

## Summary of Testimony of Beth Johnson

- The food marketing restrictions proposed by the Interagency Working Group (IWG) contradict established nutrition science, ban marketing of many healthy products, and impact thousands of food and farm jobs.
- The IWG failed to produce any evidence that the Administration's proposed restrictions would improve diet and failed to provide any estimate of costs to farmers, food companies, advertisers, broadcasters, charitable organizations, or consumers.
- The IWG's food marketing restrictions contradict established nutrition science. In particular:
  - Nutrition standards proposed by the IWG are inconsistent with and stricter than the standards used for foods sold in public schools and foods offered through federal feeding assistance programs;
  - Nutrition standards proposed by the IWG conflict with the 2010 Dietary Guidelines for Americans.
- The IWG's proposed nutrition standards would effectively ban marketing for many foods that meet the FDA definition of "healthy," including most soups, cereals, meats, breads, cheese and yogurt.
- As a result of the Children's Food and Beverage Advertising Initiative, all marketing to children is for nutritious foods that meet science-based nutrition standards. The IWG ignores the progress that has been made by industry and fails to provide any evidence that the IWG's standards would produce additional public health benefits.
- Banning marketing of most foods would have significant impacts on farm and food jobs and on charitable organizations. But, the Administration has not completed an estimate of benefits and costs.
- The IWG proposal is designed to drive food *reformulation*, not limit food marketing.
- We urge the Administration to withdraw the food marketing restrictions proposed by the IWG and to instead complete a study of the benefits and costs of this proposal, as Congress directed and as the President has pledged in two recent Executive Orders.

**Statement by Beth Johnson**  
**On behalf of the Grocery Manufacturers Association**  
**Before the House Committee on Energy and Commerce**  
**Subcommittee on Commerce, Manufacturing, and Trade**  
**Subcommittee on Health**  
**On**  
**Food Marketing: Can ‘Voluntary’ Government Restrictions**  
**Improve Children’s Health**  
**October 12, 2011**

Thank you for the opportunity to testify. My name is Beth Johnson and I am testifying today on behalf of the Grocery Manufacturers Association.

The food marketing restrictions proposed by the Interagency Working Group (IWG) contradict established nutrition science, ban marketing of many healthy products, and impact thousands of food and farm jobs. Because the IWG failed to conduct an analysis of benefits and costs, the IWG failed to produce any evidence that the Administration’s proposed restrictions would improve diet and failed to provide any estimate of costs to farmers, food companies, advertisers, broadcasters, charitable organizations, or consumers. We believe the Administration should withdraw their proposed marketing restrictions and should instead complete a study and report to Congress, as Congress explicitly directed in the FY 2009 Omnibus Appropriations Act.

We are especially troubled that the IWG’s food marketing restrictions contradict established nutrition science. In particular, the nutrition standards proposed by the IWG are inconsistent with and stricter than the standards used for foods sold in public schools and foods offered through federal feeding assistance programs. What’s more, the nutrition standards proposed by the IWG conflict with the 2010 Dietary Guidelines for Americans (DGAs). In particular, the standards proposed by the IWG ignore the important role of calories in weight management, set different intake levels for sodium

than the DGAs, and contradict dietary guidance with respect to shortfall nutrients. A more detailed critique is attached.

As a result of these contradictions, the IWG's proposed nutrition standards would effectively ban marketing for many foods that meet the FDA definition of "healthy," including most soups, cereals, meats, breads, cheese and yogurt. Only 12 of the 100 most commonly consumed foods in America could be marketed under this proposal and only three of those items are packaged foods: apple sauce with no sugar added, plain non-fat yogurt, and frozen vegetables. By implication, the IWG's proposal would lead consumers to conclude that many healthy products promoted for consumption by children by other government programs are unhealthy.

Many products which meet both the regulatory and any common sense definition of healthy could no longer be advertised to audiences primarily comprised of adults, including whole grain bread, chicken noodle soup, and a peanut butter and jelly sandwich. Nearly all food advertising on children's shows would be prohibited even though the majority is currently for food which the FDA defines as "healthy."

As a result of the Children's Food and Beverage Advertising Initiative, all marketing to children by CFBAI participants is for nutritious foods that meet science-based nutrition standards. The adoption of these standards in 2006 has dramatically changed the marketplace: the number of advertisements for food and beverages viewed by children on children's programming has fallen by half and advertisements for cookies, candy and soda have largely disappeared.

Nevertheless, the IWG proposal completely ignores the progress that has been made by industry and fails to provide any evidence that the IWG's standards would produce additional public health benefits. What's more, the IWG produces no evidence linking advertising to obesity. In 2005, the Institutes of Medicine found there was insufficient evidence to link advertising to obesity and the IWG has produced no peer-reviewed studies which draw such a connection.

Banning marketing of most foods would have significant impacts on farm and food jobs and on charitable organizations. But, the Administration has not completed an estimate of

benefits and costs, despite explicit congressional direction to complete a study and despite two recent executive orders which require government proposal to “take into account benefits and costs” and to be “based on best available science.” A recent study by IHS Global Insight, which used an economic model relied upon by Federal agencies, concluded that the IWG’s proposed restrictions would have a significant and negative impact on the U.S. economy.

Nevertheless, the IWG has not completed a study and presented no evidence that these marketing restrictions would improve public health. We find it equally troubling that the IWG proposal is designed to drive food *reformulation*, not limit food marketing. As the IWG notes, one of the “underlying objectives” of their proposal is to “create foods” that are consistent with the IWG’s nutrition standards. In recent years, food manufacturers have changed the recipes of more than 20,000 products to reduce calories, sodium, saturated fat, and sugars. But, the IWG proposal ignores recent reformulation efforts and fails to consider the impacts of proposed reformulation on price, palatability, or safety.

We urge the Administration to withdraw the food marketing restrictions proposed by the IWG and to instead complete a study of the benefits and costs of this proposal, as Congress directed and as the President has pledged in two recent Executive Orders.

**Comment of the Grocery Manufacturers Association  
on  
Interagency Working Group on Food Marketed to Children:  
Proposed Nutrition Principles: FTC Project No. P094513**

**I. Introduction**

Based in Washington, D.C., the Grocery Manufacturers Association (GMA) is the voice of more than 300 leading food, beverage and consumer product companies that sustain and enhance the quality of life for hundreds of millions of people in the United States and around the globe. The food, beverage and consumer packaged goods industry in the United States generates sales of \$2.1 trillion annually, employs 14 million workers and contributes \$1 trillion in added value to the economy every year.

Obesity rates have been rising in the population since the government began reporting periodic nutrition and health surveys in 1970s. In the last decade, the trends had reached levels that caused public health officials to call for action to arrest them. The food and beverage industry responded by taking a leadership role in the fight against obesity. Since 2004, America's food and beverage companies have introduced more than 20,000 new products and packages, and they have promoted healthy lifestyle choices in the marketplace, the workplace and schools. GMA and its members have been providing consumers with the products, tools and information they need to achieve a healthy diet and an active lifestyle.

**Summary of Comments**

GMA appreciates the opportunity to provide the Interagency Working Group (IWG) – and therefore representatives of the Food and Drug Administration (FDA), United States Department of Agriculture (USDA), Federal Trade Commission (FTC) and Centers for Disease Control and Prevention (CDC) – with feedback regarding its proposed nutrition principles for foods marketed to children ages 2-17. While GMA and its member companies support the IWG's goal of improving children's diets and addressing the high rates of childhood obesity in America, we oppose the proposed standards in the strongest possible terms, and we urge that they be withdrawn. As the following comments illustrate, the IWG proposal is **not** evidence-based, it is **not** aligned with existing federal food and nutrition programs and guidance, and the proposed nutrition principles are unworkable. Perhaps most importantly, the proposal fails to identify evidence that, if implemented, the recommended nutrition principles would have any significant effect on childhood weight reduction and obesity rates. In addition, the proposed standards would disallow marketing of many foods that are known to contribute to the health of American children.

**GMA's comments focus on four specific areas:**

- 1) The IWG proposal is fundamentally flawed, as it is unlikely to combat obesity and would prevent marketing of many types of foods that should be encouraged in the healthy, balanced diets of children.**

By focusing on the delivery of food groups and failing to consider the importance of calories and portion sizes, the proposed IWG nutrition criteria fail to address the key cause of obesity.

- 2) The proposed IWG nutrition standards are arbitrary, have no basis in scientific evidence, and conflict with federal dietary guidance and nutrition policy.**

While the IWG asserts that its proposed nutrition standards are based on federal dietary guidance and policies, and FDA regulations, numerous conflicts with those established and proposed policies are evident. GMA's comments discuss conflicts with the 2010 Dietary Guidelines for Americans (DGA), Special Supplemental Nutrition Program for Women, Infants and Children (WIC) regulations, Institute of Medicine (IOM) recommendations; nutrition criteria for participation in Healthier U.S. Schools Challenge (HUSSC); USDA's 2011 proposed rules for the National School Lunch Program (NSLP) and the School Breakfast Program (SBP), and regulatory definitions for the "healthy" nutrient content claim (FDA and USDA-FSIS).

- 3) The proposed IWG nutrition standards are extreme and reflect an unwarranted bias against prepared, value-added foods.**

The IWG proposal arbitrarily and without any basis in science would characterize many foods universally recognized as part of a healthful diet as "foods of little or no nutritional value." This includes many commonly consumed foods that the federal government and even many food industry critics, recommend as foods to be encouraged in a healthful diet.

- 4) The proposed IWG nutrition standards are poorly elaborated, and are unworkable.**

In order to build healthful diets, all consumers, including parents, need to be aware of the types of foods that contribute to such a diet. The proposed IWG nutrition standards are so restrictive that they could not be applied by large portions of the food industry, including companies that manufacture products that make valuable contributions to a healthful diet. Food and beverage products such as whole wheat bread, breakfast cereals, reduced fat yogurt, canned vegetables, and bottled water could not be promoted for consumption by children. The proposed nutrition standards also reflect inadequate consideration of technical details.

Throughout the nutrition standards proposal, the IWG has ignored product acceptance and technical feasibility factors. The food and beverage industry has provided comprehensive comments and evidence that the product reformulation goals that appear to be driving the IWG

guidelines can only be successful if the products are well accepted in the marketplace by consumers. Successful acceptance hinges on several factors that act concomitantly, including taste and palatability, affordability, technical feasibility, safety, and accessibility. Sufficient recognition and understanding of the importance of these factors is absent from the IWG proposal. Also, the “one size fits all” approach adopted by the IWG will not work. Using such an approach may result in the elimination of classes of healthful foods that should be promoted for consumption by children. This directly contradicts the IWG’s stated goal of shifting the marketing mix to include a greater number of products with improved nutritional profiles.

The IWG’s proposed nutrition principles place undue emphasis on restricting certain foods and nutrients rather than building healthful diets over time. This focus is short-sighted and lends itself to a “good food” vs. “bad food” approach that is not science-based. Banning the marketing of individual foods that exceed an arbitrary set of parameters without regard to total diet over time is neither logically nor scientifically defensible. In addition, the use of this type of approach fails to consider the American Dietetic Association (ADA) position that “the total diet or overall pattern of food eaten is the most important focus of a healthful eating style. All foods can fit within this pattern, if consumed in moderation with appropriate portion size and combined with regular physical activity. The ADA strives to communicate healthful eating messages to the public that emphasize a balance of foods, rather than any one food or meal.”<sup>1</sup> The 2010 Dietary Guidelines for Americans (DGA) and MyPlate also adopt and represent the total diet concept by recommending types and amounts of foods to eat over time without prescribing rigid guidance.

The stated goal of the IWG proposal is to reduce the amount of marketing of foods to children that are “of minimal nutritional value,” and increase healthier choices. The proposal characterizes all food that do not meet the standards as food “of minimal nutritional value”—a label that hardly fits such nutritious and nutrient-dense foods as ready-to-eat cereal, yogurt and whole wheat bread. The approach taken by the IWG in its proposal instead would result in an outright prohibition of advertising and promotion for nutritionally valuable, nutrient-dense, low calorie foods, and would remove incentives to improve food product promotion through product reformulation and portion size information.

In several places in the proposed nutrition standards, the IWG has demonstrated that it has not carefully considered the potential impacts of these criteria on the formulation and marketing of foods. For all the reasons noted, which are elaborated further in these comments, GMA and its member companies urge the IWG to withdraw the proposed nutrition principles.

## **II. The IWG Proposal Is Fundamentally Flawed, as It Is Unlikely to Combat Obesity and Would Prevent Marketing of Many Types of Foods that Should Be Encouraged in the Healthy, Balanced Diets of Children**

By focusing on the delivery of food groups and overlooking the importance of calories and portion sizes, the proposed IWG nutrition criteria fail to address the key cause of obesity. The

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<sup>1</sup> Position of the American Dietetic Association: Total Diet Approach to Communicating Food and Nutrition Information. *JADA*. Volume 107, Issue 7, Pages 1224-1232 (July 2007).

consistent, science-based conclusion of the federal government and its agencies focused on public health and nutrition is that obesity is fundamentally about the balance between “calories-in” and “calories-out.” Both the CDC and FDA advise that “calories count” and this is the message that both agencies communicate to the public.<sup>2</sup> In its 2004 report “Calories Count: Report of the Working Group on Obesity,” FDA has noted that obesity fundamentally represents an imbalance between calories consumed and calories expended. FDA further states, “Although there is much discussion about (1) the appropriate makeup of the diet in terms of relative proportions of macronutrients (fats [lipids], carbohydrates, and protein) that provide calories and (2) the foods that provide these macronutrients, for maintenance of a healthy body weight it is the consumption and expenditure of calories that is most important.”<sup>3</sup> Despite the scientifically-based conclusions of federal public health bodies, as well as Congress’ directive to the IWG that it consider calories, the IWG has chosen to ignore this fundamental element.

The IWG has offered no evidence to suggest that its proposal will have any effect in reversing obesity trends. It is a consensus view that calories and portion sizes are key driving factors in the development of obesity. By not accounting for calories and portion size, the proposed IWG nutrition standards would limit the promotion of foods that can support healthier body weight. The FTC Bureau of Economics has noted that food advertising to children has declined while obesity rates have risen. GMA suspects that the IWG proposed nutrition standards could impede efforts to combat obesity, as they would ban the advertising of relatively nutrient-dense but non-calorie-dense foods that contribute valuable nutrition to consumers, and can help to move intake patterns toward healthier body weight outcomes – foods such as whole wheat bread, breakfast cereals, soups, reduced fat yogurt, reduced fat cheeses, and canned vegetables.

### **III. The Proposed IWG Nutrition Standards Are Arbitrary, Have No Basis in Scientific Evidence, and Conflict with Federal Dietary Guidance and Nutrition Policy**

Although the IWG asserts that its proposed nutrition standards are based on federal dietary guidance and policies, and on FDA regulations, numerous conflicts with those established and proposed policies are evident. Conflicts exist between the proposed nutrition standards and the 2010 DGA, WIC regulations, nutrition criteria for HUSSC participation; USDA’s 2011 proposed rules for the NSLP and the SBP, and regulatory definitions for the “healthy” nutrient content claim under both FDA and USDA-FSIS.

#### *2010 Dietary Guidelines for Americans*

The DGA are intended to “establish the scientific and policy basis for all federal nutrition programs, including research, education, nutrition assistance, labeling, and nutrition promotion.” Furthermore, it is required by law that all federally-issued dietary guidance for the general public

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<sup>2</sup> For CDC messages, see “Healthy Weight” information on energy balance at <http://www.cdc.gov/healthyweight/calories/>

<sup>3</sup> FDA, “Calories Count: Report of the Working Group on Obesity,” March 12, 2004. Section II A, Foundations of this Report: Scientific Principles.

be consistent with the DGA.<sup>4</sup> Thus, the proposed nutrition principles contained in the 2011 IWG proposed nutrition standards are required to align with the 2010 DGA, which apply to Americans aged 2 years and older.

Upon careful review of the IWG proposal, it is clear that several important inconsistencies exist between the 2010 DGA and 2011 IWG proposal:

- **Absence of Caloric Targets:** The IWG proposal disregards the 2010 DGA over-arching concept that energy balance over time is the key to weight management and that obesity is primarily a result of the over-consumption of calories in relation to the calories expended through physical activity by an individual. By omitting this important fact, the IWG proposal fails to provide an effective strategy for combating childhood obesity, and presents proposed guidelines that are fundamentally flawed.

Portion size is noticeably missing from the proposed principles. The 2010 DGA emphasize the importance of portion size for weight management. Eating excess amounts of any type of food, including those that conform to the IWG proposed nutrition principles, can lead to obesity and overweight. The IWG proposal dismisses calories and portion sizes and instead prescribes extremely limiting food group and nutrient criteria, resulting in the exclusion of promotion for many nutrient dense, low calorie foods.

- **Consideration of Future DGA:** The IWG proposed nutrition standards would span ten years of step-wise nutrient content restrictions, particularly in the case of sodium, with final sodium targets to be achieved by 2021. This incremental restriction ignores the consideration and release of the next two editions of the DGA, due in 2015 and 2020. In the case of the 2020 DGA, the IWG proposed nutrition standards anticipate scientific research that is not yet undertaken, much less evaluated by experts in nutrition. The IWG proposal does not account for future development of the DGA, and fails to plan for a process to adjust the nutrition standards to reflect potential changes to nutrition science. This prospective approach clearly illustrates that science is not at the foundation of the proposed IWG nutrition standards.
- **Nutrients to Encourage:** The 2010 DGA clearly identify four nutrients of public health concern, or nutrients that are recommended for increased consumption in the U.S. These four “shortfall” nutrients are potassium, vitamin D, calcium and fiber. In addition, the 2010 DGA specify that “fortification of certain foods may be advantageous in specific situations to increase intake of a specific vitamin or mineral. In some cases, fortification can provide a food-based means for increasing intake of particular nutrients or providing nutrients in highly bioavailable forms.”<sup>5</sup> In other words, fortification allows for shortfall nutrients to be formulated into products consumers will eat. While food group contributions are outlined in the IWG proposal via Nutrition Principle A, specific recommendations for beneficial nutrients are omitted.

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<sup>4</sup> 2010 Dietary Guidelines Backgrounder, available at: <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/Backgrounder.pdf>.

<sup>5</sup> 2010 Dietary Guidelines, Chapter 5, page 49.

This omission is important when evaluating food groups such as grains, fruits and vegetables. Within a food group, there are natural variations and differences in nutrient composition. For example, sources of dietary fiber include vegetables, fruits and whole grains. Bran, although not a whole grain, is an excellent source of dietary fiber. Likewise, bananas and cauliflower provide potassium but little vitamin A and C. Also, some nutrient dense foods (e.g., breakfast cereal), that fall short of meeting Principle A contribute significant amounts of certain nutrients to a child's diet. Through the proposed nutrition principles, the IWG appears to disregard the important fact that products make significant contributions to the diet, through both food groups and individual nutrients.

Another example of the failure of the IWG proposed nutrition standards to address nutrients to encourage is with regard to enriched grain products. The 2010 DGA recommend 1½-ounce equivalents (1,000 kcal/day diet) to 5-ounce equivalents (3,200 kcal/day diet) of enriched grains consumption per day. This recommendation reflects the fact that enriched grain products such as bread and ready-to-eat cereals contribute important nutrients to the diet, including B vitamins, iron and folic acid. The nutrient enrichment of grain products in the U.S. with these nutrients has been a resounding success for both adults and children. In addition, the CDC has touted folic acid fortification as one of the great public health achievements in the last decade, with a proven outcome of lowering of the incidence neural tube defects. This public health benefit is available only through enriched grains, both because of requirements of food standards of identity, and because folic acid may not be added freely to foods, including whole grain flours and breads.

The IWG proposed nutrition principles preclude most enriched grains because of the whole grain contribution requirement, as well as the extremely restrictive final sodium target of 140 mg/RACC (Reference Amount Customarily Consumed) for individual foods. This ignores the nutritional merits of these products. Also important to consider is that reduced consumption increases the risk of adverse consequences resulting from lower levels of micronutrient intake.

#### Other Federal Nutrition Programs

Beyond inconsistencies with the 2010 DGA, the IWG proposal conflicts significantly with several federal food and nutrition programs. These conflicts are especially apparent and problematic when contradictory nutrition messages and recommendations come from the same federal agencies. Inconsistencies exist between the IWG proposal and the following programs: the WIC program, HUSSC, and the NSLP and SBP, to name a few.

- **WIC Food Packages:** Most foods that are included in the WIC food package (and therefore established by USDA as healthy and nutritious choices for women, infants and young children) cannot be marketed under the IWG proposed principles due to the restrictive nature of saturated fat, added sugar, and/or sodium levels proposed in Principle B. Examples of these foods include:

- 2% milk and flavored milk
- Most cheeses
- Most canned fish
- Many canned beans
- Many canned vegetables
- Some peanut butters

The 2021 sodium level of 140 mg/RACC for individual foods is unworkable and further excludes the following foods that are included in the WIC food packages:

- Almost every ready-to-eat breakfast cereal
  - Most instant oatmeal products
  - Many whole wheat and whole grain breads
- **HUSSC:** The nutrition criteria for HUSSC participation differ from the IWG proposed nutrition principles in several important ways. While there are some understandable differences between the two because the HUSSC criteria are based on average daily and weekly intake, and the IWG proposal concerns individual foods and meals, there is no policy basis for the difference between the HUSSC's measurement of total sugars, compared to the IWG proposal's measurement of added sugars. Further discussion on added sugars versus total sugars is included later in this document.

Sodium levels in the HUSSC criteria are designed for entrée and non-entrée foods. Even schools that strive to attain “distinction” through the HUSSC are required to meet a sodium level of 200 mg per non-entrée, which is considerably higher than the final 140 mg target proposed by the IWG. Bronze and silver medals are awarded in the HUSSC for meeting the FDA “healthy” level of 480 mg per non-entrée food. Additional differences between these two programs are reflected when measuring fruit, vegetable and whole grain servings.

- **NSLP & SBP – 2011 Proposed Rule:** Most notably, USDA's recent proposed rule for the NSLP & SBP does not include specific restrictions related to total or added sugars. Instead, sugars consumption is built into the minimum-maximum calorie ranges provided for various age groups.

Establishing consistent federal nutrition standards across national food and nutrition programs is essential for the development of actionable policy and effective programs. Consistent requirements would help to provide a benchmark from which science-based and workable guidelines may be built. *Another* new set of nutrition standards, as proposed by the IWG, that differ from other federal nutrition standards – including the DGA – will only increase confusion among implementers and interested consumers, potentially impeding progress in reducing rates of obesity and chronic disease. Such conflicting and competing standards cannot be defended on scientific grounds or on the basis of data demonstrating that these new standards will have a significant and positive effect on public health. Food and beverage manufacturers cannot be expected to engage in costly reformulations based on conflicting federal guidance.

### Regulatory Definitions

GMA and its member companies support nutrition standards that align with regulatory definitions established by the FDA and the USDA Food Safety and Inspection Service (FSIS). Rules governing criteria for foods representing that they are “healthy” are well defined and codified in current food labeling regulations; the IWG should not propose conflicting and more stringent definitions. The setting of new criteria for these foods by the IWG is questionable. This approach will not result in an increase in food products marketed to children that would contribute to improved health, but would prevent promotion of foods that contribute to a healthy diet.

From a regulatory perspective, the recommendations made in Principle A conflict with those made in Principle B. Principle A requires that foods make a significant food group contribution. One of the recommended food groups is “fat free and low fat milk products.” The regulatory definition for “low fat” is 3 grams per RACC. The term “low fat” is accompanied by a (1%) designation throughout the IWG proposal. Not all low fat milk products contain 1% fat. For example, a yogurt product that meets the “low fat” nutrient content claim criteria may contain more than 1% of total fat (1% fat equals 2.25 grams of total fat per RACC; “low fat” is  $\leq 3\text{g}$  of total fat per RACC). Some low fat dairy foods containing 1% fat, per RACC and per labeled serving, may qualify to declare 0 grams fat per serving in nutrition labeling. It is therefore inaccurate to refer to all low fat milk products as 1%, and unclear to food and beverage manufacturers whether all dairy products are expected to be formulated using 1% milk or expected to contain only 1% fat per IWG criteria.

Additionally, because some of these low fat milk products may contain more than 1% total fat, they would be excluded from Nutrient Principle A by not fitting into a proposed food category. Therefore, these products would be precluded from taking advantage of the naturally occurring nutrient exemption in Principle B. Once again, the discord between established regulatory definitions and IWG principles causes unreasonable confusion and implementation challenges.

#### **IV. The Proposed IWG Nutrition Standards are Extreme and Reflect an Unwarranted Bias Against Prepared, Value-added Foods**

The IWG proposal arbitrarily and without any basis in science would characterize many foods universally recognized as part of a healthful diet as “foods of little or no nutritional value.” This includes many commonly consumed foods that the federal government, and even many food industry critics, recommend as foods to be encouraged in a healthful diet, such as whole wheat bread, breakfast cereals, soups, reduced fat yogurt, reduced fat cheese, and canned vegetables. See Appendix B for a list of commonly consumed foods that would not qualify under the IWG’s standards. The IWG proposed nutrition standards would undermine food manufacturers’ ability to make and market foods important to the diet, while making no provisions for evaluation or consideration of the benefits of the proposed approach.

Importantly, the proposed IWG nutrition principles fail to identify evidence that the recommended criteria will have any effect on childhood obesity rates or any other health outcomes. While the IWG proposed nutrition principles span a ten-year period, no monitoring

and/or evaluation plan is defined or proposed to measure the impact on children's health. No evidence has been put forward as a predictor of success, and no evidence base is contemplated. This is a major concern to GMA and its member companies and should be to government as well. Essentially, the IWG is asking the food industry to undertake costly changes to food formulation based on speculation; this is not acceptable, and in many cases it is not possible.

#### **V. The Proposed IWG Nutrition Standards are Poorly Elaborated, and are Unworkable**

In order to build healthful diets, all consumers, including parents, need to be aware of the types of foods that contribute to such a diet. The proposed IWG nutrition standards are so restrictive that they could not be applied by many food companies, including those that manufacture products that make valuable contributions to a healthful diet. Food and beverage products such as whole wheat bread, breakfast cereals, reduced fat yogurt, canned vegetables, and bottled water could not be promoted for consumption by children. Further, the proposed standards may prohibit promotion of nutrient-dense foods developed for children to support catch-up growth and/or improve nutritional status. The proposed nutrition standards also reflect inadequate consideration of technical details. The comments below outline concerns regarding the proposed criteria and technical details.

##### **Concerns Regarding Principle A – Food Group Contributions**

GMA and its member companies oppose the technical elements reflected in the proposed nutrition principles, as follows:

##### **Principle A: Option 1**

- The 2010 DGA recommend consumption of at least half of total grains as whole grains; under the DGA, this goal can be met in a number of ways, including the consumption of partly whole-grain products that contribute a substantial amount of whole grain; the DGA specifically cites foods with at least 8 grams of whole grains per ounce-equivalent as a significant amount.<sup>6</sup> Yet the proposed IWG nutrition standards are so restrictive regarding whole grain content that they effectively would severely restrict advertising and promotion of ready-to eat cereal—a food which is the number one source of whole grain in American diets for adults and children,<sup>7</sup> and the third most frequently consumed school breakfast item in elementary schools.<sup>8</sup>
- The 2010 DGA recommend 2 to 3 cups of fat-free or low-fat dairy for children 2-12 years of age. Yogurt products can help to achieve this goal, as many yogurts provide more than 20

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<sup>6</sup> Dietary Guidelines 2010 Chapter 4.

<sup>7</sup> NHANES 2003-2004 and MyPyramid Equivalent Database version 2.0.

<sup>8</sup> School Nutrition Dietary Assessment Study III. Nutrition Assistance Program Report Series. USDA Food and Nutrition Service, November 2007. Available at : <http://www.fns.usda.gov/ora/menu/published/cnp/files/sndaiii-vol1execsum.pdf>

percent of the Daily Value of both calcium and vitamin D, two essential nutrients identified by the DGA as “nutrients of concern,” yet the proposed nutrient criteria are so restrictive that most products in this important food category effectively could not be promoted to children.

- It appears that bottled water, any calorie-free or low calorie beverage, as well as other beverages that contain <13 grams of added sugar, would not meet the required nutrition standards due to a lack of contributing food group. Other beverages that meet the fruit group requirement and do not exceed the added sugar requirement would be able to be marketed. If the proposed nutrition standards have been designed to identify healthier options, it is not sensible, and is not based on scientific evidence for water, zero-calorie and low calorie beverages to be excluded. These beverages are encouraged for consumption as important sources of hydration and to promote energy balance. Furthermore, excluding water from the IWG nutrition principles directly conflicts with the messaging to support the 2010 DGA. One of the consumer messages released as part of the USDA Center for Nutrition Policy and Promotion (CNPP) consumer education tools specifically encourages water consumption. The IWG proposal would prohibit companies from delivering this information to children and teens, serving as another example of how IWG recommendations clash with federal nutrition guidance.
- The IWG proposes food group requirements that would need to be met on a 50% by- weight basis. The IWG has not explained the meaning of this metric. The IWG has outlined no consideration for normalization of this metric across all food groups, including those for which dietary guidance describes a volumetric measurement. The IWG gives no consideration to the effect of moisture content on this metric. Consequently, there is no clarity on how the 50% by weight contribution would be applied or evaluated.

Principle A: Option 2

- There is no description on how the "proportionate combination" method for food group calculations would be applied or evaluated. There is no description of how main dish or meal products would account for food group contributions. In addition, there is no allowance for smaller portions of food groups or nutrient-dense formulated foods that fall short of the food group requirement but make meaningful contributions to the intake of a specific nutrient. There is no normalization described for combinations of weight-based and volume-based measures.
- The IWG process for determining food group conversions is confusing and not based on science. We understand the IWG used equivalents from the USDA Food Buying Guide and applied them on an average basis, assuming a 2,000 calorie diet and four-meal-per-day eating frequency. The resulting recommendations are awkward amounts that are difficult to implement (0.6 cups of vegetables or vegetable juice, for example). These amounts make calculations difficult and are again inconsistent with similar guidance provided through other Federal nutrition programs. For example, the 2010 DGA and HUSSC count fruit and vegetable servings in ¼ cup increments. The IWG does not describe how food group

conversions would consider prospective science that would constitute the bases for the 2015 and 2020 DGA.

- Amounts of foods groups deemed to provide a meaningful contribution are so high that combination foods would be excluded from marketing, such as fruited yogurt, vegetable, legumes or grain-containing soups and gelatin with fruit.

It is not clear what public policy objective is being served by this arbitrary set of competing standards nor is it clear how manufacturers or marketers could begin to reconcile these standards in a common-sense, science-based and consistent fashion. Consequently, GMA opposes both Option 1 and Option 2 of proposed Principle A.

### Concerns Regarding Principle B – Nutrients to Limit

The four nutrients targeted in Principle B are referred to by the IWG as nutrients that potentially have a “negative effect on health and weight.”<sup>9</sup> The proposed levels for these nutrients are unworkable and unachievable.

#### **1. Sodium:**

The sodium levels recommended by the IWG are unrealistic, extremely restrictive, and if adopted, may result in unintended consequences, including food safety risks, health risks, a decrease in affordability, and the elimination of marketing of close to whole categories of foods, without any evidence that the modifications in sodium content would prevent childhood obesity. The 2010 DGA, Healthy People 2020, and other Federal authorities support a sodium daily intake goal of 2,300 mg/day for the general population. The IWG proposed standard of 210 mg/serving by 2016 and 140 mg/RACC by 2021 do not align with these recommendations and are so severe that an unreasonable number of products would be prohibited from being marketed. GMA strongly opposes the proposed sodium targets.

The proposed levels for sodium in individual foods, main dish and meal products fail to take into account the complex role that sodium salts play in food systems, including food safety, functionality, shelf life and palatability. Sodium reduction tools available at present can only accommodate small reductions of 10-30% at a gradual rate. The fact that even today we fail to fully understand the basic mechanism of salt taste in humans underscores the challenges we still face regarding the development of reduced sodium products that are widely appealing and affordable.

Several barriers to wide-scale sodium reduction, as they relate to IWG recommendations, are presented below.

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<sup>9</sup> Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts. Interagency Working Group on Food Marketed to Children. 2011. Page 11.

- **Food safety:** Salt (sodium chloride) and other sodium-containing salts (e.g., sodium ascorbate and sodium sorbate) play an important role in food safety by helping to inhibit the growth of both pathogenic and spoilage organisms. Meat products, for example, are particularly sensitive to the reduction of sodium. These products require appropriate time for new antimicrobial agents to be evaluated by industry and approved by USDA-FSIS, as well as time to develop new technologies to prevent significant food safety problems. Low acid, thermally processed canned goods require the addition of salt to inhibit the growth of potentially deadly pathogens. GMA and its member companies are committed to their responsibility to sell safe, high quality food.
- **Functionality:** Salt and sodium-containing functional ingredients are often necessary not only to ensure food safety, but also for leavening, binding, emulsification, fermentation control, osmolarity, water-activity, color development, texture, and other food preparation processes. At 140 mg of sodium per RACC, a significant number of whole wheat and whole grain bread products will fail to meet the IWG proposed nutrition standards due to a functional need for more sodium. This result appears out of line with the stated goals of the IWG, as whole grain and whole wheat products are recommended for increased consumption in almost every form of federal food and nutrition guidance. Discouraging the consumption of these types of foods through extremely restrictive sodium limits is unreasonable and unwarranted.
- **Taste:** Consumers expect their trusted food products to have consistent taste, quality and shelf-life at a reasonable and stable price. Dramatic changes in sodium or salt concentration that significantly alter taste, texture, appearance, shelf-life or price may not be acceptable to consumers. The IWG goal to shift the marketing mix to include more nutritious products has been shared by industry for a number of years. However, it is important to remember that food must be eaten in order to be nutritious. No matter what foods are marketed, children will not eat them if they are not tasty. This is an important consequence for the IWG to consider.
- **Salt substitutes:** There is no single salt substitute that is effective for all foods. Significant research and development investment has been put into finding good alternatives, such as salt replacers and enhancers, for salt and sodium-containing functional ingredients. Salt replacers, such as potassium chloride, have different chemical properties than sodium chloride and are not always effective in their functional role. Salt replacers also often confer off-flavors, decreasing consumer acceptability of the finished food.
- **Emerging research:** Recently, multiple studies have been published that suggest low sodium diets may cause adverse health outcomes. A May 2011 article published in the *Journal of the American Medical Association* found that low sodium urinary excretion

levels were associated with higher cardiovascular disease mortality.<sup>10</sup> This study also showed no association between sodium intake-related blood pressure increases and higher rates of hypertension and cardiovascular disease complications. Two additional studies published earlier this year reported that individuals with type I and type II diabetes experienced an increased risk in all-cause mortality (among other complications) when urinary sodium excretion levels were indicative of highly restrictive sodium diets.<sup>11,12</sup> Such research results suggest that it is even more important to complete rigorous studies and evaluations on low sodium diets before making prescriptive and extremely low sodium intake recommendations.

## 2. Added Sugars

The Added Sugars criterion is not supported by the scientific data. Making dietary recommendations based on added sugars is impractical, not based on science, and inconsistent with other authoritative and scientific guidance.

- **There is no scientific agreement on the amount of sugar that should be consumed.** The National Academy of Sciences recently stated in its Phase I Report on the Examination of Front-of-Pack Nutrition Rating Systems and Symbols: “There is a lack of scientific agreement about the amount of sugars that can be consumed in a healthy diet and about potential adverse health effects of sugars beyond an effect on dental caries. The IOM report also makes three points regarding added sugars and why including them on a front of package label is inappropriate:

*“Despite the overall increase in calories that they provide to the American diet, at this time evidence and agreement are lacking about adverse health effects of added sugars, the exceptions being the extra calories that they contribute to a diet and their dilution of essential nutrient intake.*

*An analytical test that can accurately determine added sugar content is unavailable, leaving the sharing of proprietary product formulations as the only apparent option for monitoring product compliance with established criteria.*

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<sup>10</sup> Stolarz-Skrzypek K, Kuznetsova T, Thijs L et al. Fatal and Nonfatal Outcomes, Incidence of Hypertension, and Blood Pressure Changes in Relation to Urinary Sodium Excretion. *JAMA*, 4 May 2011, Vol 305, No. 17.

<sup>11</sup> Ekinci EI, Clarke S, Thomas MC et al. Dietary Salt Intake and Mortality in Patients With Type 2 Diabetes. *Diabetes Care*. 2 Feb 2011.

<sup>12</sup> Thomas MC, Moran J, Forsblom C et al. The Association Between Dietary Sodium Intake, ESRD, and All-Cause Mortality in Patients with Type 1 Diabetes. *Diabetes Care*. 9 Feb 2011.

*Added sugars are not included in the Nutrition Facts panel, so including added sugars in FOP system criteria would lead to inconsistencies between the Nutrition Facts panel and FOP symbols.”<sup>13</sup>*

The reasoning provided by the IOM in its report make it difficult to justify the IWG development of nutrition criteria surrounding added sugars. Clearly, current nutrition science and labeling regulations do not support the use of added sugars on labels, detracting from the nutrient’s ability to contribute to meaningful and actionable guidelines. Below we provide additional comments on several challenges associated with the added sugars requirement:

- **Calories, not sugars, lead to obesity.** As was recently explained in the Dietary Guidelines for Americans: “Foods containing solid fats and added sugars are no more likely to contribute to weight gain than any other source of calories in an eating pattern that is within calorie limits.”<sup>14</sup> The 2010 Dietary Guidelines Advisory committee also confirmed this view in their report: “A moderate body of evidence suggests that under isocaloric controlled conditions, added sugars, including SSB, are no more likely to cause weight gain than any other source of energy.”<sup>15</sup>
- **There is no definition of “added sugar.”** Science is similarly absent from the “added sugar” limitation. There is no well-understood definition of what is meant by “added sugar” that can be applied across all scenarios, nor does the IWG proposal point to one. “Added sugar” is an arbitrary concept that cannot be scientifically determined. Evaluating added sugar content would depend on information to which food companies may not have access, as in the case of a purchased yogurt-covered raisin ingredient to be added to breakfast cereal; information on both the naturally occurring sugars in the yogurt and the raisins would be required, along with information on other sugars, yet the ingredient supplier would be reluctant to disclose this level of detail as it may reveal a proprietary formula and trade secrets.
- **The human body treats added sugar the same as naturally occurring sugar.** Moreover, no definition will have any relevance to the human body, which processes all sugar, whether “naturally occurring” or “added,” in precisely the same manner. The body does not see the arbitrary distinctions that may be drawn between “added sugar” and other sugar, nor is there a calorie difference between any sugar and other carbohydrates. The 2010 DGA state that “[T]he body’s response to sugars does not depend on whether they are naturally present in food or added to foods...Both naturally occurring sugars and added sugars increase the risk of dental caries.”<sup>16</sup>

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<sup>13</sup> Phase I Report on the Examination of Front-Of-Pack Nutrition Rating Systems and Symbols. Page 12.

<sup>14</sup> 2010 Dietary Guidelines for Americans, page 28.

<sup>15</sup> Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans 2010. May 2010, page 310.

<sup>16</sup> 2010 Dietary Guidelines for Americans, page 27.

- A new study funded by USDA found that intake of added sugar is not associated with obesity in 6-18 year old children. In this cross-sectional study, dietary intake data (from the 2003-2006 National Health and Nutrition Examination Survey) was used to evaluate the relationship between intake of added sugars and different measures of weight or adiposity using a nationally representative sample of U.S. children. Results showed that mean intake of added sugar was 21 teaspoons in 6-11 year olds and 25 teaspoons in 12-18 year olds, accounting for 17% of total energy intake for both groups. A key finding in this study was that consumption of added sugar did not contribute significantly to BMI Z scores in either age group. In fact, normal-weight children consumed 26 teaspoons of added sugar as compared to 22 teaspoons by obese children ( $p < .01$ ).<sup>17</sup>

Concerns regarding Naturally Occurring Nutrient Exemption - Limitations

While GMA and its member companies acknowledge that the IWG included an exemption for naturally occurring nutrients in its proposal, the exemption is flawed and confusing. The human body uses natural and added sources of these nutrients in the same way; consequently, any argument for excluding certain foods and nutrients is not science-based.

- Naturally occurring amounts of saturated fat, sodium, sugars, and trans fat (and any macro- or micronutrient) are impossible to distinguish from added amounts by reading only the Nutrition Facts Panel and ingredient statement, as only total quantity is expressed on the label. To differentiate naturally occurring quantities from those provided by direct ingredient addition, proprietary company formulation data would be required. The difficulties of obtaining such proprietary data would make compliance monitoring virtually impossible; suffice it to say that food and beverage manufacturers are highly unlikely to provide such data on a voluntary basis.
- Because naturally occurring versus added amounts of the proposed nutrients to limit are not made visible on a product label, a significant amount of confusion is likely to occur among interested consumers attempting to interpret the reasoning for the types of foods being marketed to them. This presents an incredibly confusing situation without any commensurate public health benefit.
- Despite the exemption, some types of products generally considered to be nutritious choices (and therefore the types of products meant to be excluded from the proposed marketing restrictions) still fail to meet the proposed nutrition principles:
  - 1) **Yogurt:** Low fat yogurts in compliance with the FDA definition of “low fat” ( $\leq 3$  grams of fat per 225 gram RACC) may contain more than 1% total fat and therefore are prohibited from benefiting from the naturally occurring saturated fat exemption. In addition, it is impossible to tell, by reading the nutrition label of a yogurt product, how

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<sup>17</sup> Nicklas TA, et al. Nutrition Research. 2011; 31:338-364.

many grams of total sugars (as displayed on the Nutrition Facts Panel) come from naturally occurring versus added sources, and therefore whether the product would comply with the IWG proposed nutrition guidelines.

- 2) **Extra Lean and Lean Meats:** USDA definitions of these meat cuts will not meet the threshold levels to qualify under nutrient Principle B.

## VI. Conclusion

While GMA and its member companies support the IWG's goal of improving children's diets and addressing the high rates of childhood obesity in America, we oppose the proposed standards in the strongest possible terms, and we urge that they be withdrawn. As our comments illustrate, the IWG proposal is **not** evidence-based, it is **not** aligned with existing federal food and nutrition programs and guidance, and the proposed nutrition principles are unworkable. Perhaps most importantly, the proposal fails to identify evidence that, if implemented, the recommended nutrition principles will have any significant effect on childhood weight reduction and obesity rates. We urge the IWG to take to heart the focal points of our comments:

- 1) **The IWG proposal is fundamentally flawed, as it is unlikely to combat obesity and would prevent marketing of many types of foods that should be encouraged in the healthy, balanced diets of children.**
- 2) **The proposed IWG nutrition standards are arbitrary, have no basis in scientific evidence, and conflict with federal dietary guidance and nutrition policy.**
- 3) **The proposed IWG nutrition standards are extreme and reflect an unwarranted bias against prepared, value-added foods.**
- 4) **The proposed IWG nutrition standards are poorly elaborated, and are unworkable.**

For these reasons, as elaborated in these comments and in the marketing comments attached as Appendix B, GMA and its member companies oppose the proposed standards in the strongest possible terms, and we urge that they be withdrawn.

## **Appendix Contents**

- A. Comment of the Grocery Manufacturers Association on Interagency Working Group on Food Marketed to Children: General Comments and Proposed Marketing Definitions: FTC Project No. P094513**
- B. Foods Most Commonly Consumed and the IWG Standards**

## Appendix A

### **Comment of the Grocery Manufacturers Association on Interagency Working Group on Food Marketed to Children: General Comments and Proposed Marketing Definitions: FTC Project No. P094513**

#### **I. Introduction**

Based in Washington, D.C., the Grocery Manufacturers Association (“GMA”) is the voice of more than 300 leading food, beverage and consumer product companies that sustain and enhance the quality of life for hundreds of millions of people in the United States and around the globe. The food, beverage and consumer packaged goods industry in the United States generates sales of \$2.1 trillion annually, employs 14 million workers and contributes \$1 trillion in added value to the economy every year.

Obesity rates have been rising in the population since the government began reporting periodic nutrition and health surveys in the 1970s. In the last decade, the trends had reached levels that caused public health officials to call for action to arrest them. The food and beverage industry responded by taking a leadership role in the fight against obesity. Since 2004, America’s food and beverage companies have introduced more than 20,000 new products and packages, and they have promoted healthy lifestyle choices in the marketplace, the workplace and schools. GMA and its members have been providing consumers with the products, tools and information they need to achieve a healthy diet and an active lifestyle.

With the *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts*,<sup>18</sup> the Interagency Working Group (“IWG”) has asked for comments on proposed standards that would stop the marketing that has brought those innovations to children, would declare most of the products that children and adults consume of little or no nutritional value, and would discourage children from consuming the products. GMA appreciates the opportunity to comment on this proposal.

The IWG’s proposed regulations represent a departure from the policies of the agencies that proposed them. The federal government has long endorsed and participated in the dissemination of information to facilitate consumer choice. The IWG proposes the opposite. Rather than encouraging the use of information to inform consumers, the current proposal would encourage the suppression of information to steer consumers – to discourage sales of some foods and encourage sales of others. To be discouraged would be the consumption of the vast majority of foods and beverages that Americans eat today. The means of discouragement would be to make certain foods less attractive and less conspicuous, especially to children. The proposal rests on the notion that parents will not buy food their children do not want, and that children will not want food that they do not find appealing.

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<sup>18</sup> Interagency Working Group on Food Marketed to Children, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts, Request for Comments* (April 2011) (the IWG’s marketing and nutritional proposal is referred to as the “Guides” or “Principles”) (hereinafter *Request for Comments*), available at <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>.

The IWG, recognizing that the First Amendment constrains agencies from imposing the Principles, is asking food and beverage companies to adopt them as voluntary practices instead. This puts industry in an untenable position. If the companies decline the IWG's invitation, they would risk public opprobrium. If companies comply with the regulations, they would engage in practices the Federal Trade Commission has long condemned – interfering with consumers' efforts to find the products that best satisfy their desires.

Absent from this proposal is any evidence that children and adolescents would consume healthier diets or lose excess weight, in the new world the guides envision. The proposal disparages products that the Food and Drug Administration classifies as healthy, that the U.S. Department of Agriculture promotes for preschool children and school meal programs, and that experts have found associated with lower body weights in children who eat them.<sup>19</sup>

The IWG cites no evidence that any of the marketing the proposal targets has caused children to gain weight. This absence is no surprise, in light of a report the Institute of Medicine issued five years ago. After it conducted “the most comprehensive review to date of the scientific studies designed to assess the influence of marketing on the nutritional beliefs, choices, practices, and outcomes for children and youth,”<sup>20</sup> the IOM concluded that “*current evidence is not sufficient* to arrive at any finding about a causal relationship from television advertising to adiposity.”<sup>21</sup>

That obesity could not be attributed to ads made sense in the light of the long-term trends of advertising that children see for food. Food and beverage marketing directed toward children has been declining for three decades, while children, adolescents and their parents have been gaining weight.

The vast majority of food and beverage marketing currently directed to children would disappear under the proposal. Such a decline of economic activity would impair vital sectors of the economy. The regulations would displace billions of dollars of economic activity, imperil thousands of jobs, jeopardize TV programs, and undermine charities that benefit children and adolescents.

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<sup>19</sup> See generally Appendix A, *Comment of the Grocery Manufacturers Association on Interagency Working Group on Food Marketed to Children: Proposed Nutrition Principles: FTC Project No. P09451*.

<sup>20</sup> *Food Marketing to Children and Youth: Threat or Opportunity?*, at xiv (Institute of Medicine, Committee on Food Marketing and the Diets of Children and Youth, J. Michael McGinnis, Jennifer Appleton Gootman, Vivica I. Kraak, eds. 2006) (emphasis added) (hereinafter *IOM Food Marketing Report*), available at <http://www.iom.edu/Reports/2005/Food-Marketing-to-Children-and-Youth-Threat-or-Opportunity.aspx>.

<sup>21</sup> *IOM Food Marketing Report*, at 9 (emphasis added).

The IWG's proposal recalls an unfortunate chapter in the history of the FTC – the Children's Advertising rulemaking the Commission conducted in the 1970s.<sup>22</sup> The proposal then would have banned commercials for breakfast cereals and other food that activists alleged were inappropriate for children. The Commission abandoned the effort, after concluding that the cost and impracticality of the idea outweighed any conceivable benefits it might deliver. Since then, children have seen fewer food and beverage commercials on their programs, cereal consumption has been associated with lower body weight in children, and marketing has become recognized as a valuable and Constitutionally protected form of competition. The passage of time has confirmed the wisdom of the Commission's decision.

While many constructive efforts are underway, and more must be done, there is no evidence that these Principles would advance the public interest. There is good reason to predict that they would stifle marketing, competition and innovation. In the IWG's proposed world, consumers would see fewer messages, have poorer choices, and face higher prices. Those impediments would deprive manufacturers of the means to bring healthy and enjoyable foods to children, deny kids the foods they enjoy, and prevent parents from receiving the benefits of competition. Thus, the IWG should abandon this effort and start anew, beginning with conducting the study that Congress requested and then making recommendations based on the results of that study as to the efficacy of marketing standards to address health issues relating to childhood obesity.

## II. Trends in Obesity and Marketing

It has been ten years since the Surgeon General reported on increasing trends of obesity in the U.S. population and issued *The Surgeon General's Call To Action To Prevent and Decrease Overweight and Obesity 2001*.<sup>23</sup> The report cited government statistics showing that 61 percent of U.S. adults and 13 percent of children and adolescents were overweight in 1999 and that the trends had been rising for both young and old.

These gains, the Surgeon General wrote on the first page of his report, resulted "from excess calorie consumption and/or inadequate physical activity."<sup>24</sup> The factors contributing to the gap between calorie consumption and expenditure were more complicated and less obvious. The Call to Action therefore urged stakeholders to create:

a multifaceted public health approach capable of delivering long-term reductions in the prevalence of overweight and obesity. This approach should focus on health rather than appearance and empower both individuals and communities to address barriers, reduce

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<sup>22</sup> Children's Advertising, 43 Fed. Reg. 17,967 (Apr. 27, 1978).

<sup>23</sup> *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity 2001*, available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

<sup>24</sup> *Id.* at 1.

stigmatization, and move forward in addressing overweight and obesity in a positive and proactive fashion.<sup>25</sup>

Critical to the success of the Call to Action would be research and evaluation to “understand the causes of overweight and obesity, to assess the effectiveness of interventions, and to develop new communication and action strategies.”<sup>26</sup>

Experts at the IOM heeded the call for research and evaluation. At the behest of CDC, which itself was following Congressional direction, IOM reviewed a vast body of research on three decades of trends in nutrition, physical activity and contemporaneous changes in American society. The outcome of that effort, *Preventing Childhood Obesity, Health in the Balance*,<sup>27</sup> reinforced the conclusions that the Surgeon General had reached, shed light on many more facets of the growth of obesity, and offered recommendations for a coordinated, multi-sector approach to combat the problem. As the Report’s title indicates, the IOM focused on children, but the review offered important insights on adult obesity as well.

IOM first observed the same trends the Surgeon General had reported. In three decades, the prevalence of obesity had doubled in children from 2 – 5 years old, had tripled in children 6 – 11, and had doubled in adolescents 12 – 19.<sup>28</sup> These trends mirrored “a similar profound increase over the same approximate period in U.S. adults, as well as a concurrent rise internationally in developed and developing countries alike.”<sup>29</sup> Weight gains were pervasive. IOM noted evidence that even children younger than 2 years old were gaining weight.<sup>30</sup>

The data on prevalence of obesity reported from the National Health and Nutrition Examination Survey (NHANES) for children 6 – 11, youth 2 – 19 and adults 20 – 74 show the major trends well. The prevalence for children and youth have risen about 10 percentage points each while adult prevalence has risen by more than 15 points.

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<sup>25</sup> *Id.* at XIV.

<sup>26</sup> *Id.* at 16.

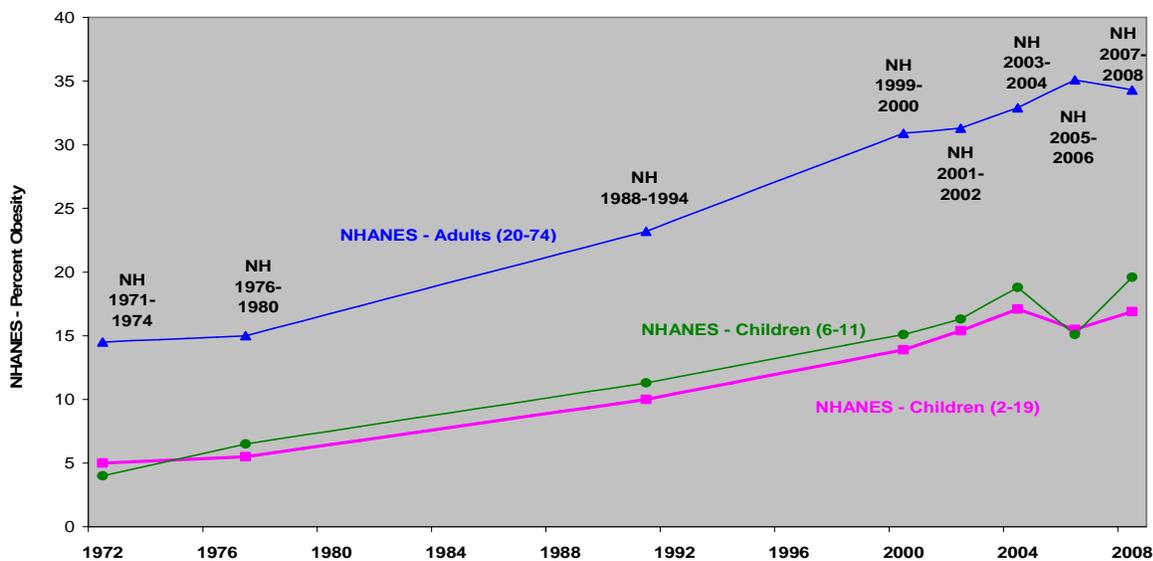
<sup>27</sup> IOM, *Preventing Childhood Obesity, Health in the Balance* (2004) (hereinafter *2004 IOM Report*), available at <http://www.iom.edu/Reports/2004/Preventing-Childhood-Obesity-Health-in-the-Balance.aspx>.

<sup>28</sup> *Id.* at 1.

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.* at 56.

**NHANES Obesity Rates**



Source: CDC, National Center for Health Statistics, NHANES Surveys.

In the three decades over which obesity had increased, society had changed dramatically. IOM observed transformations in family lives, eating habits, residential landscapes, media use, physical education, consumer perceptions, and many other factors that were posing challenges greater than any that parents and children had faced before. In combination, these forces contributed to the growing levels of obesity. And as the data that IOM presented made clear, no age group was resisting the forces that they all faced.

Some of the trends came as no surprise. For the population as a whole, IOM found evidence that calorie consumption had increased for both men and women.<sup>31</sup> More people were eating away from home, and portion sizes had increased for most foods consumed at home and away for both adults and children.<sup>32</sup> Reports on physical activity during leisure indicated little change for adults,<sup>33</sup> but physical activity of children declined. Daily enrollment in Physical Education for high-school students dropped from 42% in 1991 to 28.4% in 2003.<sup>34</sup> Between 1977 and 2001, the number of children ages 5 – 15 within walking distance of school who actually walked to school dropped from 20.2% to 12.5%.<sup>35</sup> And from 1981 to 1997 children

<sup>31</sup> *Id.* at 30.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 29.

<sup>34</sup> *Id.* at 36.

<sup>35</sup> *Id.* at 37.

aged 3 – 12 saw their free time decline by seven hours per week.<sup>36</sup> Children were losing opportunities to go out and play.

The IOM also noted ominous implications of some of the trends. “The average parents today are twice as likely to be obese as 30 years ago.... Parental obesity more than doubles the risk of adult obesity among both obese and nonobese children under 10 years of age.”<sup>37</sup> Associations between obese parents and children at risk of obesity were observed not just for school children, but also for preschoolers and newborns.<sup>38</sup>

But the data also revealed some trends that did not track the increases of obesity. For example, the number of hours children spent watching television had declined by four hours a week between 1981 and 1997.<sup>39</sup> The proportions of calories children consumed from fat and saturated fat had declined between 1965 and 1996.<sup>40</sup> But perhaps most surprising was the observation that “no significant increased trends in energy intake were observed in children 6 – 11 between 1977 and 1996.”<sup>41</sup> Children 2 – 5 and teens 12 – 19 had shown increases, but the rise in the prevalence of obesity was not associated with a comparable increase in the calories consumed by children 6 – 11 years old.

The 2004 IOM Report contained proposals and recommendations for the private and public sectors. In ten broad groups, the proposals suggested the implementation of dozens of actions – about ten apiece for schools, communities and federal authorities, seven for parents and three for the food and beverage industry. To each sector, IOM urged creating an environment that encouraged more healthful eating and more physical activity. Parents were encouraged to be role models in their own eating and activities. IOM recommended that food makers develop packages and products that help consumers make healthful choices, that restaurants expand menu choices and disclose more nutritional facts, and that advertisers and marketers adopt guidelines to minimize the risk of obesity in children and youth.

These recommendations were all intended to stem or prevent obesity from spreading. “Obesity prevention,” IOM made clear, “involves maintaining energy balance at a healthy weight while protecting overall health, growth and development, and nutritional status. Energy balance refers to the state in which energy intake is equivalent to energy expenditure, resulting in no net weight gain or weight loss.”<sup>42</sup> For adults the equation meant true equivalence between calories in and calories out. Children could afford to consume slightly more calories than they expended, because their bodies needed the additional energy for growth. But for everyone, the

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<sup>36</sup> *Id.* at 36.

<sup>37</sup> *Id.* at 64-65.

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

<sup>39</sup> *Id.* at 39.

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

<sup>41</sup> *Id.* at 30 (but noting at 97 “some indications” that a small increase might have occurred).

<sup>42</sup> *Id.* at 90.

message was essentially the same: “Inappropriate weight gain (excess fat storage) results when energy expenditure is consistently exceeded by energy intake over time.”<sup>43</sup>

IOM planned to assess progress toward its goals, but before it could do so, it received another assignment. It was asked to look again at just one facet of the 2004 report – marketing to children. As IOM described the mission:

Congress, through the FY2004 Health, Labor, and Education Committee appropriation, directed the Centers for Disease Control and Prevention (CDC) to undertake a study of the role that marketing of food and beverages may play as a determinant of the nutritional status of children and youth, and how marketing approaches might be marshaled as a remedy.<sup>44</sup>

Explicitly beyond the scope of this second study would be many factors that IOM had identified in the first as critical to the understanding of obesity trends and promising as goals to reverse them. For this study, IOM would not address physical activity, parental obesity, community design, and the other forces. Instead, IOM undertook what became at the time and remains today the most comprehensive review of the evidence on marketing and obesity. As a consequence, the second review answered fewer questions than the first, and findings of the report shed little additional light on the causes of obesity. But the review addressed the most important issue at stake in the IWG’s proposal.

IOM found insufficient evidence to conclude that advertising caused obesity in children or adolescents.<sup>45</sup> Although the evidence included studies that had found associations between advertising and obesity, IOM’s experts could not rule out other causes for those associations. The experts reached this conclusion despite finding evidence that advertising to children 2 – 11 could stimulate their preferences for items advertised, and finding evidence that children would request food they preferred. (For teens 12 – 18 the evidence was insufficient to establish even an association between advertising and food preferences.) But as advertisers in many industries have discovered many times, IOM found that short-term curiosity does not necessarily translate into sustained purchase patterns. The evidence for an association between advertising and usual dietary intake for children 6 – 11 was weak. And when it came to usual dietary intake for teens, the evidence indicated that advertising did *not* have an influence, although that evidence was weak as well.<sup>46</sup>

As it had done a year earlier, IOM produced ten categories of recommendations. This time, because IOM had explicitly confined its review to marketing, all the proposals pertained to marketing. Increasing physical activity, creating caregiver role models and other goals were

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<sup>43</sup> *Id.*

<sup>44</sup> *IOM Food Marketing Report*, at xiii.

<sup>45</sup> *Id.* at 9.

<sup>46</sup> *Id.* at 8.

hardly mentioned. The principal charges to industry, governments and communities and caregivers extended the marketing and educational exhortations of 2004. IOM urged industry to use its creativity and resources to promote and support more healthful diets, and to adhere to the highest standards of marketing. It urged governments at all levels to marshal the full range of public policies to foster healthful diets. And it urged schools and parents to educate children about more healthful diets and to promote those diets.

In the space of two years, two bodies of experts under the auspices of IOM authored two comprehensive studies that sought to identify forces at work in society that had contributed to the rise in obesity in the population. After “examining the behavioral and cultural factors, social constructs, and other broad environmental factors involved in childhood obesity and identifying promising approaches for prevention efforts,”<sup>47</sup> and then “after specifically [examining] the role of food and beverage marketing in the diets of children and youth,”<sup>48</sup> one factor failed to test positive. IOM could not conclude that marketing was one of the forces causing obesity in children and adolescents.

Still, the experts of IOM urged advertisers to enlist marketing in the cause to improve health and nutrition. The agencies of the IWG echoed IOM’s exhortations. FTC and HHS conducted public forums in 2005 and 2007 to encourage and assess the progress of industry marketing efforts. FTC did the same in its 2007 report on food marketing expenditures of 44 companies in 2006. Federal authorities uniformly commended information and education as the means to prevent obesity and improve health.

The food and beverage industry responded with initiatives in every category the IOM prescribed. For example:

#### **Investing in Solutions**

More than 140 major food and beverage manufacturers, retailers and advocacy groups have committed to a multi-million, multi-year initiative designed to help reduce obesity, particularly childhood obesity, by 2015.

The Healthy Weight Commitment Foundation helps kids and adults achieve a healthy weight through energy balance and focuses on three critical areas – the marketplace, the workplace and schools.

#### **Teaching Kids about Calories In and Calories Out**

Created by the food and beverage industry, the Healthy Schools Partnership teaches kids that the calories they consume and the calories they expend must be in balance. Understanding that nutrition and exercise are both key elements of a healthy lifestyle, the initiative brought physical education and nutrition professionals together to illustrate what an “energy balance” means. A pilot program was created with the help of PE4life

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<sup>47</sup> 2004 IOM Report, at 3.

<sup>48</sup> IOM Food Marketing Report, at 6.

and the American Dietetic Association Foundation, and is expanding beyond the original Kansas City pilot school to additional schools in Kansas City and schools in the Des Moines area.

### **Using Advertising to Encourage Good Decisions**

More than two-thirds of food and beverage television advertising geared toward kids under 12 is used to promote good nutrition, healthier lifestyles and simply making better food choices. The Children's Food and Beverage Advertising Initiative (CFBAI) pulled together 17 of the nation's top food and beverage manufacturers to pledge that they would focus their efforts on promoting healthy eating and exercise habits.

### **Better Beverage Choices in Our Schools**

America's leading beverage companies are providing students with a range of beverages that are lower in calories and packaged in smaller portion sizes. Following the School Beverage Guidelines of the Alliance for a Healthier Generation, companies are making only lower-calorie, smaller-portion beverages available in schools as part of a broader effort to teach children the importance of a balanced diet and exercise. The Alliance for a Healthier Generation is a joint initiative of the American Heart Association and the William J. Clinton Foundation.

### **Front-of-Pack Labeling**

On January 24, 2011, GMA and the Food Marketing Institute (FMI) announced the launch of *Nutrition Keys*, a new voluntary front-of-pack nutrition labeling system that will help busy consumers make informed choices when they shop.

First Lady Michelle Obama challenged industry to find a way to provide busy parents with the front-of-pack nutrition information they need to make informed choices easily and quickly. To that end, GMA and FMI have worked over the last year to develop a fact-based, simple and easy-to-use front-of-pack icon that companies can use to inform consumers about how the key nutrients in each product fit into a balanced and healthy diet as part of the federal government's dietary guidance. In addition, as part of the beverage industry's Clear on Calories initiative, America's beverage companies are adding new labels to the front of every can, bottle and pack produced – and displaying the total calories per container on beverages 20 ounces or smaller.

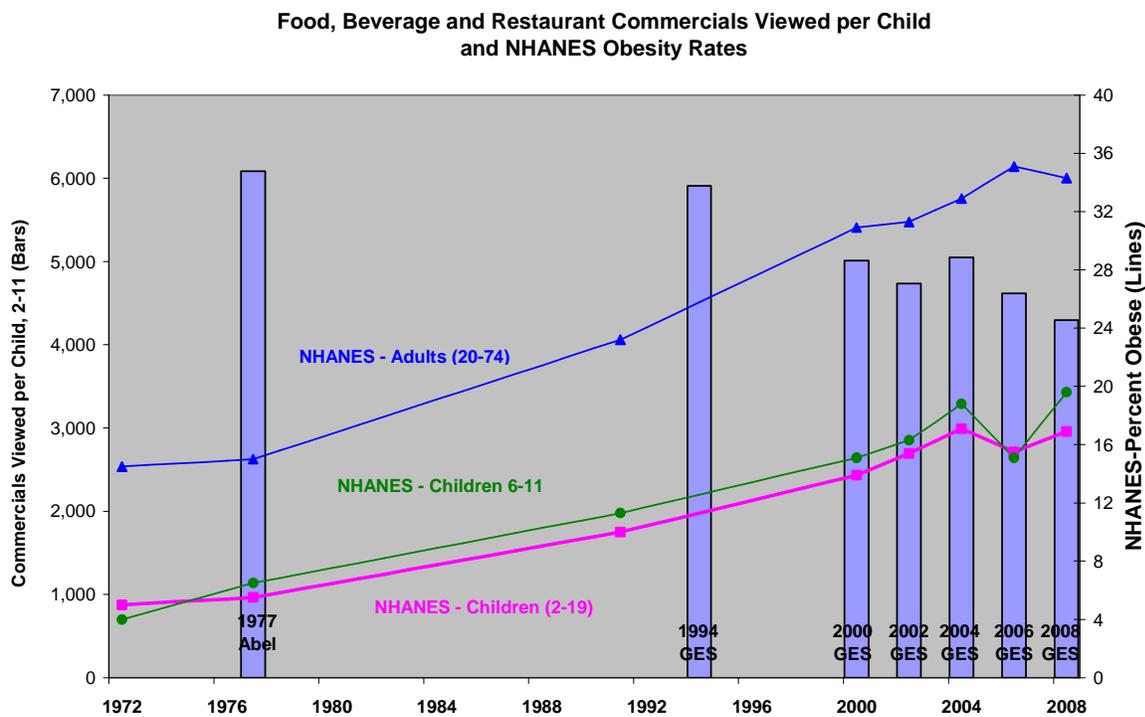
### **Wellness in Workplaces Worldwide**

As part of the Healthy Weight Commitment Foundation, GMA member companies are providing resources to help their employees achieve and maintain a healthy weight through promotion of energy balance and through adoption of a variety of model workplace wellness practices. In addition, the GMA and food and beverage companies have taken the lead in the World Economic Forum's "Working Toward Wellness" initiative. Knowing that where people work greatly affects their lifestyles and overall well-being, the effort promotes business engagement in the global fight against chronic disease.

GMA and its member companies have made significant progress on each of these fronts, all of which are critical in the battle to prevent obesity. More information about them is available at [www.gmabrands.com](http://www.gmabrands.com). Because the IWG proposal deals principally with marketing, this comment will elaborate on the accomplishments there.

First, the aggregate trends of food marketing reveal some important context. Advertising of food and beverages to children has been in a long-term decline. The commercials that children see on television – still the dominant medium for children’s advertising – have declined over the past three decades. In 2000, on the eve of the Surgeon General’s Call to Action, children 6 –11 were seeing significantly fewer ads on children’s TV than they had seen in 1977. The number of commercials viewed were about the same four years later – still much less than in 1977 – when IOM issued its 2004 report. Just as TV viewing had declined for children, so had their viewing of commercials for food and beverages.

The chart below shows that decline, along with the obesity trends reported by NHANES. In light of these trends, it is not surprising that IOM was unable to conclude that the evidence identified advertising as a cause of obesity. The advertising and obesity trends move in opposite directions.

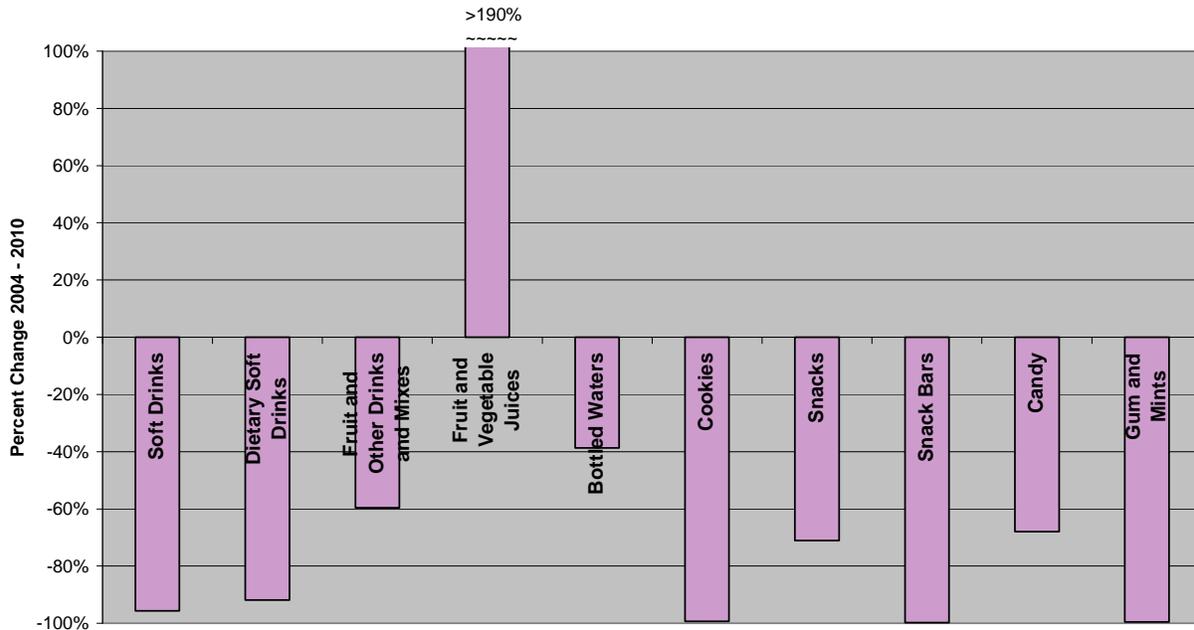


Sources: Nielsen Media Research Monitor-Plus (GES data); The Henry J. Kaiser Family Foundation Report: Food for Thought, Television Food Advertising to Children in the United States (Abel data); CDC, National Center for Health Statistics, NHANES Surveys.

The chart also shows how the long term decline in advertising impressions began to accelerate in 2004. The acceleration is fueled by drops in food and beverage commercials that children viewed on their TV programs, which fell by 50 percent between 2004 and 2010.

This steeper decline came in the wake of the launch of the Children’s Food and Beverage Advertising Initiative, in which members either concentrated on healthy life-style messages and foods that satisfied nutritional criteria in their advertising directed to children, or stopped advertising directed to children. The most significant effect of CFBAI emerges in the shifts of advertising among food categories. Commercial impressions fell precipitously for cookies, candy, soda and snacks, while growing for fruit and vegetable juices.

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



Source: Nielsen Media Research, Monitor-Plus. The Monitor-Plus data contained herein are the property of The Nielsen Company, © 2011 The Nielsen Company. Unauthorized use of this copyrighted material is expressly prohibited. Excludes cable TV networks not in the database for 2004.

As commercials viewed by children declined overall and shifted from some categories to others, food makers were introducing thousands of new products with smaller portion sizes, fewer calories, reduced fats and less sugar. Reformulated products with more vitamins, fiber and whole grains continued to appear on supermarket shelves. In all, over 20,000 different products, portions and packages that did not exist when the IOM first surveyed the landscape are filling the shelves today.<sup>49</sup>

Not all of these products succeeded, but a great many did. The successful products typically had two things in common – intelligent marketing, which helped shoppers find them

<sup>49</sup> Press Release, GMA, Food and Beverage Companies Have Introduced More than 20,000 Healthier Product Choices Since 2002 (Aug. 2010), available at <http://www.gmaonline.org/news-events/newsroom/food-and-beverage-companies-have-introduced-more-than-20000-healthier-produ/>.

and gave shoppers reasons to try them, and intrinsic value, which meant consumers enjoyed them when they tried them.<sup>50</sup> A product that is not marketed may never make it into the home. A product that fails to satisfy the household is not likely to make it back in.

The thousands of products in the market today represent the knowledge accumulated through millions of decisions. Companies go through countless trials and errors in their kitchens and in their marketing departments to create products that consumers want, communications that tell consumers about them, and brands that consumers can recognize. This knowledge took decades to build and apply. The icons that have represented products for half a century and longer are but a few illustrations of these efforts. Thousands of employees contribute to these efforts. Billions of dollars of commerce depend on them. Many more billions of dollars are invested in the good will that prior efforts have created.

Yet with all this knowledge from the past, and all the tools of modern marketing at their disposal, food makers can never be sure that the next launch will fly off the shelf or sit unnoticed.<sup>51</sup> About all that can be predicted with some confidence is that without effective means to communicate with consumers, the next launch will fail and the products that have already achieved some success will gradually decline. Consumers need to learn about new products if they are going to buy them. And consumers will forget about products that have been made inconspicuous and unappealing. Indeed, these effects – fewer launches and declining consumption of products that don't meet the standards – appear to be the objectives of the IWG's proposal to suppress information about those products.

### **III. The Proposed Definition of Marketing Directed to Children and Adolescents Would Restrict a Vast Array of Economic Activity**

The purpose and effect of the policy to suppress information is illustrated by the scope of activity covered by the restraints. The IWG seeks to transplant definitions used by the FTC for its 2006 survey of youth-directed food marketing expenditures and activities.<sup>52</sup> Those definitions began as instructions for subpoenas seeking expenditures that could *potentially* qualify as marketing directed to children or adolescents. They were instructions to companies on where to search for expenditures that might be related to marketing. The list was not put forth as a workable definition for regulation, but rather as a data collection tool. Now those same terms are proposed as regulations. Combined with the nutrition standards the IWG is proposing, the

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<sup>50</sup> See generally Joan Schneider and Julie Hall, *Why Most Product Launches Fail*, Harv. Bus. Rev., April 2011, at 21 (discussing the difficulty of getting something new on shoppers' "radar"), available at <http://hbr.org/product/why-most-product-launches-fail/an/F1104A-PDF-ENG>.

<sup>51</sup> See generally Susumu Ogawa, Frank T. Piller, *Reducing the Risks of New Product Development*, MIT Sloan Mgmt. Rev., Winter 2006, at 65 (finding that new products suffer from high failure rates "not because of technical shortcomings, but because they simply have no market"), available at <http://hbr.org/product/reducing-the-risks-of-new-product-development/an/SMR196-PDF-ENG?Ntt=new%2520products%2520that%2520fail>.

<sup>52</sup> *Request for Comments*, at 16.

definitions reach activities never before considered marketing, and would declare them off limits for most products that Americans consume.

The scope of activities covered by the definitions is not limited to advertising and marketing directed at children. These activities range from traditional advertising on children's television, to making packages appealing to kids and their parents, to supporting athletic activities and charities for kids fall within the definitions.

There are twenty different categories of activity considered marketing that would be prohibited for disfavored products. Traditional advertising intended for children and teens is covered, of course. But so is a commercial that appears on a television show pulling a 20-percent adolescent or 30-percent child audience, even if adults make up the majority of the audience. So is a cartoon character or message on a box of cereal, even if it isn't kid-directed, if it might appeal to kids. So is an in-store display that attracts shoppers to special deals on lunch-box foods, as is a celebrity endorser if he or she appeals to youth.

Likewise, the sponsorship of a little league team, a donation to Cub Scouts and Brownies, and support for an organization that "encouraged children to engage in physical activities or promoted messages about healthy diets"<sup>53</sup> is covered. In short, any of these activities would be deemed marketing to kids. If a hint of a discouraged product can be found in the activity, it would be banned.

If an activity does not fit the terms of one of the twenty categories (the last of which is simply "other"), it still could qualify as marketing by virtue of triggering terms in the communication or in the files of the company that sponsored the communication. For example if a company website not directed toward children includes a word, "such as 'kid,' 'child,' 'tween,' or similar words" it could be swept into the definition.<sup>54</sup> Even if the communication contained no triggering words, but marketing materials in the files of a company contained them, then the

**Examples of Activities Deemed Marketing**

- o Television, radio, print advertising
- o Product placements
- o Company-sponsored websites and all other internet and digital advertising
- o Character licensing, toy co-branding, and cross-promotions
- o Packaging and labeling
- o Movie theater/video/video game advertising
- o In-store displays and promotions
- o Celebrity endorsements
- o Specialty item or premium distribution
- o Promotion or sponsorship of public entertainment events
- o Sponsorship of sports teams or individual athletes
- o Word-of-mouth and viral marketing
- o Advertising in conjunction with philanthropic endeavors

Source: Order to File a Special Report, FTC Matter No. P064504

<sup>53</sup> Federal Trade Commission, *Marketing Food to Children and Adolescents, A Review of Industry Expenditures, Activities, and Self-Regulation, A Report to Congress*, at 51 (hereinafter *FTC Food Marketing Report*) (July 2008), available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf>.

<sup>54</sup> Federal Trade Commission, *Order to File a Special Report*, FTC Matter No. P064504, at B-4 (July 31, 2007) (defining what is considered marketing to children or adolescents on company-sponsored Internet sites), available at <http://www.ftc.gov/os/06/orders/foodmktg6b/index.shtm>.

activity could still be deemed marketing to kids, tweens or teens. In other words, an activity need not fit within the twenty categories of activity to be deemed marketing to children. An indication that a company was aware that children would be in the audience that a communication reached could be enough.

The combination of activity categories and triggering terms led the Commission to report in 2008 that back-to-school block parties, scholarships, honors and cash prizes to children and teens based on success at school or in the community were all marketing. Sponsoring essay contests was another form of marketing. Philanthropic activities that encourage children to engage in physical activities or promoted messages about healthy diets was marketing. Supporting “Kids Day” events at games or “Kids Clubs” of athletic teams was marketing. These are the types of activities that the Commission is proposing to stop, if any sign of a discouraged product appears. A proposed regulation that treats all these activities as marketing is seriously flawed.

Another serious flaw in the Principles is that the definitions proposed by the IWG would capture marketing to adults as well as to children or teens. For example, the Commission set thresholds for teens and children in measured-media audiences to determine whether the advertising to those audiences would be deemed advertising targeting the young cohorts. GMA warned the Commission that “data generated [from the definitions] would reflect so much extraneous expenditures that it would shed little light on advertising and marketing that targets children and adolescents.”<sup>55</sup>

As predicted, that occurred. Companies reported expenditures that could not sensibly be considered marketing to children or adolescents. Movies intended for adults, broadcasts of Major League Baseball, professional and college football, NASCAR, Christmas specials, PGA programming all would qualify as programs for kids or teens under the simple numerical calculations in the definitions.

Shows that have drawn 30% or more children:

Classic Christmas Movies  
College Football  
Home Makeovers  
Science Fiction Movies  
Family Sitcoms  
Pop Concert Broadcasts  
NASCAR Race Coverage  
National Lampoon Movies  
NFL programming  
Sports News  
Tournament of Roses Coverage  
Travel Programming  
USA Soccer Programming

Shows that have drawn 20% or more teens:

Adult Comedy Acts  
Drug-Culture Comedy Acts  
Comedy Competitions  
Indy car Coverage  
News Broadcasts  
Science Fiction Movies  
MLB Broadcasts  
NFL Broadcasts  
PGA Programming  
Adult Sitcoms  
Action Movies  
WC Soccer  
WNBA Broadcasts

Thus, the definitions also would cover advertising that supports adult, all-family and parent-dominated audiences, as well as programs that reach an abnormally high percentage of children

<sup>55</sup> *Comments of GMA, FTC Request for Information and Comment on Food Industry Marketing to Children Report: Paperwork Comment*; FTC File No. P064504, at 8 (May 2007); *see also Comments of GMA, Food Marketing to Children and Adolescents Report to Congress*, Proj. No. P064504, at 3 (April 2006); *Comments of GMA, Food Marketing to Children and Adolescents Study: Paperwork Comment*, Proj. No. P094511, at 3 (Nov. 2009).

or adolescents – for example, if enough children or adolescents happen to be home on a snow day and see food marketing during a talk show.

The IWG justifies using the definitions as a basis for its Principles with the claim that they were “vetted” in an administrative proceeding,<sup>56</sup> but the proposal does not describe that vetting process or address the comments of GMA that warned how inaccurate the definitions would be. Thus the Commission does not report the only conclusion that should be drawn from the commentary on the definitions that were to be used in collecting data – that they would collect too much data and inaccurate data. Too much data would not be an insurmountable problem for an analyst capable of separating the extraneous from the relevant. When the definitions become regulations, however, a study that collected too much data becomes a restriction that stifles unintended activity.

Left unchanged, these definitions would misclassify vast amounts of business activity – much of it not marketing at all, much less marketing to youth – as marketing to children and adolescents. From offering products at ball parks and county fairs, to sponsoring charity events, to placing commercials during prime-time movies, the IWG Principles would declare any food that did not meet the standards as off limits. A preponderance of foods would still not comply, even after years of reformulating to the limit of technological capability and market acceptance. For these foods, the message from the IWG is: abandon the activity or run the risk of condemnation.

A rule restricting these activities is not just a regulation of marketing. The effort to restrict all these activities could affect billions of dollars of commerce. The Commission reported that 44 companies spent \$1.6 billion on all these activities in 2006, and \$60 million alone on donations to various causes. For all manufacturers, the numbers would of course be greater than that reported for 44.<sup>57</sup> And this estimate does not capture the cost of revamping communications for the vast majority of products covered.

The proposal covers more than efforts to communicate to consumers about food products. It also covers the products themselves and the packages that contain them. In a measure that goes beyond the ambition of the Children’s Advertising rulemaking, the IWG proposes that many products be stripped of the identifying marks that have characterized them for decades. A small sample of the products that would lose their identities and sponsors appears below.

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<sup>56</sup> *Request for Comments*, at 17.

<sup>57</sup> *FTC Food Marketing Report*, at ES-1.

### Some Endangered Packages Under the Guides



Under the proposal, packages would be stripped of long-recognized branding and traditional icons, leaving consumers with less ability to distinguish one product from another. Tony the Tiger®, the character identified with Kellogg's Frosted Flakes® cereal when today's grandparents were kids, would have to retire. So would Snap, Crackle and Pop®, who have represented Kellogg's® Rice Krispies® cereal since the early 1930s. Barnum's Animals®, the icons of Animal Crackers for over a century, would be seen in circuses and museums, but not on the product, even though it is marketed to adults, not children. Every one of these products fits within a healthy diet. All offer fewer calories than other choices consumers could make. All contribute important nutrients. Many display recently enhanced nutritional profiles. As demonstrated in GMA's comments on the Nutritional Principles, there is no reason to disguise these products or discourage consumers from buying them.

Neither the IOM nor any source cited by the IWG has found that recognizable packages and products cause obesity in children and adolescents. Nor has any evidence been offered as to

the effects of disguising packages and products. Indeed, the IWG's announcement is the first time that restrictions of this scale have been proposed.

Stripping the favorite features and characters from products that have used them for generations would deprive shoppers of means to find the foods and beverages they want and deprive children of the enjoyment that the characters have delivered. Because these characters are so familiar to the public, they are some of the most precious assets the food companies possess. By design, the proposed regulations would tell manufacturers to diminish and destroy the associations between these characters and the products they represent. The destruction of value and the burden on consumers would far outweigh the \$1.6 billion dollars that the Commission reported in 2008 as expenditures on marketing to children and adolescents.

The fundamental purpose of the suppression of information is to make it less likely that kids will want certain products and more difficult for parents to find them. This is contrary to the policy that has informed federal policy for decades. In its renunciation of the last proposal to suppress advertising to children, the staff of the FTC stated, "Advertising informs consumers as to product availability, price and performance characteristics. Thus it facilitates consumer purchasing decisions. Moreover, it may stimulate competition among sellers of a product, resulting in lower prices for the consumer."<sup>58</sup>

The government has long advocated information as a tool for consumers to make better decisions. More than any agency, the FTC has decried efforts to reduce consumer satisfaction and abet shopper ignorance:

Since 1980, the U.S. FTC has filed more than 750 comments [examining] the economic effects of marketing restrictions in areas as varied as health care, real estate, wine delivery, legal services. Quite often, the Commission has persuaded regulators that restrictions exceeded the scope necessary to protect customers, and likely raised prices and impeded entry. As early as 1989, the American Bar Association estimated that the Commission's comments have saved consumers more money annually than the agency's entire budget.<sup>59</sup>

Much of the evidence supporting the FTC's comments comes from the FTC's own economists,<sup>60</sup> and numerous other studies concur. One recent case study found that restricting

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<sup>58</sup> FTC Final Staff Report and Recommendation (In the Matter of Children's Advertising, 43 Fed. Reg. 17967), at 5 (Mar. 31, 1981).

<sup>59</sup> Directorate for Financial and Enterprise Affairs, Competition Committee, Global Forum on Competition, *The Interface Between Competition and Consumer Policies*, Contribution from BIAC (Feb. 13, 2008).

<sup>60</sup> See, e.g., FTC Staff, *Health Claims in Advertising and Labeling: A Study of the Cereal Market* (Aug. 1989), available at <http://www.ftc.gov/be/econrpt/232187.pdf>; remarks by Deborah Platt Majoras, Chairman, FTC, Keynote Address, Current Topics in Antitrust Economics and Competition Policy, Charles River Associates, "A Dose of our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program," at 15 (Feb. 8, 2005).

advertising directed at children demonstrated the effect the Commission has often predicted – higher prices overall and more difficulty for products with smaller shares to gain ground in the market place.<sup>61</sup> Unfortunately for parents and kids, the products subject to the ad restrictions were breakfast cereals in Montreal, Canada. Citizens who lived in Montreal, which restricts such advertising to children, pay the price of that restriction every time they buy breakfast cereal. This food, that is associated with lower body weights in children, is more expensive when ads are restricted. This study echoed others that have found advertising restrictions raised prices in industries ranging from toys to eyeglasses to legal services.<sup>62</sup>

Condemning all the economic activity described as “marketing” by the IWG’s Principles would cause companies to shy away from undertaking far more activity than advertising, let alone advertising to children. Companies would have to fear the consequences of learning, long after the fact, that some activity, no matter how divorced from marketing to children, somehow fell into a covered category. Creative personnel would shy away from talking, thinking or writing about kids and what kids want. Commercials designed for all family entertainment could easily be misconstrued as advertising intended for kids, if kids showed up in the commercial, or the creators of the message tried to reach families with children. For products that fall below the standards – nearly ninety percent of the products most commonly consumed today as shown in Appendix C – companies would be encouraged to curtail communicating to adults rather than take the risk of “inappropriately” communicating to kids.

Even if the IWG agencies never enforced the rules, companies marketing foods that the IWG deemed not appropriate for marketing to children would run increased risks of governmental enforcement, regulation or litigation – even for marketing that was never intended for children or teens. The IWG’s standards would provide ready authority for putative plaintiffs, regulators or interest groups to allege that some activity went too far into the youth audience, that some package was too attractive to kids, that some charitable contribution was tainted by an inappropriate product mention.<sup>63</sup> Likewise, drafters of tax laws, state regulations and local ordinances could piggyback upon the FTC’s pronouncements that food not meeting the standard was of “little or no nutritional value,” the marketing of which “supports” rather than “undermines” efforts to eat more healthfully.

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<sup>61</sup> C. Robert Clark, *Advertising Restrictions And Competition in the Children’s Breakfast Cereal Industry*, 50 J. Law & Econ. 757 (2007).

<sup>62</sup> J. Howard Beales III, *Presentation Before the U.S. Chamber of Commerce Spring 2011 Regulatory Affairs Committee Meeting* (June 30, 2011) at 8, available at <http://www.uschamber.com/sites/default/files/issues/environment/files/BEALES%20-%20interagency%20working%20group%20presentation%20%5BCompatibility%20Mode%5D.pdf>.

<sup>63</sup> See, e.g., CBS/AP, “Kellogg Won’t Market Sugary Cereal To Kids” (“In the face of a lawsuit, cereal-maker Kellogg ... will increase the nutritional value of the cereals and snacks targeted at children or stop marketing those products to them altogether.”), available at <http://www.cbsnews.com/stories/2007/06/14/health/main2926923.shtml>.

These reasons alone would be sufficient justification to withdraw the proposal. It would not accomplish any good public purpose. It is likely to do public harm. When considered against the economic costs the proposal would impose, the reasons to withdraw it multiply.

#### **IV. The Potential Impact of the IWG's Proposal on the Marketplace and Food Supply Chain**

Assessing the expected impact of adopting the IWG's Principles is essential to understanding the extent of the damage they could do. The IWG "recognizes that, if the proposed nutrition principles were fully implemented by industry as proposed, a large percentage of food products currently in the marketplace would not meet the principles."<sup>64</sup> Indeed, around 90 percent of products most commonly consumed in the U.S. would not qualify under the IWG's Principles.<sup>65</sup> Also, and equally important, under the IWG's expansive definitions of marketing, adult-targeted products would fall under the IWG's purview and their marketing would be curtailed as well. It is difficult to underestimate the practical consequences of displacing such a large percentage of food products in the marketplace.

As noted, the combination of the IWG's nutritional standards and use of food marketing definitions would mean the end of billions of dollars of marketing and other activities. For just forty-four companies in 2006, the Commission estimated expenditures in the twenty categories deemed marketing at \$1.6 billion dollars, most directed towards advertising on TV.<sup>66</sup> Over fifteen hundred TV programs in 2009 met the quantitative criteria that the IWG would apply to deem programs as those for children and adolescents. These programs and the media that carry them face the loss of revenue that could spell the difference between viability and cancellation.

Just recently, the IWG agencies received instructions in the Executive Order of the Office of Management and Budget, which requires agencies to craft regulatory proposals in the least burdensome manner:

each agency must ... (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs ... (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those

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<sup>64</sup> *Request for Comments*, at 5.

<sup>65</sup> Beth Johnson, *Presentation Before the U.S. Chamber of Commerce Spring 2011 Regulatory Affairs Committee Meeting* (June 30, 2011), available at <http://www.uschamber.com/sites/default/files/issues/environment/files/Beth%20Johnson%20Presentation%20for%20USCC%20Event%20Final.pdf>.

<sup>66</sup> *FTC Food Marketing Report*, at ES-1.

approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity)....<sup>67</sup>

Given the potential economic impact of the proposal, the regulatory approach that the IWG has taken here should have followed these instructions. There is no indication that the IWG did.

## V. The Evidence Does Not Support the Proposition that Advertising Restrictions Would Affect Obesity

This comment already discussed the IOM's studies and its conclusion that "*current evidence is not sufficient* to arrive at any finding about a causal relationship from television advertising to adiposity."<sup>68</sup> One of the members of the IOM committee of experts conducted a more recent review of the literature. After looking at all available research that has been published since the IOM completed its study, he reached the same conclusion.<sup>69</sup>

The IWG fundamentally fails to justify its restriction of marketing activities by showing an expected improvement in health among children and adolescents, and the IWG does not comment on this failure. There is no prediction of what effect might be expected from restricting marketing directed toward children and adolescents that has declined for decades, no discussion of the effects of other government policies that adopted similar means, and no discussion of the likely consequences of shifts away from the foods that do not meet the proposed standards. The evidence on all these issues fails to support the proposal.

Just as a decline in advertising in the United States has failed to produce a decline of obesity, outright bans of advertising in other countries has not arrested the trends. A number of European countries have enacted restrictions or bans on advertising to children, including Sweden and Norway.<sup>70</sup> There has been no documented success in the approach. According to published reports, more than 20 percent of seven year old Swedish children are obese, a figure that has increased while the ban has been in effect and is greater than current estimates regarding

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<sup>67</sup> "Improving Regulation and Regulatory Review," Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011); *see also* "Regulation and Independent Regulatory Agencies," Exec. Order No. Executive Order 13,579 (July 11, 2011).

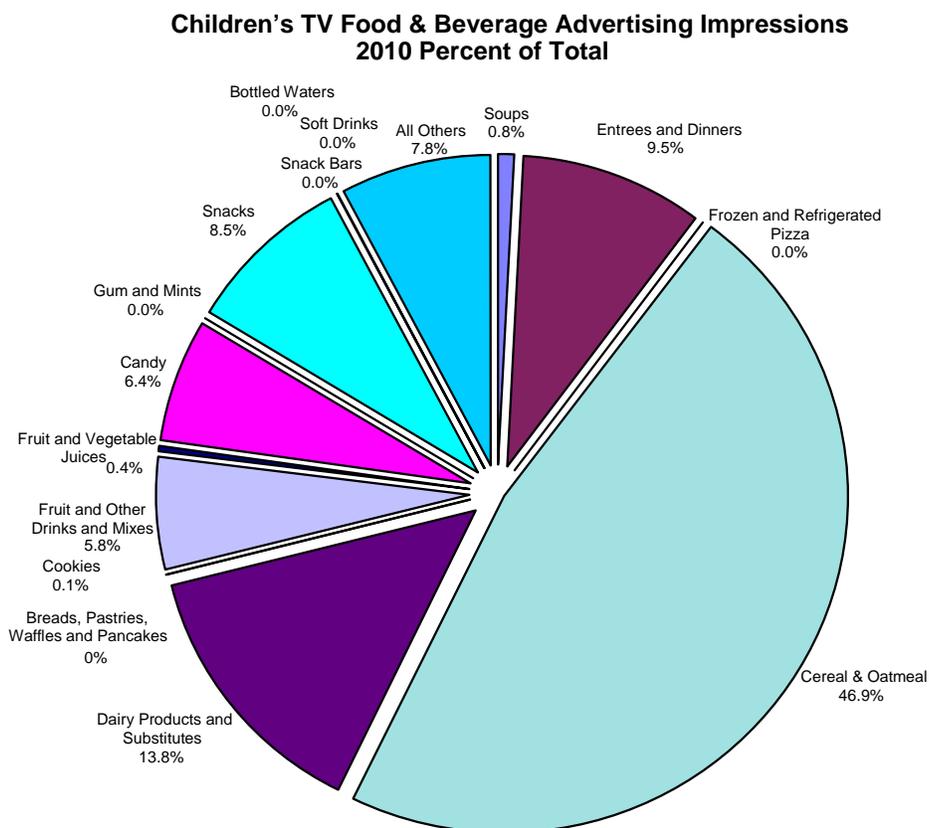
<sup>68</sup> *IOM Food Marketing Report*, at 379-80 (emphasis added). The IOM explained that a focus on television marketing, as opposed to all marketing, occurred in its analysis because "virtually all of the published scientific research has focused on advertising – and television advertising in particular." *Id.* at xiv.

<sup>69</sup> J. Howard Beales III, *Television Advertising and Childhood Obesity* (Oct. 2010) ("the state of the evidence concerning the relationship between television advertising and childhood adiposity remains much as it was at the time of the IOM [2006 *Food Marketing Report*] report").

<sup>70</sup> *See generally* Sweden: Radio and Television Act of 1996, Ch. 7, § 4; Norway: Act No. 127 of 4 December 1992 Relating to Broadcasting, <http://odin.dep.no/kkd/engelsk/media/018041-200005/index-dok000-b-n-a.html>; *see also* Legislative Intervention to Address Obesity in Overseas Jurisdictions (2004), available at <http://www.diabetes.org.nz/resources/files/ObesityLegislation.doc>.

U.S. children.<sup>71</sup> Similarly, over a seven-year period ending in 2000, one study found that the obesity rates of Norwegian school children had increased dramatically, despite the existence of advertising restrictions.<sup>72</sup>

That the proposed Principles would be equally ineffective, and potentially counter productive, can be seen by assessing the advertising that the standards would disqualify. Nearly half of the advertising that children now see on their programming is advertising for breakfast cereals.



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

The next largest category of affected advertising would be for dairy products, which are the main source of calcium for children. Smaller than Dairy are Entrees and Dinners (a combined category), and Snacks. Each is less than 10% of the ads that kids see on Children's

<sup>71</sup> *Child Obesity Threatens Life Expectancy*, The Local, at ES-1 (Apr. 13, 2005), available at <http://www.thelocal.se/article.php?ID=1274&date=20050413>.

<sup>72</sup> LF Andersen, et al., *Overweight and Obesity Among Norwegian Schoolchildren: Changes from 1993-2000*, Scand J Public Health 33(2):99-106 (2005), available at [http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list\\_uids=15823970&dopt=Citation](http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=15823970&dopt=Citation).

TV. Candy is smaller still. Every category from large to small contains products that fit into healthy diets. Many of those products have been improved, and all the advertising of CFBAI members (which sponsor the vast majority of food and beverage ads directed to children) will comply with the standards of CFBAI. Quick-service restaurant ads feature apples, milk and juice. Many of these are among the messages that the IWG has proposed to restrict. Soft drinks, pizzas, pastries, gums and mints are nearly invisible on children's programs, so the restrictions would not be expected to change their status.

As for the products that are likely to be affected, numerous studies have shown that the consumption of breakfast cereals is associated with lower levels of BMI in children, a relationship that holds regardless of the amount of sugar in the cereal:

Although lay myths suggesting sugar consumption is associated with weight status persist, it has been documented in the scientific literature that sugar consumption is not positively correlated with body weight and may, in fact, be correlated with improved BMI [31,32]. Supporting our hypothesis that BMI would not differ as a function of sugar content, the study findings indicated that cereal eaters, regardless of the type of cereal consumed, had a lower BMI than did children who did not eat cereal....<sup>73</sup>

The consumption of milk is of course related to the consumption of cereal. Discouraging the marketing of cereal to children could diminish the consumption of milk. If at the same time, the IWG were to discourage the marketing of yogurt as is indicated in the proposal, it would be discouraging the consumption of a second major source of dairy products and calcium.

Television remains the dominant medium for delivering food advertising to children, accounting for more than 90 percent of advertising purchased on media measured by syndicated tracking services,<sup>74</sup> and for the majority of expenses that the FTC identified in its 2008 Report to Congress. The mix of advertising to children on television is likely indicative of the mix of marketing to children generally. Thus, the likely effect of the restrictions would be to discourage aggregate marketing of foods and beverages that public policy should encourage for children. The prohibitions would fall predominantly on cereals and dairy products – foods that deliver essential nutrients and help children avoid excess weight.

If IOM could not find evidence that advertising to children caused obesity before changes in the marketing environment of the CFBAI era, it is inconceivable that the IWG could find evidence that shrinking marketing further would prevent obesity. Put in the terms of the Commission's own advertising enforcement policy, the IWG lacks a reasonable basis for representing that its proposal would deliver the benefits claimed. In order to substitute a new role for marketing, the IWG should provide Congress a balanced, data-backed study that considers the effect of marketing restrictions on the obesity of children and adolescents. The

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<sup>73</sup> Ann M. Albertson et al., Weight Indicators And Nutrient Intake In Children And Adolescents Do Not Vary By Sugar Content In Ready-To-Eat Cereal: Results From National Health And Nutrition Examination Survey 2001-2006, 31 Nutrition Research 229, 234 (2011).

<sup>74</sup> Georgetown Economic Services, 2010 GMA Health & Wellness Survey (Aug. 2010).

study should take into account the information about dietary guidance that consumers would miss as marketing communications decline.

## VI. The IWG's Principles Violate the First Amendment

In its *Food Marketing Report*, the IOM acknowledged Constitutional issues with taking a regulatory approach such as the IWG has engaged.<sup>75</sup> The issue is particularly acute because the types of standards the IWG proposes would result in restricting commercial communications directed to adults which goes beyond the asserted government issue.<sup>76</sup> Here, the IWG presents its Principles as “voluntary,” because of “the First Amendment constraints on the government’s ability to regulate commercial speech.”<sup>77</sup> The suggestion that these Principles would be voluntary does not avoid the problem.

Where the government has expressed its opinion about the propriety of commercial speech, even in an informal manner, courts have struck down the pronouncements as restrictions upon freedom of speech.<sup>78</sup> A set of suggested “voluntary guidelines” can be construed as a veiled threat that encroaches upon a company’s constitutional protection of commercial speech if there is a clear nexus between the government suggestion and the “voluntary” action. Thus, an action of the food industry in restricting advertising in accordance with the Principles could be fairly treated as that of the government itself.<sup>79</sup>

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<sup>75</sup> *IOM Food Marketing Report*, at 342-51.

<sup>76</sup> See generally Martin H. Redish, *Childhood Obesity, Advertising and the First Amendment*, (White Paper June 8, 2011) available at <http://www.uschamber.com/sites/default/files/issues/environment/files/CHILDHOOD%20OBESITY%2C%20ADVERTISING%20AND%20THE%20FIRST%20AMENDMENT%20PDF.pdf>.

<sup>77</sup> Statement of the Commission Concerning the Interagency Working Group on Food Marketed to Children Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts, at 1-2 (“The Commission also believes that the voluntary approach continues to be preferable to government-imposed restrictions on food marketing to children, especially given the First Amendment constraints on the government’s ability to regulate commercial speech.”) (Apr. 28, 2011), available at <http://www.ftc.gov/os/2011/04/110428foodmarketstmt.pdf>.

<sup>78</sup> See, e.g., *Bantam Books v. Sullivan*, 372 U.S. 58, 63, 66-67 (1963) (holding that by informing publishers that particular books were “completely objectionable,” even without issuing “formal legal sanctions,” the government had induced the publishers to change their speech behavior); *Rattner v. Netburn*, 930 F.2d 204, 209 (2d Cir. 1991) (by disapproving an advertisement, local official conveyed message that noncompliance would be met by punishment or other negative official consequences, in violation of First Amendment); *Rossignol v. Voorhaar*, 316 F.3d 516, 526 (4th Cir. 2003) (by mass-purchasing newspapers which had run story critical of police department, the police had intimidated business owners and curtailed their free speech rights).

<sup>79</sup> See generally *Jackson v. Metro. Edison Comp.*, 419 U.S. 345, 351 (1974) (considering whether the state of Pennsylvania was sufficiently connected with the challenged utility service termination to make the utility’s conduct attributable to the State for purposes of the Fourteenth Amendment required an inquiry of “whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself”). That is not to say that all self-regulatory efforts trigger First

When the government announces regulations, they are not voluntary, even if officials insist they are. The context in which this proposal has been announced reveals the threat of coercion that is implicit in it. Advocates and authorities from across the political spectrum have called for compulsory regulation if the food industry declines the invitation to regulate itself. In 2005, the IOM recommended that FTC enforce industry's marketing efforts.<sup>80</sup> At an FTC Workshop in 2005, Senator Harkin, a co-author of the language that created the IWG, called for legislation if official recommendations weren't followed.<sup>81</sup> In its May 2010, Report to the President, the White House Task Force on Childhood Obesity made at least three compelling statements: (1) it called for uniform nutrition standards for "all forms of marketing across multiple platforms";<sup>82</sup> (2) it warned that "effective voluntary reform will only occur if companies are presented with sufficient reasons to comply [and] [t]he prospect of regulation or legislation has often served as a catalyst for driving meaningful reform in other industries and may do so in the context of food marketing as well";<sup>83</sup> and (3) it explicitly called for "promulgating laws and regulations when other methods prove insufficient."<sup>84</sup>

Under *Central Hudson Gas & Electric Corp.*, in order to regulate speech that is not false or misleading, the government regulation must prove that (1) the government's asserted interest is substantial; (2) the regulation directly advances that interest; and (3) the regulation is no more extensive than necessary to serve that interest.<sup>85</sup>

The IWG does not claim that the marketing they propose to restrict is false and misleading. The Principles would restrict truthful and non-misleading advertising, marketing and other communications.

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Amendment issues, even if governmental agencies are part of the general conversation leading to self-regulation. *Writers Guild of Am., West v. FCC*, 423 F. Supp. 1064, 1150 (C.D. Cal. 1976), vacated and remanded on jurisdictional grounds sub nom. *Writers Guild of Am., West v. ABC*, 609 F.2d 355, 364 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).

<sup>80</sup> IOM, *Advertising, Marketing, and the Media: Improving Messages* ("Industry should implement the advertising and marketing guidelines. The Federal Trade Commission should have the authority and resources to monitor compliance by the food, beverage, and sedentary entertainment industry advertising practices") (Sept. 2004 Fact Sheet), available at <http://www.iom.edu/~media/Files/Report%20Files/2004/Preventing-Childhood-Obesity-Health-in-the-Balance/factsheetmarketingfinaBitticks.pdf>.

<sup>81</sup> Senator Tom Harkin (D-IA), *Remarks at the FTC/HHS Workshop On Marketing, Self-Regulation, And Childhood Obesity* (July 14, 2005), available at <http://harkin.senate.gov/press/release.cfm?i=240635>.

<sup>82</sup> *White House Task Force Report*, at 31.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 32.

<sup>85</sup> *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557, 566 (1980).

While nobody would dispute the government interest in public health, the IWG's proposal is an explicitly *indirect* effort to advance it. Public health officials have all recognized that the direct cause of obesity is an excess of calories consumed over calories expended. This proposal does not attempt to regulate either. Public health officials have identified numerous societal factors contributing to the obesity trends. This proposal does not address them. IOM examined thoroughly the activity that the IWG seeks to regulate here. The experts could not find sufficient evidence that advertising had caused obesity. The IWG has not offered any evidence that *regulating* advertising would prevent obesity. The lack of evidence connecting the means the IWG has chosen and the ends that it seeks to advance highlights the distance between the two. Even if there were some evidence that restrictions on marketing to children and adolescents could advance the public health, as discussed above, the marketing restrictions proposed by the IWG would clearly be "more extensive than necessary to serve the interest."

Courts have reminded the FTC that its regulations must pass Constitutional muster.<sup>86</sup> The consumer interest "which is in obtaining information on which to base the decision of whether to buy . . . coincides with the public interest served by the regulation" and this is particularly of concern when "health is involved."<sup>87</sup> FTC Chairs have long recognized these constraints.<sup>88</sup> Here, the IWG has offered no evidence that the Principles meet them. There is no evidence that benefits, if indeed there are any benefits, are likely to accrue, and there is no debate that the costs are likely to be tremendous.

Just two weeks ago, the Supreme Court rejected a restraint based on the same principles that motivate the IWG's proposal. California had enacted restrictions on the labeling and marketing of video games, in order to protect children from games deemed inappropriate for them. The Supreme Court found nothing in its prior cases to justify the restraint. The majority ruled:

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works *to adults* – and it is wise not to, since that is but a hair's breadth from the argument rejected [last year]. Instead, it wishes to create a

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<sup>86</sup> See, e.g., *Standard Oil Co. v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978) (holding that "administrative agencies may not pursue rigorous enforcement to the extent of discouraging advertising with no concomitant gain in assuring accuracy and truthfulness").

<sup>87</sup> *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 162 (7th Cir. 1977).

<sup>88</sup> See, e.g., Timothy Muris, *Don't Blame TV*, *The Wall Street Journal* (June 25, 2004) (declaring such restraints "impractical, illegal and ineffective"); Deborah Platt Majoras, *The Vital Role of Truthful Information in the Marketplace*, Roy H. Park Lecture, University of North Carolina School of Journalism and Mass Communication (Oct. 11, 2007) ("the Supreme Court clearly disfavors approaches that restrict speech"), available at [http://www.ftc.gov/speeches/majoras/071011UNCSpeech\\_DK.pdf](http://www.ftc.gov/speeches/majoras/071011UNCSpeech_DK.pdf).

wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. “[M]inors 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.” No doubt a State possesses legitimate power to protect children from harm, but that 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.”<sup>89</sup>

The IWG’s Principles should be retracted as an infringement upon Constitutionally protected speech.

## **VII. Conclusion**

The IWG has failed to demonstrate by any study or analysis a reason to expect that its proposed restrictions would have any effect on child and adolescent obesity. Instead, the IWG proposes an unconstitutional means to suppress valuable and truthful communications to consumers. The predictable outcome of these restrictions would be an impairment of companies’ abilities to compete and consumers’ ability to benefit from that competition. Issuing the Principles ignores Congress’s mandate that the IWG conduct a study and make recommendations. Unless and until the evidence is adequate to reverse the findings of the IOM, the only recommendation that the evidence supports would be one that endorses the efforts that industry has undertaken to date. For the forgoing reasons, the IWG should retract the Principles, study the truly voluntary efforts that have already taken place, and report to Congress on the progress those efforts have achieved.

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<sup>89</sup> *Brown v. Entm’t Merchs. Ass’n*, 2011 WL 2518809, \*5 (2011) (citations omitted) (emphasis in original).

## Appendix B

### Food & Beverages Most Commonly Consumed and the IWG Standards

(A) Top 100 Commonly Consumed Product List*	(B) Representative Food Used to Assess**	(C) Meets 2021 Target Criteria	(D) Selected Reason(s) food does not meet 2021 target criteria***
All Family Cereal	Oat cereal	No	sodium, added sugar
AO Italian Dshs- Pasta/Macaroni/Noodles/Parmesan etc (Ex Can/Frz)	Lasagna	No	sat fat, sodium
<b>Baby Food</b>	<i>Too varied to assess</i>	N/A	N/A
<b>Bacon</b>	Bacon (pork, cooked)	No	sat fat, sodium
<b>Bagels</b>	Bagel, plain	No	sodium
Baked Beans & Pork n Beans	Baked beans, canned, with pork and Sweet sauce	No	sodium
Beef Burger	Beef burger, hamburger (95% lean, 1 patty cooked) + bun	No	sat fat
<b>Biscuits</b>	Biscuits (plain/buttermilk, commercially prep)	No	sat fat, sodium
<b>Bottled Water Non-Carb</b>	Bottled water	No	<50% of a food group
Bran+Natural Cereal	Raisin Bran	No	sodium
Bread: All Other Flavors	Bread (rye)	No	sodium
Bread: Pan Tostado	Bread (wheat, toasted)	No	sodium
Brkfst/Gran/Fruit/Cereal Bars	Strawberry Bar	No	<50% of a food group
<b>Buns/Rolls</b>	Hamburger bun, plain	No	sodium
<b>Cakes</b>	White cake (prepared from recipe without frosting-9" diameter)	No	sat fat, sodium, added sugar
<b>Cheese (Ex Crm Cheese)</b>	American cheese	No	sat fat, sodium
Chicken Breast: Bone-In (Default)	Chicken breast, bone in & skin on	No	sat fat, sodium (added in prep)
Chicken: Nuggets/Stick/Fingers	Chicken nugget, frozen-cooked	No	sat fat, sodium
Chips	Original Potato Chips	No	sat fat, sodium
Chocolate Candy Bars	Chocolate bar	No	sat fat, added sugar
Chocolate Covered Candy	Plain covered chocolate	No	sat fat, added sugar
<b>Coffee</b>	Coffee, Black	No	<50% of a food group
Commercial Frozen Novelties	Ice Cream Cone	No	sat fat
<b>Cookies (Ex Rte Treat Bars)</b>	Sandwich	No	sat fat, sodium, added sugar
Diet/Low-Cal Carbonated Soft Drink)	Diet cola (12 oz can)	No	<50% of a food group
<b>Donuts</b>	Donuts (yeast-leavened, glazed)	No	sat fat, sodium
Eggs:Fried	Egg, fried w/ added fat	No	sat fat/trans (added in prep)
Eggs:Scrambled	Eggs, scrambled (made w/ added fat & salt)	No	sat fat, sodium (added in prep)
<b>Flavored Rice</b>	Herb & Butter flavor	No	sat fat, trans, sodium
Frozen Dinners/ Entrees	Macaroni and Cheese (frozen meal)	No	sat fat, sodium
<b>Fruit Drinks/Ades/Lemonade</b>	Orange bkfst drink, RTD	No	added sugar
<b>Fruit Juice</b>	100% Apple Juice	Yes	MEETS
Fruit: Total Apples (fresh in most common)	Apple, raw w/ skin	Yes	MEETS
Fruit: Total Applesauce (canned is most common)	applesauce (sweetened)	Yes	MEETS

<b>(A) Top 100 Commonly Consumed Product List*</b>	<b>(B) Representative Food Used to Assess**</b>	<b>(C) Meets 2021 Target Criteria</b>	<b>(D) Selected Reason(s) food does not meet 2021 target criteria***</b>
Fruit: Total Bananas (fresh is most common)	Banana, medium raw	Yes	MEETS
Fruit: Total Grapes (fresh is most common)	Grapes, Red or Green, raw	Yes	MEETS
Fruit: Total Oranges (fresh is most common)	Orange, raw navel	Yes	MEETS
Fruit: Total Peaches (fresh is most common)	Peach, raw	Yes	MEETS
Fruit: Total Strawberries (fresh is most common)	Strawberries, raw	Yes	MEETS
Garlic Bread	Frozen, ready-to-heat garlic bread	No	sat fat, sodium
Ground Beef/Hamburger Dish	Cheeseburger Macaroni	No	sat fat, trans, sodium
<b>Ham/Ham Lunchmeat</b>	Ham/Ham lunchmeat (sliced, regular ~11% fat)	No	sat fat, sodium
Homemade/Mix Variety:AO Appl	Microwaveable Casserole	No	sat fat, sodium
<b>Hot Cereal</b>	Raisin spice instant oatmeal, prepared with water	No	sodium, added sugar
Hot Dog Sandwich	Hot dog (beef, pork) + bun	No	sat fat, sodium
<b>Hot Dogs Not In Bun</b>	Hot dog (beef, pork)	No	sat fat, sodium
Hot Tea	Brewed tea, prepared with water	No	<50% of a food group
Ice Cream	Vanilla	No	sat fat, added sugar
Iced Tea	Iced tea, with lemon flavor	No	added sugar
Leaf Salad	Iceberg lettuce (chopped) w/ salad dressing	No	sodium (from dressing)
<b>Mac/Pasta/Noodles(Plain)</b>	Spaghetti noodles, plain (boiled in salted water)	No	sodium (added in prep)
<b>Macaroni &amp; Cheese (Ex Frz)</b>	Macaroni & Cheese (prepared)	No	sat fat, sodium
Meat/Fish/Poultry/Egg Salad	Egg salad: home prepared with eggs, Mayonnaise, onions, peppers, celery, salt	No	sodium
Mixed/Combination Vegetables (frozen is most common)	Mixed frozen vegetables (peas/corn/carrots/lima, boiled, drained, no additives)	Yes	MEETS
Nuts/Seeds	Mixed nuts/seeds (dry roasted, salted)	No	sodium
Other Legumes (canned is most common)	Beans, canned	No	sodium
Pancakes	Pancake (plain, frozen, ready-to-heat)	No	sodium
<b>Pies</b>	Apple pie, commercially prepared	No	sat fat, trans, sodium, added sugar
Pizza: Restaurant	Pizza (cheese, reg crust)	No	sat fat, sodium
Pizza:Peperoni (No Sausage)	Pizza (pepperoni, reg crust)	No	sat fat, sodium
Plain/Fluid Milk (Ex Alternatives)	2% Milk	No	sat fat
Popcorn	Microwavable Butter Popcorn, microwave	No	sat fat, sodium
Pork Cut:Chops	Pork, center loin (chops), bone-in, cooked, pan-fried	No	sat fat
Potatoes:AO/Unidentified Types	Potato salad, home prepared	No	sat fat, sodium
Potatoes:Baked	Baked potato, flesh w/ skin, margarine added	No	sat fat (from margarine)
Potatoes:Fried	French fries, frozen, oven prepared	No	sodium
Potatoes:Mashed/Creamed	Mashed potatoes w/ milk or water, margarine & salt	No	sat fat, sodium (added in prep)
Pre-Sweet Cereal	Oats and marshmallow	No	sodium, added sugar
Pretzels	Pretzels, salted	No	sodium
<b>Pudding/Custard/Tapioca</b>	RTE pudding Snacks, Chocolate	No	sodium

<b>(A) Top 100 Commonly Consumed Product List*</b>	<b>(B) Representative Food Used to Assess**</b>	<b>(C) Meets 2021 Target Criteria</b>	<b>(D) Selected Reason(s) food does not meet 2021 target criteria***</b>
Regular Carbonated Soft Drink	Cola (12oz can)	No	added sugar
Rice:Reg/White	Short grain white rice, made per instructions w/ salt	No	sodium (added in prep)
Saltines	Saltines, regular	No	sodium
Sandwich:Chicken	Chicken patty (frozen, cooked) + bun	No	sat fat, sodium
Sandwich:Chs/Crm Chs	Cheese (2 slices American) + wheat bread (2 slices)	No	sat fat, sodium
Sandwich:Ham	Ham & Cheese Sandwich (Quick Service)	No	sat fat, sodium
Sandwich:Pntbtr/PJ	2T PB + 1T jam + 2 slices bread (wheat)	No	sat fat, sodium, added sugar
Sandwich:Tuna/Salad	Tuna salad + wheat bread (2 slices)	No	sat fat, sodium
Sandwich:Turkey	Deli-Style Turkey (3 slices) + wheat bread (2 slices)	No	sodium
<b>Sausage</b>	Sausage (pork, cooked)	No	sat fat, sodium
Sndwch W/Proc Meat: Bologna	Bologna: chicken/pork/beef (2 slices) + wheat bread (2 slices)	No	sat fat, sodium
Spaghtti/Angl Hr (Ex Can/Frz)	Spaghetti noodles (boiled in salted water) + pasta sauce (RTS)	No	sodium
Steak	Beef, short loin, top loin, steak, all grades, cooked, broiled	No	sat fat
<b>Sweet Muffins</b>	Muffins (blueberry, commercially prep)	No	sat fat, sodium, added sugar
<b>Sweet Rolls/Danish/Coffee Cake</b>	Sweet rolls/danish/coffee (danish pastry, fruit)	No	sat fat, sodium, added sugar
Tacos/Burritos	Beef taco, prepared from kit (2 shells, 1 tbsp taco sauce, 2 tsp seasoning mix)	No	sat fat, sodium
<b>Toaster Pastries</b>	Strawberry unfrosted	No	sat fat, sodium, added sugar
Total Broccoli (fresh is most common)	Broccoli (cooked, boiled, drained, no additives)	Yes	MEETS
Total Carrots (fresh is most common)	Baby carrots (raw)	Yes	MEETS
Total Corn (canned is most common)	Whole Kernel Sweet Corn, canned	No	sodium
Total Green Beans (canned is most common)	Cut Green Beans, canned	No	sodium
Total Peas (canned is most common)	Young Tender Sweet Peas, canned	No	sodium
Total Wheat Breads	Bread (wheat)	No	sodium
Unspecified Type Of Bread	English muffin, plain	No	sodium
Waffles	Waffle (homestyle, frozen, ready-to-heat)	No	sat fat, sodium
White/Butter(Milk) Bread	Bread (white)	No	sodium
Yogurt: All Other/Not Rprtd Yogurt	Strawberry	No	added sugar
Yogurt: Non-Fat Yogurt	Light, strawberry	Yes	MEETS
Yogurt: Reduced/Low Fat Yogurt	Lowfat strawberry	No	added sugar

\*Source: The NPD Group, Inc. National Eating Trends® (NET®) in-home food consumption for the two years ending February 2011. NET® classifies all base dish foods and beverages into 88 standard categories; e.g. Vegetables, Fruits, Sandwiches, etc. (Base dish is defined as the final dish consumed). For this study, further sub-classifications of foods were required (e.g. Carrots, Corn, Apples, Oranges, etc.), resulting in over 400 expanded categories. Alcoholic beverages not listed.

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

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

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