling to rebuild homes for tornado victims, but its logo could not appear on the teenaged participants’ t-shirts. Even where the promotion unquestionably benefits adults or the participants are more than 80% adults, the advertising could

not feature any child- or teen-oriented characters, celebrities popular with children or teens, or depict child or teen models in advertising or promotional materials.

As a result of the Proposal, parks, clubs, and other charities would need to re-think strategies for procuring donations or avoid seeking donations from food manufacturers and restaurants altogether. Adding to the preposterousness of this definition, a largely adult-centered organization, for example an organization focused on senior citizen's issues, would not be able to hold a fundraising carnival-type event or raffle of products such as iPods, Sony Move systems, or other popular products because the activities or prizes might be deemed child- or teen-oriented if a food company or restaurant puts its logo on event paraphernalia in exchange for sponsoring the prizes. An organization could not hold all-family fund-raising events, for example a talent show that is partly sponsored by a food company or restaurant unless it refuses to put its sponsor's trade name on the printed program.

R. Other

This catch-all category includes any other promotional activities that do not fall in the above described categories in which a marketing plan specifically indicates that such activities are intended to reach children or teens between 2 and 17.

The same concerns described above would apply.

V. The Proposal Restrains Commercial Speech in Violation of the First Amendment

The Proposal should be abandoned because, if implemented, it would violate the First Amendment. It is well-established Supreme Court doctrine that the government "may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, non-misleading advertisements"²⁶ in violation of the First Amendment. While child obesity is a serious public concern, the Proposal does not directly advance the government's interests nor is it narrowly tailored. Instead, the Proposal, if not abandoned, will have a chilling effect on free speech.

As a preliminary matter, the Working Group's strategy to cloak its proposed regulation as a request for "voluntary" industry action should not be immune from judicial review if the

²⁶ *Sorrell v. IMS Health Inc.*, 564 U.S. __, __ (2011) (slip op., at 22).

Proposal is implemented. The Working Group is comprised of representatives from the Federal Trade Commission, the Centers for Disease Control and Prevention, the Food and Drug Administration, and the United States Department of Agriculture – four major governmental agencies that play significant roles in regulating the food industry. As such, requests for industry action by the Working Group will effectively have a coercive effect, and result in de facto “mandatory” regulation.

If the Proposal is promulgated and it establishes the proposed Nutritional Standards, companies advertising and marketing foods which do not meet those standards will face an array of adverse consequences. These include the following:

- the risk of increased regulation by those federal agencies, as well as state attorneys general, if their advertising and marketing are not in compliance with the nutritional standards;
- the risk of enforcement actions;
- creating ill-will among the agencies that have the greatest power over virtually every aspect of the food companies’ businesses;
- subjecting themselves to continued investigations relating to their advertising practices;
- opening themselves up to class action lawsuits, which have been increasing in recent years against advertisers and are a certainty in the event of noncompliance with the proposed nutritional standards; and
- 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.

It is well-established that threats to freedom of speech justify facial challenges due to the chilling effect on speech created by the threat of government sanctions.²⁷ The Supreme Court

²⁷ See *New York Times v. Sullivan*, 376 U.S. 254, 278-70 (1964) (the threat of sanctions to speech can lead to “self-censorship”); *Bantam Books v. Sullivan*, 372 U.S. 58, 66-67 (1963) (invalidating the government practice of notifying publishers that certain books met the definition of obscenity because this had a chilling effect on speech); *Wolfson v. Brammer*, 616 F.3d 1045, 1058-59 (9th Cir. 2010) (“one need not await ‘consummation of threatened injury’” before challenging a statute restricting speech).

has stated that “It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments.”²⁸

Even though the government has the power to protect children, that power “does not include a free-floating power to restrict the ideas to which children may be exposed. ‘Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.’”²⁹ Akin to state laws struck down by the Supreme Court recently in June 2011, the Proposal is unconstitutional because it violates the First Amendment.³⁰ In *Sorrell v. IMS Health Inc.* and *Brown v. Entertainment Merchants Association*, the Supreme Court found that the laws placed burdens on protected commercial speech based on the content of the speech and/or the identity of the speaker were unconstitutional because the laws (1) did not directly advance the government’s interests and (2) were not narrowly tailored.

In *IMS Health*, the Supreme Court stated that when a restriction on commercial speech is “designed to impose a specific, content-based burden on protected expression . . . [i]t follows that heightened judicial scrutiny is warranted.”³¹ According to the Court, “The First Amendment requires heightened scrutiny whenever the government creates a ‘regulation of speech because of disagreement with the message it conveys.’”³² Citing to *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980), the Court in *IMS Health* stated:

Under a commercial speech inquiry, it is the State’s burden to justify its content-based law as consistent with the First Amendment. . . . To sustain the targeted, content-based burden [the law] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. . . . There must be a “fit between the legislature’s ends and the means chosen to accomplish those ends.” . . . As in other contexts, these standards ensure not only that the State’s interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message.³³

With respect to the “fit between the legislature’s ends and the means chosen to accomplish those ends,” the Supreme Court has stated that the regulation of truthful commercial

²⁸ *Bantam Books v. Sullivan*, 372 U.S. at 66.

²⁹ *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. __, __ (2011) (slip. op., at 7).

³⁰ See *IMS Health Inc.*, 564 U.S. __ (2011); *Entm’t Merchs. Ass’n*, 564 U.S. __ (2011).

³¹ *IMS Health Inc.*, 564 U.S. __, __ (2011) (slip op., at 9).

³² *Id.* at 10.

³³ *Id.* at 16.

speech can be no more extensive than necessary to serve that interest.³⁴

In *IMS Health*, the Supreme Court struck down a Vermont law restricting the sale, disclosure, and use of pharmacy records that reveal the prescribing patterns of individual physicians. Vermont argued that the law protects physician privacy and lowers health care costs. The Court stated that “While Vermont’s stated policy goals may be proper, [the law] does not advance them in a permissible way.”³⁵ The Court found that the law fails to protect physician privacy because it permits the use of physician-identified information in a variety of circumstances. In addition, the Court found that the law only indirectly advances the State’s interest in controlling health care costs by limiting speech by certain speakers, noting that other efforts (such as promoting lower-cost generic drugs) might be equally effective in lowering costs while protecting the free speech rights of pharmaceutical manufacturers and data mining firms. The Court stated: “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.”³⁶

In *Entertainment Merchants Association*, the Supreme Court found that the California law prohibiting the sale of violent video games did not directly advance the government’s interests because the government could not “show a direct causal link between violent video games and harm to minors.”³⁷ In that case, the Supreme Court reaffirmed its position that First Amendment rights are not diminished when children are involved. The Court stated that “Minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”³⁸

The Proposal does not directly advance the government’s interests, and for this reason alone is unconstitutional. As discussed above, the IWG cannot show that there is a causal link between advertisements to children and obesity. The IWG admits that it “is unaware of studies concluding whether or not such marketing is any more successful in affecting adolescents’ food

³⁴ See, e.g. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (striking down a prohibition on price advertising of liquor because “It 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 promotion temperance.”).

³⁵ *Id.* 21.

³⁶ *Id.* at 22.

³⁷ *Entm’t Merchs. Ass’n*, 564 U.S. __, __ (2011) (slip. op., at 12).

³⁸ *Id.* at 7, citing *Erzoznik v. Jacksonville*, 422 U.S. 205, 212-213 (1977).

choices than traditional advertising.”³⁹ In fact, just the opposite is true: the FTC found that in recent years, “food ad exposure has not risen and is likely to have fallen modestly.”⁴⁰ Despite the decline in food advertisements, obesity amongst children is increasing. We submit that this shows that prohibiting advertisements of certain foods to children does not directly advance the government’s interest in reducing child obesity.

In addition to not directly advancing the government’s interests, the Proposal is not narrowly tailored because it is both under-inclusive and over-inclusive. The Supreme Court is clear that rules burdening protected commercial speech may not be “too narrow to advance legitimate interests or too broad to protect speech.”⁴¹ The Proposal is under-inclusive because it only addresses the categories of foods and ingredients, but does not address the major contribution of food to obesity, namely, the amount of calories in a product. The Proposal is also over-inclusive because it effectively bans advertisements in nearly every medium even when the advertisements are part of sponsorships to nonprofits, bans advertisements even when the advertising is intended for adults and adults represent the majority of the audience, and does not account for the differences between younger children and adolescents.

Because the Proposal violates the First Amendment, the Proposal should be abandoned in its entirety. While the government has a legitimate interest in protecting children, the Proposal does not further the government’s interests. The government must still meet constitutional requirements, even when it is burdening protected speech for what it perceives to be for the “public’s good.” Simply put, “the ‘fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech.”⁴²

VI. THE PROPOSAL WOULD BAN THE ADVERTISING OF “HEALTHY” AND OTHER GOOD FOOD

Although the goal of the Proposal is to combat childhood obesity by encouraging the consumption of healthy food, the Proposal will actually ban the advertising of many “good” foods. In fact, the Proposal would ban the advertising of many foods that the FDA defines as

³⁹ Interagency Working Group on Food Marketed to Children, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts Request for Comments*, at 17.

⁴⁰ Federal Trade Commission, Bureau of Economics Staff Report, *Children’s Exposure to TV Advertising in 1977 and 2004: Information for the Obesity Debate* at ES-5 (2007).

⁴¹ See *IMS Health Inc.*, 564 U.S. __, __ (2011) (slip op., at 19).

⁴² *IMS Health Inc.*, 564 U.S. __, __ (2011) (slip op., at 22).

“healthy,” are encouraged by the USDA and HHS 2010 Dietary Guidelines, and are included in the USDA’s WIC program.

In its food-labeling regulations, the FDA says that a food may be labeled “healthy” if it contains low levels of fat, saturated fat, and cholesterol, and contains other specified nutrients.⁴³ Many foods (such as whole wheat bread, whole grain cereals, and enriched grain products) meet the FDA’s definition of healthy but would be banned under the Proposal. Similarly, among numerous recommendations, the 2010 Dietary Guidelines encourage people to eat at least half of their total grains as whole grains and to increase their intake of fat-free and low-fat milk and milk products.⁴⁴ Despite these recommendations, many whole wheat breads, whole grain cereals, and enriched grain products as well as many yogurts would be banned under the Proposal. Further, these same foods are expressly included in the USDA’s WIC program but again would be banned under the Proposal.

If companies cannot advertise these foods, people may not know about them. And if people do not know about them, they cannot buy and/or eat them. Rather than combating childhood obesity, the Proposal’s advertising ban would deter the consumption of numerous healthful foods.

VII. THE PROPOSAL WOULD CREATE BAD PRECEDENT TO PERMIT FEDERAL AGENCIES TO BYPASS THE FORMAL RULEMAKING PROCESS BY SIMPLY CALLING THE REGULATIONS “VOLUNTARY”

When a federal agency “adopt[s] a new position inconsistent with . . . existing regulations,”⁴⁵ the agency is required to engage in this formal rulemaking process with the possibility of judicial review in accordance with the Administrative Procedure Act (“APA”).⁴⁶ The Proposal would impose drastic restrictions on the ability of food marketers to advertise their products, which is clearly inconsistent with existing regulations. Accordingly, the IWG cannot utilize “voluntary” guidelines to completely reshape how and when food marketers can advertise. Instead, notice-and-

⁴³ 21 C.F.R. §101.65(d)(2).

⁴⁴ <http://www.health.gov/dietaryguidelines/dga2010/DietaryGuidelines2010.pdf>.

⁴⁵ *Air Transp. Ass’n of Am., Inc. v. FAA*, 291 F.3d 49,56 (D.C. Cir. 2002) (quoting *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995)).

⁴⁶ 5 U.S.C. 500 *et seq.*

comment rulemaking, accompanied by the possibility of judicial review, is the appropriate vehicle for such dramatic changes.

Not only are the regulations subject to public comment in accordance with the APA, they are also subject to scientific and judicial review. We do not believe that the Proposal could survive scientific or judicial review because, as discussed above, the IWG did not conduct a study of the problem of childhood obesity, the Proposal is based on the unfounded assumption of a causal relationship between food advertising to children and childhood obesity, and there are serious concerns about the constitutionality of banning huge segments of food advertising. The IWG should not be able to bypass this required and appropriate review simply by calling the Proposal “voluntary.”

Moreover, not only would it be inappropriate for the IWG to impose de facto regulations without review just by saying they are voluntary, permitting the IWG to do so would create a bad precedent for all federal agencies. No agency would choose to undergo the requisite time-consuming scrutiny if it could simply state that its proposed regulations were voluntary. In order to maintain the checks and balances that are an integral part of the American government’s rulemaking process, the IWG cannot permissibly implement the Proposal without subjecting it to the standard rulemaking process.

Moreover, even if the standard rulemaking process were followed, this unduly burdensome Proposal would contravene President Barack Obama’s recent Executive Orders 13563 and 13579, issued on January 18 and July 11, 2011, respectively, urging the reduction of regulatory burdens. Executive Order 13563 states that regulation “must be based on the best available science. It must allow for public participation and open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative.” *See also* Executive Order 13579 (regulatory “decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).”). The Proposal does none of these things.

As discussed above, the Proposal is not based upon science, as there is no proven link between advertising of food and beverages to children and obesity. It does not use generally

accepted definitions of marketing to children, it would be extremely difficult to implement, and would effectively restrict most advertising for foods and beverages. These burdens are extremely high, particularly where the nexus between the regulatory goals and the substance of the Proposal is unsupported. Indeed, Executive Order 13563 states that “each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.”

We therefore urge the IWG to conduct a study and make recommendations to Congress that would more effectively address the problem of childhood obesity while not unduly interfering with freedom to exercise one’s right to commercial speech and flexibility.

VIII. IWG’S IGNORES INDUSTRY SELF-REGULATION RELATING TO THE ADVERTISING OF FOOD TO CHILDREN

The IWG Proposal fails to recognize the important strides food marketers have made in improving the nutritional content of products advertised to children due to industry-self regulation through the Children’s Food and Beverage Advertising Initiative (“CFBAI”). CFBAI was launched in 2006 by the Council of Better Business Bureaus and 10 leading food and beverage advertisers to change advertising messages directed to children under 12 to encourage healthier dietary choices and lifestyles. CFBAI’s membership currently consists of 17 of the nation’s largest food and beverage marketers such as McDonald’s, Kraft Foods, General Mills, ConAgra Foods, Unilever, and Burger King.

CFBAI members pledge to reduce the use of third-party licensed characters in advertisements, cease paying for or actively seeking product placement in programming content targeted at children under 12, stop advertising foods and beverages in elementary schools, and alter company-owned Web sites and games to incorporate healthier foods and encourage a healthy lifestyle. The nutritional standards of CFBAI member companies are subject to CFBAI approval and must be based on USDA and HHS dietary guidelines and FDA definitions for “healthy,” “low,” or “reduced” products. CFBAI monitors member companies’ compliance and issues annual reports.

Compliance among CFBAI participants is extremely high. Only a handful of non-CFBAI compliant products appeared in advertising to children, and offenses were quickly detected and

resolved. Accordingly, CFBAI has had an important impact on the marketing of food to children. Since the creation of CFBAI, the amount of food and beverage advertising seen by children has been reduced.⁴⁷ According to the Grocery Manufacturer's Association, "Between 2004 and 2008, children viewed 31 percent fewer food, beverage, and restaurant ads on children's programming."⁴⁸ Significantly, the advertising that children see has shifted towards advertisements featuring healthy products with fewer calories and more nutrients. Advertising for junk foods has dropped substantially. Furthermore, due to CFBAI's nutrition guidelines, more than one hundred products have been reformulated to improve nutritional composition, reducing sugars, fats, or sodium while increasing positive nutrients.⁴⁹

CFBAI's guidelines have also been strengthened since its creation, further changing the face of food marketing to children. Initially, CFBAI required its participants to devote 50% of their advertising to healthier products. Now, CFBAI requires members to devote 100% of their advertising to healthier products. Additionally, in the fall of 2010, nearly all CFBAI members agreed to limit advertising directed to children under 12 to no more than 35% of total child-directed advertising. Coverage was also expanded to include ads directed at children in new and emerging media, including word of mouth advertising, mobile media, interactive games, and DVD content. CFBAI limits the use of licensed characters, movie tie-ins, and celebrities to advertising that adhere to healthy nutrition standards.⁵⁰

CFBAI's membership has made tremendous strides in changing the face of advertising directed at children, exposing them to less food and beverage advertising overall, altering advertising to focus on healthier products, and actually encouraging participants to reformulate products to meet nutritional guidelines. Overly broad and overly restrictive guidelines such as the IWG Proposal are unnecessary, as substantial strides have already been made while also allowing food manufacturers to exercise their right to free commercial speech.

⁴⁷ "The Children's Food & Beverage Advertising Initiative in Action: A Report on Compliance and Implementation During 2009," <http://www.bbb.org/us/storage/0/Shared%20Documents/BBBwithlinks.pdf>, Last Accessed on July 8, 2011.

⁴⁸ "An Eye on Marketing," *GMA Social Media Center*, <http://www.gmaonline.org/blog/?p=932>.

⁴⁹ *Id.*

⁵⁰ "Children's Food and Beverage Advertising Initiative Program and Core Principles Statement," <http://www.bbb.org/us/storage/0/Shared%20Documents/Enhanced%20Core%20Principles%20Third%20Edition%20-%20Letterhead.pdf>.

IX. CONCLUSION

In conclusion, we believe that the IWG's Proposal is so flawed that it cannot be fixed. Not only is the Proposal well outside the scope of Congress's mandate, the Proposal is fatally overbroad. The Proposal sharply encroaches on advertisers' abilities to market food products to adults and relies upon definitions that are impossibly vague and difficult to implement. Moreover, even though the guidelines described in the Proposal would technically be voluntary, they would have a severe chilling effect on marketers' behavior and would contravene the First Amendment's protection of commercial speech. The Proposal would not have any material benefit in advancing Congress's goal of combating childhood obesity while hampering the abilities of charities and non-profits to find corporate sponsors, harming public health by virtually banning the advertising of healthy foods, and creating a bad precedent by enabling federal agencies to bypass the formal rulemaking guidelines by implementing so-called "voluntary" guidelines.

Accordingly, we recommend that IWG withdraw this Proposal and carry out the assignment given to it by Congress.

Respectfully Submitted,

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