

**Before the
Interagency Working Group on Food Marketed to Children
Washington, D.C. 20580**

In the Matter of)
)
General Comments and) Project No. P094513
Proposed Marketing Definitions)

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”)¹ hereby submits its comments on the “preliminary proposal for voluntary principles to guide industry self-regulatory efforts to improve the nutritional profile of foods marketed to children” issued by the Interagency Working Group on Food Marketed to Children (“Working Group”).²

The cable industry strongly supports efforts to improve the health of our nation’s children. There is, however, no reason to believe that the proposed nutrition principles, if implemented, would serve that end. Meanwhile, of great concern to our industry, implementation of the proposed nutrition principles would result in significant unintended consequences that undermine the support of quality programming and would raise significant constitutional questions.³ Accordingly, NCTA urges the Working Group to withdraw its

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90% of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$170 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

² See Interagency Working Group on Food Marketed to Children, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts*, Request for Comments at 1 (Apr. 28, 2011) (“Notice”), available at <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>. The Notice seeks comment to inform the Working Group in “shaping its recommendations for enhanced industry self-regulatory efforts as part of a report requested by Congress.” *Id.*

³ The cable industry is not involved in the manufacturing of food or beverage products and, thus, these comments will not address how the proposed nutrition principles put forth by the Working Group will impact advertising of specific products.

proposed nutrition principles and engage in further study before finalizing any recommendations to Congress. The Working Group should ultimately take note of, and defer to, voluntary measures to limit the marketing of certain food and beverage products to children, such as the Children’s Food and Beverage Advertising Initiative (“CFBAI”), as well as other ongoing industry efforts to address childhood obesity.⁴

INTRODUCTION AND SUMMARY

This is a time of unprecedented choice and quality in children’s television programming. Much of that quality programming has been developed by the cable industry, which offers a diverse and robust slate of educational and entertaining programming options for children and more ways than ever before for children and families to access that content.

Cable operators distribute hundreds of hours of quality programming each week on networks dedicated to children and families, including ABC Family, Boomerang, Cartoon Network, Disney Channel, Nickelodeon, NickToons, Nick Jr., TeenNick, and PBS KIDS Sprout. Indeed, four of these networks are ranked among the top twenty-five cable networks based on the number of subscribers they reach. These networks offer a wide variety of content, including educational and entertaining age-appropriate programming specifically developed for children in various age groups. Cable also offers a significant amount of children’s television programming that can be accessed on demand, as well as access to the growing array of online children’s programming through its high speed broadband service.

⁴ To satisfy its congressional directive, the Working Group is required to “conduct a study and develop recommendations for standards,” and then submit a report to Congress “containing the findings and recommendations” of the Working Group. *See Notice*, at 2 (quoting Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84). Thus far, the Working Group has not fulfilled this mandate, but instead has reviewed existing studies and created a wholly new set of nutritional guidelines and marketing restrictions more in the mold of federal rules than guidance or recommendations to Congress.

This kind of quality children's programming is expensive to produce, and much of it is advertiser-supported. Restrictions on advertising, such as those in the Working Group's proposed nutrition principles, would undermine the economic model that supports such programming. As Congress recognized when adopting limits on the amount of advertising during children's programming in the Children's Television Act of 1990, advertising is a critical part of the formula enabling the creation of children's programming. The Working Group should avoid any action in this area that would undermine the financial viability of the continued investment in quality children's programming, particularly in this challenging economic environment.

In any event, wholly apart from their harmful impact on advertiser-supported children's programming, the proposed nutrition principles represent an ill-advised approach to the problems that they are intended to address. First, the guidelines are premature and lack any evidentiary basis to support their necessity or usefulness in combating childhood obesity. Moreover, any such "voluntary" government guidelines would raise serious First Amendment problems by effectuating an expansive prophylactic ban on wholly truthful advertising (no matter what it said) of any product failing to meet the nutrition principles (no matter what it was) in any of the specified forums.

To be clear, NCTA's concerns with the proposed guidelines do not mean that we disagree with the importance of improving our children's health. Cable programmers and others are committed to these issues and have invested significant time and resources in voluntary efforts to positively influence, educate, and inform children and families to adopt balanced and healthy lifestyle choices. This is an issue of means, not ends, and avoiding unintended consequences in the process.

I. CABLE PROGRAMMERS ARE MAKING SIGNIFICANT VOLUNTARY EFFORTS TO EDUCATE AND INFORM CHILDREN AND FAMILIES ABOUT BALANCED AND HEALTHY LIFESTYLES.

The cable industry generally welcomes efforts to find effective approaches to reducing the incidence of childhood obesity and promoting children's health through better diet and nutrition. Childhood obesity is widely acknowledged to be a complex issue with numerous contributing factors that must be addressed through a variety of approaches and stakeholders.⁵ As detailed below, members of the cable industry have engaged in a multifaceted approach designed to educate children and caregivers regarding proper diet, exercise, and nutrition.

In 2010, Nickelodeon and Disney announced their participation in *Let's Move*, an initiative with First Lady Michelle Obama to help address childhood obesity. Nickelodeon offered its resources and research, including child and family-targeted public service announcements ("PSAs"), and special programming events on its channels and websites.⁶ Disney announced that it would produce a series of PSAs featuring the First Lady and leading Disney Channel stars intended to inspire healthier eating habits and physical activity.⁷ Early in

⁵ See, e.g., Inst. of Med., *Food Marketing to Children: Threat or Opportunity 2* (2006) ("Although seemingly straightforward, [eating and physical activity] behaviors result from complex interactions across a number of relevant social, environmental, and policy contexts"); Tavon Cooke *et al.*, *Tipping the Scales, Strategies for Changing How America's Children Eat, A Report to the Robert Wood Johnson Foundation 1* (Jan. 2011) ("[I]t is also evident that childhood obesity is a multi-faceted problem that cannot be addressed using a single strategy."), available at http://www.princeton.edu/research/pwreports_fy10/WWS591g.pdf; Fed. Trade Commission ("FTC"), *Statement of the Commission Concerning the Interagency Working Group on Food Marketed to Children: Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts 1* (Apr. 28, 2011), available at <http://www.ftc.gov/os/2011/04/110428foodmarketstmt.pdf>.

⁶ See Press Release, Nickelodeon, *Nickelodeon to Participate in First Lady Michelle Obama's Let's Move Campaign to Tackle Childhood Obesity* (Feb. 9, 2010), available at http://biz.viacom.com/sites/nickelodeonpress/NICKELODEON/Pages/showpdf.aspx?FileName=First_Lady_Childhood_Obesity_Announcement_Release_Final.pdf&ListName=Corporate_PressReleases&ItemID=76.

⁷ Disney committed to feature the messages across Disney's kid and family targeted media platforms, including Disney Channel, Disney XD, Radio Disney, and Disney.com. See Press Release, The Walt Disney Company, *Disney Announces Collaboration with First Lady Michelle Obama to Create a Healthier Generation* (Feb. 9, 2010), available at http://corporate.disney.go.com/news/corporate/2010/2010_0209_healthier_generation.html; Amie Parnes, *Disney Says: 'Let's Move!'*, Politico Click (Sept. 30, 2010), available at http://www.politico.com/click/stories/1009/disney_says_lets_move.html.

2011, Cartoon Network’s inaugural sports award show, *Hall of Game*,⁸ featured a special taped appearance by the First Lady to recognize the twenty-five Louisiana schools that had most successfully created healthier school environments through promotion of nutrition and physical activity and further supported *Let’s Move* with PSA’s promoting healthy lifestyles featuring the First Lady across Cartoon Network platforms. These companies’ participation in *Let’s Move* continues a long-standing commitment to kids’ health and nutrition.

In December 2010, Disney launched *Disney Magic of Healthy Living*, a multimedia initiative to make healthy living fun for kids and families.⁹ The initiative features two websites, one for kids and one for parents, promoting healthy lifestyles.¹⁰ In 2006, Disney announced guidelines aimed at giving parents and children healthier eating options that include limiting the use of the company name and its characters to only those kid-focused products that meet specific nutritional guidelines.¹¹ Moreover, Disney Channels Worldwide has committed to provide programming that reflects and recognizes that everyone shares a responsibility to encourage kids and families to adopt healthy lifestyles, including dedicating at least one episode of each series currently in production to a healthy lifestyle theme.¹² In addition, Disney has dedicated over 100 interstitials to encouraging healthier lifestyles.¹³

⁸ *Hall of Game* is “a high-energy, off-the-wall, multi-platform experience that lets viewers vote and honor their favorite sports stars and sports moments of the year.” See Press Release, Cartoon Network, *Cartoon Network Hall of Game Awards to Feature All Star Line-Up* (Feb. 16, 2011), available at http://news.turner.com/article_display.cfm?article_id=5560.

⁹ See Press Release, Disney, *Healthy Kids, Healthy Families! Disney Launches Magic Of Healthy Living* (Sept. 30, 2010), available at http://corporate.disney.go.com/news/corporate/2010/2010_0930_mohl.html.

¹⁰ See *id.*

¹¹ See Press Release, *supra* note 7.

¹² See *id.*

¹³ The interstitials include *Pass the Plate*, an effort to inform and empower viewers by showing them how kids around the world enjoy and benefit from healthy foods, and *Get’cha Head in the Game*, an interstitial series that inspires kids to follow their dreams through physical activity. See *id.*

For more than 10 years, Nickelodeon has engaged in a number of award winning pro-social initiatives, which aim to “engage children and help empower them to make a difference in their own lives, for their families and communities, and in the world at large.”¹⁴ The original *Let’s Just Play* initiative helped kids make healthy lifestyle choices and combat childhood obesity. A key element of the campaign is the *Worldwide Day of Play*, an entire day in September each year committed to the celebration of active play. On that day, Nickelodeon, NickToons, Nick Jr., TeenNick, and their companion websites go dark for three hours to reinforce the message to children to turn off their television and go outside and play.¹⁵ In June 2011, Nickelodeon’s *The Big Help* campaign partnered with the President’s Challenge to help promote the Presidential Active Lifestyle Award (“PALA”) Challenge to encourage one million or more Americans to sign up for and achieve the PALA Challenge by this year’s *Worldwide Day of Play*.¹⁶ *The Big Help* will support the PALA Challenge with an on-air and online campaign that will encourage kids to get up and get active. Nickelodeon also has committed significant resources to health and wellness messaging and, effective January 2009, Nickelodeon voluntarily limited the use of its well-known characters to food packaging that meets “better for

¹⁴ Cyma Zarghami, President of Nickelodeon and the MTV Networks Kids & Family Group, Before the U.S. Senate Committee on Commerce, Science and Transportation, *Rethinking the Children’s Television Act for a Digital Media Age*, at 8 (July 22, 2009) (“Zarghami Testimony”), available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=512afa5c-b479-43a1-81f2-1906f4e9b875.

¹⁵ *See id.* On September 24, 2011, Nickelodeon will host the 8th annual *Worldwide Day of Play* in Washington, D.C. in partnership with the President’s Council on Physical Fitness and the National Park Service, where the Ellipse will serve as “headquarters” with a family-friendly activity zone with the best in professional and youth sports, health, and wellness and community-based organizations. *See* Nickelodeon, *Worldwide Day of Play*, at <http://www.childrensmuseums.org/programs/letsmovemuseums.htm#nick> (last visited July 13, 2011). Nickelodeon and its partners also organize and host hundreds of other events annually to inspire children to go outside and be active.

¹⁶ Press Release, Nickelodeon, *Nickelodeon’s The Big Help Partners with the President’s Challenge Program for Million PALA Challenge* (June 6, 2011), available at <http://www.viacom.com/news/pages/newstext.aspx?RID=1571173>.

you criteria” established by its marketing partners in accordance with governmental dietary guidelines.¹⁷

Cartoon Network launched its *Move It Movement* campaign in 2010 working with the National Association for Sport and Physical Education’s Let’s Move! in Schools to empower youth and families to get more active in order to experience healthier lifestyles.¹⁸ The *Move It Movement* initiative is the latest expansion of Cartoon Network’s award-winning *Get Animated* initiative that began in 2005 to promote healthier lifestyles through daily recess, health and wellness education, and active after-school involvement in short-form content shown on multiple platforms. As part of this initiative and for the seventh summer in a row, Cartoon Network has sponsored a nationwide tour with live events in 25-30 cities each year with multiple activity and learning stations, occasional appearances by Cartoon Network talent, and participation by local professional athletes from the NBA and the NFL. This year, the tour features a partnership with the President’s Council on Fitness, Sport and Nutrition to promote youth and family registration and participation in the PALA Challenge. These efforts complement Cartoon Network’s ongoing relationship with the Food & Drug Administration (“FDA”) and an interactive *Spot the*

¹⁷ See Ira Teinowitz, *Nickelodeon Limits Food Licensing for SpongeBob, Dora*, TV Week (Aug. 15, 2007), available at http://www.tvweek.com/news/2007/08/nick_limits_food_licensing_for.php; Zarghami Testimony, *supra* note 14, at 10. Dora the Explorer, SpongeBob SquarePants, and other Nickelodeon characters can be seen on packaging for fruits and vegetables, including carrots, spinach, clementines, tangelos, and oranges. See *id.*

¹⁸ See Press Release, Cartoon Network, *Cartoon Network to Launch MOVE IT MOVEMENT TOUR in Partnership with NASPE’s LET’S MOVE In School Platform* (Apr. 29, 2010), available at <http://eon.businesswire.com/news/eon/20100429006339/en>; see also Press Release, Cartoon Network, *Cartoon Network’s Rescuing Recess Awards \$310,000 in Grants to 49 States at PTA’s National Convention in Phoenix* (June 26, 2006), available at http://www.timewarner.com/newsroom/press-releases/2006/06/Cartoon_Networks_iRescuing_Recessi_Awards_310000_in_06-26-2006.php; Press Release, Cartoon Network, *More Than 10,000 Schools, Joined by Top U.S. Mayors, Rally to Celebrate National Recess Week* (Sept. 18, 2006), available at http://www.timewarner.com/newsroom/press-releases/2006/09/More_than_10000_Schools_Joined_by_Top_US_Mayors_Rally_09-18-2006.php.

Block campaign driving awareness and understanding of nutritional labels on packaged food;¹⁹ other Cartoon Network PSAs on physical activity and nutrition; and extensive nutritional guidelines that Cartoon Network first announced in 2007 for its product licensing and custom brand-integrated promotional tie-ins featuring characters from its company-owned, original series targeted to children.²⁰

PBS KIDS Sprout has demonstrated its ongoing commitment to inspiring pre-schoolers to make healthy eating choices through its Sprout Diner television programming and online content.²¹ Sprout Diner, which debuted on Sprout in September 2006, features “nutritious and fun recipes inspired by popular preschool characters.”²²

In March 2011, Discovery Familia, a network targeting the needs of Hispanic moms and pre-school children, announced that it will join forces with the President’s Council on Fitness, Sports and Nutrition (“PCFSN”) and become a leading advocate among Hispanics for the “Million PALA Challenge.”²³ Discovery Familia will support the campaign with on-air, off-air, and grass-roots initiatives in a number of top Hispanic markets encouraging Hispanic moms and their kids to get informed and sign up and get fit. The Discovery Familia website contains

¹⁹ See Food & Drug Admin., *Spot the Block Using the Nutrition Facts Label to Make Healthy Food Choices -- A Program for Tweens*, available at <http://www.fda.gov/Food/ResourcesForYou/Consumers/KidsTeens/ucm115810.htm>.

²⁰ See Cartoon Network, *Nutritional Guidelines*, available at <http://help.cartoonnetwork.com/ics/support/default.asp?deptID=5458&task=knowledge&questionID=195>.

²¹ See PBS KIDS Sprout, *Sprout Diner*, at <http://www.sproutonline.com/sprout/Originals/SproutDiner.aspx> (last visited July 6, 2011).

²² Press Release, PBS KIDS Sprout, *PBS KIDS Sprout Continues Commitment to Inspiring Healthy Eating Habits in Preschoolers* (Feb. 6, 2007) (noting that KidsHealth.org provided nutritional consultation to Sprout for Sprout Diner recipes), available at <http://www.sproutonline.com/sprout/pressroom/release.aspx?id=287cb55c-77eb-433c-87ff-9b9f00e7dbf8>.

²³ Press Release, Discovery Familia, *Discovery Familia Joins Forces with President’s Challenge* (Mar. 30, 2011), available at <http://multivu.prnewswire.com/mnr/discoveryfamilia/49142/>.

healthy recipes, information about the PALA Challenge, and how to sign up, along with links to healthy eating resources.

These efforts collectively represent a significant contribution to the fight against childhood obesity, particularly as they often build upon existing school and government programs. Such public-private partnerships are the optimal means of promoting pro-social goals, as they can amplify the underlying message in more meaningful ways designed to resonate with the public. It is important to keep in mind, however, that advertising revenues largely fund such efforts, and advertising restrictions would necessarily impact their continued success.

II. THE PROPOSED MARKETING DEFINITIONS ARE PROBLEMATIC FOR A VARIETY OF REASONS AND SHOULD NOT BE RECOMMENDED TO CONGRESS.

A. The Proposed Marketing Definitions Were Developed With Limited Input and Are Not Appropriate For Broad Application As Proposed in the *Notice*.

Although the Working Group's proposed definitions for marketing to children and adolescents are described in the *Notice* as having been vetted through a public comment process,²⁴ the purpose of that prior proceeding and the application of the proposed definitions vary significantly from the instant proposal.²⁵ That proceeding involved the collection of food industry advertising expenditures pursuant to Rule 6(b) of the Federal Trade Commission Act to allow the Federal Trade Commission ("FTC") to report to Congress on expenditures for food

²⁴ *Notice*, at 17 (explaining that the definitions were vetted in connection with a 2006 study of youth-directed food marketing expenditures).

²⁵ The Request for Public Comment in 2006 sought comment "on how food and beverage companies record and maintain information about their marketing activities and expenditures targeted to children and adolescents [and] how food and beverage companies record and maintain information about commercial advertising time on television, radio, and in print media and information about exposure to products through the use of other marketing techniques." FTC, *Food Industry Marketing Practices to Children and Adolescents*, Request for Comment, 71 Fed. Reg. 10535, 10536 (Mar. 1, 2006). Thus, the definitions relating to marketing standards proposed in the *Notice* were not developed to form the basis for marketing restrictions. Because of the intended purpose of the proposed definitions, the cable industry had no reason to or basis from which to comment on them. Indeed, no media companies have commented on the definitions in the past.

marketing to children. As explained below, the food marketing definitions are not appropriate to form a basis for the nutrition principles that the Working Group intends to recommend to Congress.²⁶ The proposed definitions incorporate the twenty categories of advertising, marketing, and promotional activities identified in the FTC’s food marketing study definitions, including television, radio, print advertising, website and Internet marketing, packaging and in-store marketing, endorsements, cross-promotions, and a “catch-all” category.²⁷ While some of these categories are well understood, many others are not clearly defined, particularly in so far as they apply to new and evolving industry practices. For example, to the extent that the definitions would be extended to cover brand advertising, without any reference to particular foods or nutritional elements, it would go far beyond the stated intent of the proposal and exacerbate these concerns. Likewise, limits on the use of third-party character licensing in contrast with brand-specific characters would directly impact programmers and raise significant First Amendment concerns. Given the sweeping scope of the proposed definitions, and the potential for even broader application through the “catch-all” category, the proposal represents an effective ban on all forms of marketing that meet the relevant criteria for being “targeted to children or adolescents.”²⁸

In terms of applying the relevant age metrics, each category corresponds to purportedly objective criteria, such as marketing plans and audience composition, as well as subjective

²⁶ Other countries are examining the problem of childhood obesity, with some establishing limits on advertising to children. As part of its report to Congress, the Working Group should evaluate the efforts of other countries, including the United Kingdom, which has nutrition-based advertising limits that have achieved mixed results. *See, e.g.,* Joe Lepper, *Ban on Junk Food Advertising Has Little Impact*, Children & Young People Now (May 27, 2009) (“The ban on junk food advertising during children’s television may have been futile, according to latest research.”), available at <http://www.cypnow.co.uk/Health/article/908836/Ban-junk-food-advertising-little-impact/>.

²⁷ *See Notice*, at 18.

²⁸ The Working Group acknowledges this expansive reach in its proposal. *See id.* (“Thus, marketing activities are broadly defined to encompass virtually all kinds of promotional activities directed to youth”).

criteria, such as whether the marketing activity features a child or adolescent oriented animated or licensed character, a celebrity popular with children or adolescents, or child or adolescent oriented language, activities, or themes. Such an approach is not workable or even reliable for distinguishing between marketing to children and adults. As a result, the proposed nutrition principles are inherently vague, would be difficult to implement, and extend far beyond their intended reach.

For example, the audience composition numbers of twenty and thirty percent are so low that they will affect programming intended for, and primarily watched by, general audiences and adults. Even if a higher percentage were used, audience composition numbers are complex and dynamic, with significant variance between different days, timeslots, and seasons. They also do not adequately address new shows, or anticipate co-viewing or parent-targeted content. The use of animated or licensed characters is also an unreliable indicator, as they often appear in content intended for general or adult audiences. To the extent that the proposal intends to overlay multiple objective and subjective age criteria to a particular type of marketing where one metric alone is insufficient or unclear, that indicates that the proposal is structured to be as comprehensive and far-reaching as possible. As described in greater detail below, this over-inclusive approach raises significant constitutional questions.

Some governmental regimes apply a more tailored and workable approach, focusing on the intent of the content producer. For example, in its implementation of the Children's Television Act of 1990 – legislation that was intended by Congress to protect the interests of children “without negatively impacting the viability of children’s programming on commercial television” – the Federal Communications Commission (“FCC”) adopted commercial limits that apply to “children’s programming,” defined as “[television] programs originally produced and

broadcast primarily for an audience of children 12 years old and younger.”²⁹ In stark contrast to the proposed marketing definitions, the FCC’s approach was fully vetted in a formal rulemaking process wherein the “vast majority and a broad cross-section of the commenters support[ed the] proposal.”³⁰ As the FCC explained, “[v]arious parties note that this formulation is well established, thereby providing certainty, and is consistent with legislative intent, industry practice, and the statutory purpose of protecting children.”³¹ Helpfully, the bounds of the FCC’s commercial limits have been shaped and defined by precedent developed over nearly two decades.

The contrast in clarity between the FCC’s existing regulatory regime and the instant proposal illustrates the cable industry’s concerns with the latter’s far-reaching scope and vague definitions.³² The fact that the proposed principles are intended to be “voluntary” does not ameliorate these concerns given that they are issued by four federal agencies with broad enforcement powers.³³ As a result, we strongly encourage the Working Group to withdraw the instant proposal and, in making recommendations to Congress, defer to industry-led voluntary measures already in place.

²⁹ 47 C.F.R. § 73.670, note 2; *see also* H.R. Rep. No. 101-385, at 8.

³⁰ *In re Policies and Rules Concerning Children’s Television Programming; Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report & Order, 6 FCC Rcd 2111 ¶ 3 (1991).

³¹ *Id.*

³² As explained herein, we do not support the audience composition approach to the proposed marketing definitions. However, we note that where the FTC has used such a standard before, it applied a much higher threshold. The FTC’s 900 Number Rule defines advertisements “directed to children” as those appearing during or adjacent to programming with an audience of more than 50% of children under the age of 12 or in a publication, radio show, or other media directed towards children under 12. *See* 16 C.F.R. § 308.3(e). For individuals under the age of 18, the Rule looks to an audience composition of more than 50% of individuals under age 18 (or if the advertisement appears in a publication, radio show, or other media directed towards individuals under 18), and merely requires a clear and conspicuous disclosure that the individual must have parental permission before calling. *See* 16 C.F.R. § 308.3(f).

³³ In contrast, while CFBAI member companies have agreed to limitations based on audience share, these limits are wholly voluntary and have been adopted and customized by the member companies themselves rather than imposed and enforced via government involvement.

B. Any Marketing Definitions Recommended to Congress Should Exclude Marketing to Adolescents.

As the *Notice* indicates, the Working Group recognizes the special concerns that arise when considering restrictions on advertising to adolescents aged 12 to 18.³⁴ These concerns include: (a) a lack of any scientific evidence justifying such measures, (b) significant developmental differences in teens' ability to understand and respond to marketing, and (c) heightened First Amendment concerns resulting from impacts on general audience programming.³⁵ Thus, the Working Group is considering recommendations that more narrowly define the scope of marketing to which the proposed nutrition principles would apply with respect to adolescents, for example, by limiting the scope to in-school marketing and social media.³⁶

The Working Group should decline to recommend any restrictions applicable to adolescents. There is insufficient evidence to show that television advertising or other marketing has a statistical relationship to adolescent obesity.³⁷ Moreover, any restrictions on marketing to adolescents will unduly impact programming with a substantial adult audience. For example, a television show meeting the 20% viewer share threshold to qualify as "targeted" to adolescents could still have as much as 80% adult viewership.

Further, the proposal to restrict social media activities relevant to this age group is arbitrary and unclear, particularly in so far as the definition of social media could encompass

³⁴ *Notice*, at 17.

³⁵ *See id.*

³⁶ *See id.*

³⁷ The Institute of Medicine's 2005 and 2006 reports focused on how children under 8 react to advertising and noted the distinction between the adolescent population of ages 12 to 18 and the population of children under 12. *See* Inst. of Med., *Food Marketing to Children: Threat or Opportunity*, *supra* note 5; Inst. of Med., *Preventing Childhood Obesity: Health in the Balance* (2005).

“the Internet, digital, word of mouth, and viral marketing.”³⁸ Even this purportedly more narrow definition could be construed as inclusive of all advertising and marketing available in these venues, and it could also potentially expand the scope of covered marketing to more traditional marketing campaigns with minimal social media elements (*e.g.*, a television advertisement that briefly references a Facebook page or website address). Because the Working Group does not define which activities would be considered “social media,” it is impossible to respond on the merits to this proposal other than to point to its current lack of clarity. Moreover, the Working Group does not point to any evidence that social media advertising or marketing influences teens, much less that it influences teens more significantly than any other venue of advertising or marketing.³⁹ In short, there is no evidentiary or other basis for choosing to focus a recommendation on limiting social media.

III. THE PROPOSED NUTRITION PRINCIPLES WOULD UNDULY RESTRICT FINANCIAL SUPPORT FOR PROGRAMMING.

As noted above, childhood obesity is widely acknowledged as a complex problem with a variety of contributing factors. Indeed, as the FTC’s statement accompanying the *Notice* declared: “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.”⁴⁰ In its haste to propose a possible solution to the complex issue of childhood obesity, the Working Group risks recommending a “voluntary” measure that is premature and may not

³⁸ *Notice*, at 17.

³⁹ See Inst. of Med., *Food Marketing to Children: Threat or Opportunity*, *supra* note 5, at 96 (noting that “growing independence and eating away from home, concern with appearance and body weight, the need for peer acceptance, and busy schedules all can impact eating patterns and food choices” among adolescents (defined as age 12 to 19)).

⁴⁰ FTC, *Statement of the Commission* *supra* note 5, at 1.

address the issue targeted, while it risks substantially harming the support of quality media products enjoyed by children, teenagers, and their families.

As acknowledged by the Institute of Medicine of the National Academies of Science (“IOM”), there is not sufficient evidence to establish a causal link between television advertising of food and childhood obesity.⁴¹ For example, the IOM has found that, to the extent some evidence of a possible relationship between television viewing of food advertising and obesity exists, such evidence weakens as the age of the children increase between the age groups of 2 to 5, 6 to 11, and 12 to 18.⁴² The lack of evidence of a firm causal relationship between advertising and childhood obesity, the broad application of the proposed nutrition principles, and the broad scope of the marketing definitions – described by the Working Group itself as “broadly defined to encompass virtually all kinds of promotional activities directed to youth”⁴³ – exacerbate the potential negative impact that the Working Group’s preliminary proposal would have on programming.

Like other media, the cable industry relies on advertising and marketing as important sources of revenue to support programming. As noted above, this revenue model has resulted in a rich slate of programming enjoyed by viewers of all ages, including children, adolescents, and their families. The Working Group must proceed cautiously in making recommendations that have the potential to disrupt the existing equilibrium by impacting funding for child- and adolescent-appropriate content, overburdening development of new creative content, or triggering other problematic effects. The preliminary proposal fails this test.

⁴¹ Inst. of Med., *Food Marketing to Children: Threat or Opportunity*, *supra* note 5, at 9, 306-09; *see also* J. Howard Beales III, *Television Advertising and Childhood Obesity* (Oct. 2010), *available at* http://www.gmaonline.org/file-manager/Health_Nutrition/Beales-Review-of-Recent-Studies.pdf.

⁴² *See* Inst. of Med., *Food Marketing to Children: Threat or Opportunity*, *supra* note 5, at 306-09.

⁴³ *Notice*, at 18.

The cable industry anticipates that the proposed nutrition principles, if implemented, would severely restrict potential advertising revenue from an entire sector of potential advertisers – namely food and beverage companies – on children’s and adolescents’ programs. The FTC itself acknowledges that “a significant percentage of the products currently marketed to children would not meet the proposed nutrition principles.”⁴⁴ Such an action risks negatively impacting the amount and quality of programming geared specifically to children or adolescents.⁴⁵ This potential result is of particular concern as it is likely to inadvertently drive children and adolescents to programs that have far less age-appropriate content and protections for those age groups. The proposed nutrition principles also create a disincentive for general audience networks to offer family-friendly or children’s programming.

CFBAI member companies have already adopted self-imposed restrictions on advertising to children under the age of 12, which are estimated to represent a vast majority of child-directed food and beverage spending.⁴⁶ These self-regulatory restrictions have already led to a reduction in revenues that support programming geared toward children. As the CFBAI restrictions have reduced the amount of advertising that appears in children’s programming from food and beverages, there have been efforts to attract and increase advertisements from other categories, with modest success in the areas of toys, games, and products intended for caregivers to offset

⁴⁴ FTC, *Statement of the Commission*, *supra* note 40, at 2.

⁴⁵ One recent analysis, assuming that the proposed guidelines would reduce current food and beverage advertising expenditures by just 20%, projects that advertising would drop by \$1.9 billion in 2011, leading to a decline of \$10.2 billion in sales and a loss of 21,000 jobs. See IHS Consulting, *Economic Impact Statement: Assessing the Economic Impact of Restricting Advertising for Products That Target Young Americans 2* (July 8, 2011), available at <http://www.ana.net/getfile/16535>.

⁴⁶ The CFBAI restrictions have had a significant impact. For example, earlier this year, the Grocery Manufacturers Association (“GMA”) and the Association of National Advertisers (“ANA”) announced the results of a new study that shows the average number of food and beverage advertisements that children 2 to 11 viewed on children’s programming fell by 50 percent between 2004 and 2010. See Press Release, Grocery Manufacturers Association, *New Research Shows Dramatic Changes in Food and Beverage Ads Viewed by Children* (Apr. 28, 2011), available at <http://www.gmaonline.org/news-events/newsroom/new-research-shows-dramatic-changes-in-food-and-beverage-ads-viewed-by-chil/>.

the lost funding. However, the demand for ad inventory within children's programming is limited and there are a limited number of products that are appropriate to advertise in children's programming.

In contrast to the anticipated effect of the Working Group's proposal, and taking into account the challenges noted above, self-regulation has an established record of success. Through the CFBAI, four food and beverage companies do not engage in any advertising primarily directed to children under 12, and the other 12 participating companies rely on responsible nutrition standards to govern their child-directed advertising activity.⁴⁷ Additionally, by 2009, some participants had agreed to significant expansions of the program, including: (a) increasing the advertising commitment to 100% so that all advertising primarily directed to children under 12 must be for healthier dietary choices or better-for-you products; (b) eliminating the healthy lifestyle messaging as a compliance option; (c) expanding the limitations on use of licensed characters in covered advertising; and (d) extending the media covered by the advertising principles.⁴⁸ Further updates to the CFBAI are expected in the near term, and the participants have committed to engage in regular reviews and updates.⁴⁹

Encouraging these types of self-regulatory programs, along with pro-social efforts by industry, will minimize disruption in the economic support for the production of quality entertainment and educational programming designed for children and adolescents. These types of truly voluntary efforts should be encouraged by the Working Group, and its report should

⁴⁷ See Council of Better Business Bureaus, *The Children's Food & Beverage Advertising Initiative in Action, A Report on Compliance and Implementation During 2009 1* (Dec. 2010), available at <http://www.bbb.org/us/storage/0/Shared%20Documents/BBBwithlinks.pdf>.

⁴⁸ See *id.*

⁴⁹ See Council of Better Business Bureaus, *BBB Children's Food and Beverage Advertising Initiative, Program Requirements Effective January 1, 2010* (Mar. 2010), available at <http://www.bbb.org/us/storage/16/documents/BBB%20CFBAI%20Program%20Requirements%20Fact%20Sheet.pdf>.

defer to their ongoing application and development. They represent a less restrictive means of achieving the stated aims of the Working Group, and one which avoids the regulatory uncertainty that accompanies government oversight of private industry efforts. This approach not only minimizes potential negative economic impacts and disincentives to advertise and invest in quality children’s programming, but it also lacks the constitutional infirmities of the instant proposal.

IV. THE PROPOSED “VOLUNTARY” NUTRITION PRINCIPLES VIOLATE THE FIRST AMENDMENT.

The Commission seeks comment on whether standards, if made mandatory, would raise problems under the First Amendment. For the reasons discussed below, they surely would be unconstitutional. But even if adopted as “voluntary” guidelines, the myriad ways in which advertisers might feel pressured or coerced by the government to comply would, for the same reasons, make even such voluntary guidelines highly likely to run afoul of the First Amendment. However well-meaning efforts to control food advertising to children and adolescents might be, “[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”⁵⁰ Here, the proposed guidelines would impose an expansive prophylactic rule banning any advertising (no matter what it said) of any product failing to meet the nutritional guidelines (no matter what it was) in any of the specified forums. The Government cannot come close to justifying that kind of sweeping regulation of speech under governing First Amendment standards.

A. The proposed guidelines would “seek[] to achieve [their] policy objectives through the indirect means of restraining certain speech by certain speakers,”⁵¹ that is, by banning

⁵⁰ *Sorrell v. IMS Health Inc.*, 2011 WL 2472796, at 16 (June 23, 2011), quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (opinion of Stevens, J.).

⁵¹ *Sorrell*, at 16.

advertisements for disapproved products in specified media with children as an audience.⁵² But, “[a]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁵³ Instead, “[t]he constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us”⁵⁴ In particular, “content-based regulations are presumptively invalid,”⁵⁵ and rarely upheld.⁵⁶

These same principles restrain government efforts to censor the content of commercial speech.⁵⁷ Whether or not less exacting scrutiny should be applied to limitations on commercial speech,⁵⁸ the fact remains that, at a minimum, “[u]nder a commercial speech inquiry, it is the [government]’s burden to justify its content-based law as consistent with the First Amendment.”⁵⁹ Here, there can be little question that the proposed guidelines are “content-based” in both intent and operation: they “impose[] a burden based on the content of speech [*i.e.*, advertisements about certain foods] and the identity of the speaker [*i.e.*, advertisers of the

⁵² Parts A through D of the following discussion address First Amendment concerns on the assumption that advertisers would be prohibited by law from marketing activities that do not comply with the proposed guidelines. See *Notice* at 24, Question 28. As we discuss, however, given the stated possibility that the guidelines might be imposed on advertisers against their will, there would also be substantial First Amendment concerns even if the guidelines were adopted by advertisers on a so-called voluntary basis. See Part E *infra*.

⁵³ *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010) (internal quotation marks omitted); *Brown v. Entertainment Merchants Ass’n*, 2011 WL 2518809, at 3 (June 27, 2011).

⁵⁴ *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991) (internal quotation marks omitted).

⁵⁵ *R.A.V. v. St Paul*, 505 U.S. 377, 382 (1992).

⁵⁶ See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000).

⁵⁷ See, e.g., *Sorrell*, at 11-15; *Thompson v. Western States Medical Center*, 535 U.S. 357, 366-68 (2002); *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

⁵⁸ See *Sorrell*, at 13.

⁵⁹ *Sorrell*, at 13; *Thompson*, 535 U.S. at 373.

affected products].”⁶⁰ The guidelines thus face the daunting task of overcoming “[t]he First Amendment’s hostility to content-based regulation”⁶¹

It does not matter, for these purposes, that children and adolescents may be the intended audience for the disfavored speech. Indeed, the Supreme Court has recently rejected an argument that it should “create a wholly new category of content-based regulation that is permissible only for speech directed at children.”⁶² In so doing, the Supreme Court made clear that, while Government “[n]o doubt . . . possesses legitimate power to protect children from harm, . . . that does not include a free-floating power to restrict the ideas to which children may be exposed.”⁶³ To the contrary, “[s]peech 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.”⁶⁴

To be sure, the Government does have authority to protect children, like anyone else, from speech that is actually or inherently misleading.⁶⁵ But that narrowly defined power is of little use to the Government here for at least three reasons. First, the *Notice* does not even claim that the Government is attempting to ban food advertisements to children and adolescents on the ground that they are misleading, either in general or with respect to minors in particular.⁶⁶

⁶⁰ *Sorrell*, at 10; see *Notice* at 5 (distinguishing “foods [that] would be appropriate and desirable to market to children” from “foods [that] industry should voluntarily refrain from marketing to children”).

⁶¹ *Consolidated Edison Co. of N.Y. v. Public Service Comm’n of N.Y.*, 447 U.S. 530, 537 (1980).

⁶² *Entertainment Merchants*, at 5.

⁶³ *Id.*

⁶⁴ *Id.*, quoting *Erzoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975).

⁶⁵ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (“[f]or commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading”) (internal quotation marks omitted).

⁶⁶ Indeed, the Children’s Advertising Review Unit (“CARU”) is an existing self-regulatory body which has, for more than 30 years, successfully addressed any limited instances of misleading or inappropriate advertising to children.

Rather, the proposed guidelines reflect a quite different concern: that the targeted advertisements, even if entirely truthful, might persuade children and adolescents to consume unhealthy foods to their detriment.⁶⁷ It is well established, however, that “the ‘fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech.”⁶⁸ In keeping with that principle, the Supreme Court has repeatedly rejected the view that “the force of speech can justify the government’s attempts to stifle it.”⁶⁹

Second, and in any event, a guidelines-based ban could not conceivably be supported on the theory that the prohibited food advertisements are misleading for the simple reason that the guidelines are far too broad. By their very terms, the guidelines prohibit any advertisement for any disapproved food product, regardless of what the advertisement might say or what form it might take. Furthermore, the guidelines would apply even where a disapproved product fails to meet the nutritional standards by a small, perhaps inconsequential, margin. And the guidelines limit marketing across a wide range of platforms for speech, ranging from television to the internet, to sponsorship of sports teams, and even to “philanthropic activity tied to branding opportunities,”⁷⁰ all defined according to an arbitrary mixture of objective and subjective factors. It is simply not possible that every advertisement for every product in every one of those contexts could be properly regarded as misleading, even considered solely from the perspective of children.

⁶⁷ See *Notice* at 11 (“foods marketed to children should also be those with minimal quantities of nutrients that could have a negative impact on health and weight”).

⁶⁸ *Sorrell*, at 16, quoting *Thompson*, 535 U.S. at 374.

⁶⁹ *Sorrell*, at 16; *Thompson*, 535 U.S. at 374; *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976). The Court in *Sorrell* further noted that “[t]hose who seek to censor or burden free expression often assert that disfavored speech has adverse effects.” *Sorrell*, at 16. Despite that familiar kind of justification, the fact “[t]hat the [Government] finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.” *Id.*

⁷⁰ *Notice* at 18.

Thus, even viewed (counter-factually) as an effort to deal with misleading speech, the proposed guidelines exhibit the flaw common to virtually all categorical bans on speech: they lack the precision required by the First Amendment. The Supreme Court has made clear that, if extensive prophylactic restrictions were tolerated, “the protection afforded commercial speech would be reduced almost to nothing; comprehensive bans on certain categories of commercial speech would be permitted as a matter of course.”⁷¹ Thus, while the Government may challenge specific instances of misleading speech,⁷² it cannot do what the proposed guidelines would do, that is, treat all speech within a broadly defined class as indistinguishable and then presume that any example of that speech is invariably misleading. Just as for regulation of noncommercial speech, that kind of fact-finding in advance is “inconsistent with [the] Court’s general approach to the use of preventative rules in the First Amendment context.”⁷³

Third, even if the Government could establish that all advertising of disapproved products is somehow inherently misleading, that showing would still not solve the First Amendment problem, because the proper remedy in that case would be to order correction of the misleading speech, not prohibit the speech altogether, as the guidelines do.⁷⁴ While attempts to compel speech may themselves run afoul of the First Amendment,⁷⁵ the Supreme Court has granted at least some leeway for Government to mandate additional disclosures in order to counteract the effects of misleading commercial speech.⁷⁶ Here, for example, the Government,

⁷¹ *Edenfield v. Fane*, 507 U.S. 761, 777 (1993).

⁷² *See, e.g., Illinois ex rel. Madigan v. Telemarketing Assoc, Inc.*, 538 U.S. 600 (2003).

⁷³ *Edenfield*, 507 U.S. at 777.

⁷⁴ *See, e.g., Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (requiring “fit between the [Government’s] ends and the means chosen to accomplish those ends”) (internal quotation marks omitted); *Central Hudson*, 447 U.S. at 566.

⁷⁵ *See Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 797-801 (1988).

⁷⁶ *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S.Ct. 1324, 1339-41 (2010); *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

upon a proper showing, might be able to require advertisers to make disclaimers about the health benefits of certain foods, or perhaps even to include limited nutritional information in their materials, both of which, while burdensome, would nevertheless preserve the right to speak in the first place. Thus, even though it is hard to imagine that all advertisements barred by the proposed guidelines could be treated as misleading, even if they were, the remedy of banning them would go much further than necessary to serve the Government's particular interest in assuring the flow of accurate commercial information.

B. The guidelines fare no better if judged solely as an attempt to serve the particular interest that the Government does advance: promoting healthy eating habits for children and adolescents. At the outset, the Government must confront troublesome causation questions about the strength of the connection between the advertisements minors see and the foods they eat. Even assuming that the advertisements in question invariably stimulate the interest of children and adolescents in eating certain foods,⁷⁷ common experience suggests that virtually all of the food buying for children 2-11, and much of the food buying for adolescents 12-17, is done, not by children and adolescents themselves, but by their parents or other adults. The presence of that intervening adult decision-maker would make it far more difficult for the Government to establish a critical element of its pro-regulation argument: that advertising actually causes children and adolescents to eat unhealthy foods (rather than just ask for them). Many parents presumably would prefer not to be urged to buy the advertised products at all, but, with or

⁷⁷ *But see Notice* at 17 (noting that the 2006 Institute of Medicine study “reported . . . that the evidence was insufficient on whether television advertising influenced the diets of adolescents”).

without the Government's involvement, they retain authority, in most cases, to make the final choice.⁷⁸

There is also the difficulty that, in seeking to limit speech to children and adolescents, the guidelines would put substantial curbs on the availability of protected speech to adults.⁷⁹ Although the *Notice* alludes to this concern,⁸⁰ the guidelines still prohibit advertisements for disapproved foods in circumstances where as many as 80 percent of the audience consists of adults (*i.e.*, where adolescents make up 20 percent), or where activities are targeted to children regardless of the percentage of adults.⁸¹ This kind of wide-ranging restriction again crosses into forbidden territory. The Supreme Court has repeatedly said that “the government may not reduce the adult population . . . to . . . only what is fit for children.”⁸²

The Government would also have to deal with the fact that there are many less-restrictive ways to pursue the objective of improving minors' eating habits. Most obviously, the Government could try to achieve its public health goals by directly regulating the nutritional content of foods that it regards as unhealthy. Indeed, it is striking that, in its effort to improve the eating habits of children and adolescents, the Government has chosen to employ the indirect means of censoring speech, rather than the more direct (and constitutionally less intrusive) means of requiring foods to meet designated nutritional standards. The Supreme Court has expressly questioned the practice of restricting speech instead of directly regulating conduct, stating that it

⁷⁸ The causal relationship between food advertisements and obesity (as opposed to better eating habits) is even more tenuous. Given the number of factors that can contribute to obesity (*e.g.*, physiological makeup, lack of exercise), the decision to single out *speech* about allegedly unhealthy foods seems especially problematic.

⁷⁹ *See, e.g., Reno v. ACLU*, 521 U.S. 844, 875 (1997) (“the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults”).

⁸⁰ *See Notice* at 18.

⁸¹ *See id.* at 18-19.

⁸² *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989) (internal quotation marks omitted); *Reno*, 521 U.S. at 875; *Lorillard Tobacco*, 533 U.S. at 564.

“review[s] with special care regulations that entirely suppress commercial speech in order to pursue a non-speech-related policy.”⁸³ And that is for good reason: not only do such backdoor attempts to control behavior distort the marketplace for speech – enough in itself to justify their invalidation – but they carry with them the potential side-effect of “screen[ing] from public view the underlying governmental policy.”⁸⁴

Even within the marketplace for speech, there are less restrictive alternatives to imposing far-reaching prohibitions on advertising. In particular, the Government can always increase the prominence of its own voice in the marketplace, making expanded efforts to educate parents and children about the importance of proper nutrition. If the Government believes that food advertisements are producing harmful effects, “the remedy to be applied is more speech, not enforced silence.”⁸⁵ More information, not less, is “[t]he preferred First Amendment remedy.”⁸⁶

C. It is also important to recognize that the guidelines’ impact on speech would not be limited to censoring advertisers’ commercial speech, oppressive as that might be. Given the fact that advertising supports a great deal of noncommercial speech (including television programming) for children and adolescents, any law suppressing the former will necessarily impose a burden on the amount or quality of the latter.⁸⁷ That effect must be weighed in the First Amendment balance as well.

It is, of course, true that the guidelines do not explicitly restrict the content of programming for children and adolescents, but the impact on such speech is both potentially

⁸³ *Central Hudson*, 447 U.S. at 566 n.9.

⁸⁴ *Central Hudson*, 447 U.S. at 566 n.9; *see also* 447 U.S. at 575 (Blackmun, J., concurring in judgment) (expressing concern that “the State’s policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them”).

⁸⁵ *Texas v. Johnson*, 491 U.S. 397, 419 (1989) (internal quotation marks omitted).

⁸⁶ *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

⁸⁷ *See supra* Part III.

severe and entirely foreseeable. As the Supreme Court has observed, “[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech.”⁸⁸ Here, the Working Group has not just proposed to restrict certain kinds of advertising, it has chosen to define the prohibited advertising primarily in terms of the particular kind of speech that it supports. For example, the *Notice* expressly states that the use of “audience share” criteria is intended “to ensure capturing most programming or publications targeted to children or adolescents.”⁸⁹ Similarly, the *Notice* explains that “[f]or movies, videos, and video games, ratings under industry codes [which are typically age-specific] are also included in the proposed criteria.”⁹⁰ The guidelines thus establish a necessary correlation between the banned advertising and the kinds of speech that are especially appealing to minors.

It seems probable, if not unavoidable, that, by eliminating much of the financial underpinning for youth-oriented “programming and publications,” or for certain kinds of “movies, videos, or video games,” the proposed guidelines will negatively affect the supply and quality of those materials. For example, cable program networks such as Disney Channel, Nickelodeon, and Cartoon Network currently provide a significant amount of the television and other programming that is viewed extensively by children and adolescents, and often by their parents. Yet, each of those networks relies heavily upon advertising, sponsorships, and other marketing revenues to support the creation and presentation of that material. If that support is significantly reduced – as it seems likely to be⁹¹ – the impact will be felt both by the creators and

⁸⁸ *Citizens United v. FEC*, 130 S.Ct. 876, 905 (2010).

⁸⁹ *Notice* at 18.

⁹⁰ *Id.*

⁹¹ *See supra* Part III.

distributors of programming and, ultimately, by the viewers, young and old, that enjoy that material.⁹²

Furthermore, the guidelines would have the odd effect of setting up several categories of Government-created discrimination among various kinds of speech directed to children. For example, if the creators of material aimed at children depend upon the backing of advertisers of disapproved products, they will face the just-described risk of having to alter their speech as a result of diminished resources, a problem that would not be presented for programmers and publications – say, public television stations or book publishers – that generate the bulk of their revenues without advertising. By the same token, programmers that appeal to audiences containing more than the specified percentage of children or adolescents will be subjected to burdens on their speech, while programmers with a lower percentage (though, perhaps, a higher absolute number) of children and adolescents in the audience will not. These newly formed classes of favored and disfavored speakers would all be the direct consequence of the Government’s unjustified decision to intervene in the private marketplace in order to dictate what advertisements can and cannot be shown.

D. Mandatory guidelines to limit food advertising thus would fail any possibly applicable First Amendment test, whether it be strict scrutiny or some less demanding review for commercial speech. But that is not the guidelines’ only First Amendment infirmity: at least with respect to the subjective definitions of marketing to children and adolescents, they are also hopelessly vague. The Supreme Court has made clear that “[t]he vagueness of [a content-based] regulation raises special First Amendment concerns because of its obvious chilling effect on free

⁹² Similarly, this could serve as an economic disincentive or barrier to entry for new competitors to enter the marketplace and develop quality children’s and adolescent programming.

speech,”⁹³ a principle that fully “appl[ies] to laws that regulate speech for the purpose of protecting children.”⁹⁴ Yet, in setting forth criteria for determining whether speech is being marketed to children and adolescents, the *Notice* relies on a “set of subjective indicators,”⁹⁵ including such amorphous concepts as “use of language to appeal particularly to children or teenagers,” or “child-or-teen-oriented themes, activities, or incentives.”⁹⁶ In many cases, it would be mere guesswork for speakers to determine whether their speech fell within those opaque definitions. A ban on speech that depends on such uncertain standards does not mark out the boundaries of protected speech with the “narrow specificity” that the First Amendment demands.⁹⁷

E. Finally, it is important to note that the guidelines would raise serious First Amendment concerns even if they were simply agreed to by the relevant advertisers instead of being enacted into law via legislation or regulation. Food producers and sellers have a general First Amendment right to advertise to audiences of their own choosing, and, while they are free to waive that right, it is critical that such a waiver, like the waiver of any constitutional right, be “knowing, intelligent, and voluntary”⁹⁸ Here, given the looming threat of potentially unconstitutional lawmaking as the alternative to voluntary compliance, it is highly possible that any agreement by advertisers to limit their advertising would be the product of implicit Government coercion, not their own independent judgment.

⁹³ *Reno*, 521 U.S. at 871-72.

⁹⁴ *Entertainment Merchants*, at 11 (Alito, J., concurring in judgment).

⁹⁵ *Notice* at 19.

⁹⁶ *Id.*

⁹⁷ *See, e.g., NAACP v. Button*, 371 U.S. 415, 433 (1963).

⁹⁸ *Maryland v. Shatzer*, 130 S.Ct. 1213, 1219 (2010).

The Government cannot avoid First Amendment scrutiny merely by declining to give sought-after standards the force of law, while pressuring citizens to abide by them anyway. The Supreme Court has declared that, in assessing whether private action is truly voluntary, it will “look through forms to the substance” of the underlying circumstances.⁹⁹ Thus, in *Bantam Books*, the Court found that, while a book distributor admittedly “was ‘free’ to ignore [a state Commission’s notices about ‘objectionable material’], in the sense that his refusal to ‘cooperate’ would have violated no law,”¹⁰⁰ his “compliance with the Commission’s directives was not voluntary.”¹⁰¹ That commonsense notion – that the threat of Government intervention can turn seemingly voluntary acts into involuntary ones – likewise applies where Government raises the prospect of burdensome regulatory proceedings as an alternative to voluntary compliance with its proposed agenda.¹⁰²

Given the fact that no agreement has been reached here, it would be premature to speculate about whether industry adoption of a guidelines-based program limiting food advertising to children or adolescents would be truly voluntary. But the threat of constitutionally suspect legislation mandating such limits plainly presents a strong risk of implicit coercion. In addition, the four government agencies involved in designing these guidelines have broad regulatory authority over the manufacturing, safety, packaging, and marketing of food and beverage products specifically, and advertising more generally. Within the statutory and regulatory authority of these agencies is the power to investigate and subpoena documents to

⁹⁹ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

¹⁰⁰ *Id.* at 68.

¹⁰¹ *Id.*; see also *id.* (“[p]eople do not lightly disregard public officers’ thinly veiled threats to institute criminal proceedings against them if they do not come around . . .”).

¹⁰² See *Writers Guild of America, West, Inc. v. FCC*, 423 F.Supp. 1064, 1140 (1976) (finding that “adoption of the [television networks’] family viewing policy was caused substantially by government pressure”).

assess company behavior and practices,¹⁰³ which adds to industry concern and the potential coercive impact of “voluntary” standards encouraged by government. If advertisers do not accede to the Government’s plan, they may face, at the very least, the forbidding prospect of extended and costly proceedings to vindicate their First Amendment rights, as well the possible displeasure of Government officials for asserting those rights in defense of speech that the Government views as harmful. Those predictable consequences tilt the constitutional scale. In the end, pervasive government pressure – especially if exerted in support of guidelines of questionable constitutionality – is incompatible with the idea of a voluntary surrender of First Amendment freedoms.¹⁰⁴

* * *

In sum, the proposed guidelines would face serious, if not insurmountable, First Amendment hurdles. The guidelines are the paradigm of broad prophylactic rules that seek to control behavior by denying consumers truthful, non-misleading information, and the heavy burden imposed by the rules would fall on noncommercial, as well as commercial, speech. No Government interest can justify that kind of pervasive interference with private choices. So long

¹⁰³ The FTC recently relied on this power to demand production of expenditure records from more than 40 food and beverage companies in an effort to assess all expenditures made to market food products to anyone under the age of 18. *See Notice* at 16 n.44 (noting that 44 food and beverage companies provided responses “to compulsory orders issued by the [FTC]”).

¹⁰⁴ *See Writers Guild*, 423 F.Supp. at 1140 (“[t]he adoption of the [television networks’ family viewing] policy was not the kind of independent decision required by the First Amendment”); *see also Ancheta v. Watada*, 135 F.Supp. 2d 1114, 1126 (D. Hawaii 2001) (“[t]he State cannot constitutionally force its candidates for public office to choose between alternative perils”).

as their speech is not misleading, advertisers of food products, like other speakers protected by the First Amendment, should be left to decide for themselves what they will say and to whom they will say it. In the end, those judgments “are for the individual to make, not for the Government to decree”¹⁰⁵

¹⁰⁵ *Playboy Entertainment Group*, 529 U.S. at 818.

CONCLUSION

As described herein, the cable industry strongly supports efforts to improve the health of our nation's children and, through the efforts of many individual companies, has made a significant contribution to the fight against childhood obesity. However, there is no reason to believe that the proposed nutrition principles, if implemented, would help to address children's health concerns. Meanwhile, implementation of the proposed nutrition principles would result in significant unintended consequences that undermine the support of quality programming and would raise significant constitutional questions. NCTA urges the Working Group to withdraw its proposed nutrition principles and engage in further study before finalizing any recommendations to Congress. In that effort, the Working Group should ultimately take note of, and defer to, voluntary measures such as the CFBAI to limit the marketing of certain food and beverage products to children.

Respectfully submitted,

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