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CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

September 12, 2011

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
The Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Tom Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D.C. 20250

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Secretary Sebelius, Secretary Vilsack, and Chairman Leibowitz:

Some two and a half years ago, Congress directed you to establish an Interagency Working Group on Food Marketed to Children (IWG) to “conduct a study” and to develop recommendations for standards for the marketing of food to children and teenagers.¹ The IWG was to report the findings of its study and its recommendations to Congress no later than July 15, 2010.

Instead of conducting the prescribed study or providing timely recommendations to Congress, the IWG has produced a document entitled “Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts.” The IWG describes the development of these Nutrition Principles—recommendations addressed not to Congress, but to industry—as the “first

¹ Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84.

phase of preparing a report to Congress.” *Nutrition Principles* at 2. Nowhere, however, does the IWG set forth any plan for conducting the requested study. It appears, therefore, that the IWG has settled on its course and intends nothing more than to review the public comments, adjust the Nutrition Principles as it deems necessary, and send them to Congress.

The Nutrition Principles, produced without the benefit of the study that was to inform IWG’s recommendations, are little better than a shot in the dark. The IWG admits that if they were fully implemented as proposed, “a large percentage of food products currently in the marketplace” would not comply. *Nutrition Principles* at 5. Foods that do not comply with the Nutrition Principles are disapproved equally, whether they are nutritionally disastrous or can appropriately be labeled “healthy” under current federal regulations. According to the IWG, it “*may* be feasible to reformulate some food products to meet [the Nutrition Principles],” but “in many cases reformulation would require substantial changes in the nutritional profile of the food,” and such substantial changes “may present *both* technical difficulties and challenges in maintaining the palatability and consumer acceptance of the product.” *Id.* (emphasis added). In short, implementation of the proposed Nutritional Principles would have an enormous, immediate impact, and the IWG has no idea whether it is actually possible to make foods that would qualify, much less to make them enjoyable to eat.

As to the many foods that could *not* be reformulated to meet the ambitious guidelines, they could not be marketed, under the IWG proposal, either to children or teenagers. But the IWG’s definition of “marketing” sweeps in far more than just advertising targeted directly at children. It would ban the advertisement of noncomplying foods on television even when adults are known to make up the vast majority (70-80 percent) of viewers. For such foods, in-store displays and familiar packaging would likewise have to be modified or abandoned. Even charitable sponsorships of youth sports teams would be disallowed, despite the undoubted benefits of physical exercise for children’s health. The economic impacts of the proposal would clearly be substantial, but there is no indication that the IWG intends to evaluate such effects before finalizing the Nutrition Principles.

Significantly, the IWG offers no scientific support for the notion that restricting advertising will actually help reduce childhood obesity. In its most recent study, the Institute of Medicine found that “current evidence is *not* sufficient” to demonstrate a causal relationship between television advertising and obesity.² Other nations have tried food advertising bans in recent years without documented success. What *has* been documented from experiments elsewhere is an increase in prices for foods that are not allowed to be advertised.

The real causes of childhood obesity have more to do with inadequate physical activity and excess calorie consumption than with the advertising and packaging of food. Many of the foods that are threatened by the IWG’s proposal, such as breakfast cereals, have been shown to be associated with lower body mass index in children. The IWG’s “one size fits all” approach also ignores the substantial progress that has already been made by some firms in recent years to improve the nutrition profile of foods marketed to children.

² *Food Marketing to Children and Youth: Threat or Opportunity?*, at 9 (Institute of Medicine, Committee of Food Marketing and the Diets of Children and Youth, J. Michael McGinnis, Jennifer Appleton Gootman, Vivica I. Kraak, eds 2006)(emphasis added).

Given these and many other defects, the Nutrition Principles would never pass muster if they were adopted as regulations. Because compliance with the Nutrition Principles is deemed “voluntary,” however, the IWG apparently does not feel the same sense of responsibility for them as its constituent agencies would for binding regulations. Yet that attitude underestimates (some would say “exploits”) the impact of government recommendations in an arena as closely watched as this. In the real world, there will be many forces at work driving compliance, particularly for brand-conscious companies that try to be responsible. Normally, we applaud the companies who go the extra mile to do good things for society, but here there has been no research or study that their adherence to the Nutrition Principles will benefit society, far less that any benefits justify the immense costs of doing so.

Under the circumstances, we believe that the IWG should withdraw the current proposal and start afresh. Conducting the study Congress asked for should be the first step in the process, not an afterthought or post hoc rationalization. The IWG should base its recommendations to Congress on sound science, and should explicitly evaluate the benefits and cost of different approaches Congress could take. The IWG should scrupulously avoid making recommendations in the form of a black and white quasi-regulation (like the proposed Nutrition Principles) that others can use to bludgeon companies into compliance.

To inform our oversight efforts, we request that you provide answers to the following questions no later than September 27, 2011:

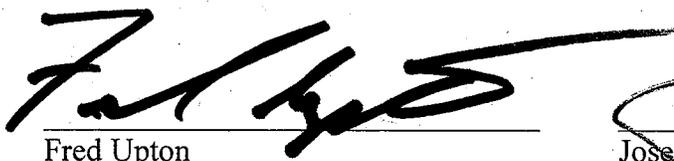
1. When does the IWG intend to complete the study called for by Congress? How will the IWG take account of the study in formulating its recommendations to Congress?
2. How did the IWG derive the precise levels of the nutrients to limit per Principle B? Why did the IWG deviate from existing federal nutrition standards?
3. What evidence exists to show that the proposed Nutrition Principles are achievable for most types of food? What evidence exists to show the proposed phase-in periods are adequate?
4. What evidence exists to show that childhood obesity is related to advertising of food that doesn't comply with the proposed Nutrition Principles? Are there examples of advertising restrictions elsewhere that have led to reductions in childhood obesity?
5. What costs would be involved in reformulating food on a widespread scale to meet the proposed Nutrition Principles? How would such costs affect the price of food?
6. If manufacturers cannot successfully reformulate foods to comply with the proposed Nutrition Principles and comply instead with the “voluntary” marketing restrictions, how would the economy be affected? Has the IWG determined the likely impact on advertising revenues? What is the likely impact on television programming, particularly programming intended for children and families? What impact on employment do you expect the proposed Nutrition Principles to have?

7. What alternatives to the current proposal has the IWG considered? In particular, what does the IWG expect would happen if the industry is allowed to continue its self-regulatory efforts without "voluntary" government guidelines?
8. Has the IWG determined the secondary economic impacts of the proposed marketing restrictions on American communities and schools, such as reduced financial sponsorships for athletic teams?
9. How does the IWG reach consensus on its recommendations? How does it address differences of opinion?
10. Does the IWG interpret its mandate as giving it the flexibility to recommend against adopting food standards or food marketing restrictions, either for children generally or for some age groups, if it concludes that is the best course? Or does it interpret the mandate as requiring it to recommend some type of standards and restrictions, even if the costs substantially outweigh the benefits?

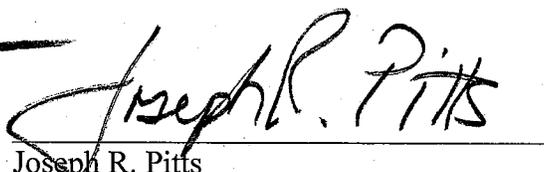
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In closing, we reiterate our strong objection to the proposed Nutrition Principles and the associated marketing restrictions. We urge you to follow Congress's direction to conduct a study *before* formulating your recommendations and to ensure that whatever recommendations you make are addressed to Congress for its plenary consideration, not in the form of a regulatory fait accompli. Should you have any question concerning this matter, please contact Ryan Long or Gib Mullan of the Majority staff at (202) 225-2927.

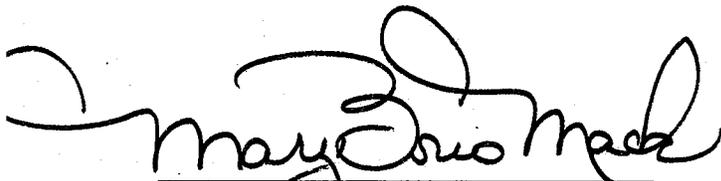
Sincerely,



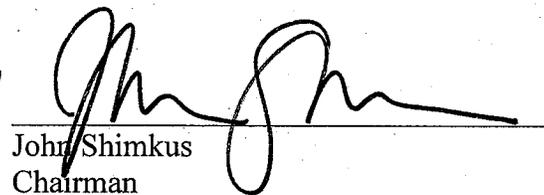
Fred Upton
Chairman



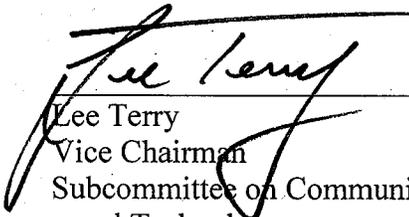
Joseph R. Pitts
Chairman
Subcommittee on Health



Mary Bono Mack
Chairman
Subcommittee on Commerce,
Manufacturing, and Trade



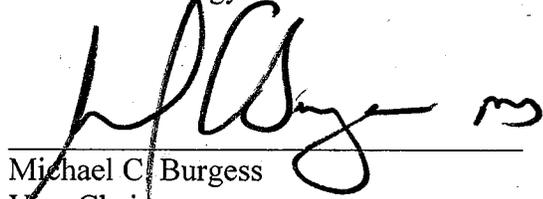
John Shimkus
Chairman
Subcommittee on Environment and the Economy



Lee Terry
Vice Chairman
Subcommittee on Communications
and Technology



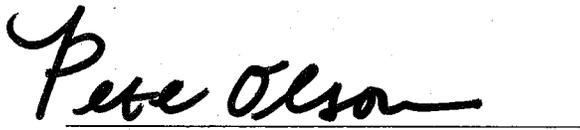
Marsha Blackburn
Vice Chairman
Subcommittee on Commerce, Manufacturing,
and Trade



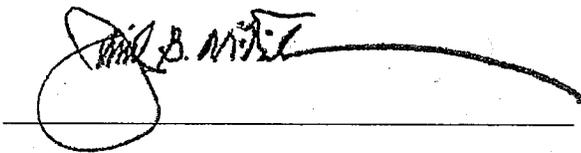
Michael C. Burgess
Vice Chairman
Subcommittee on Health



Mick R. Pompe



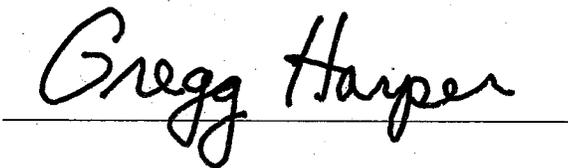
Pete Olson



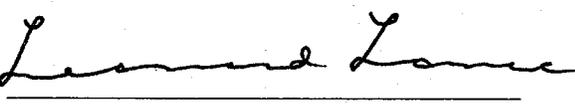
Bill B. Witt



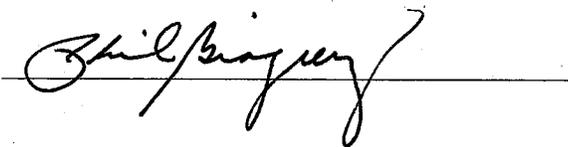
Brett Guthrie



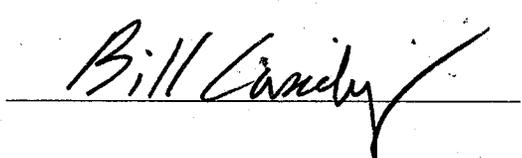
Gregg Harper



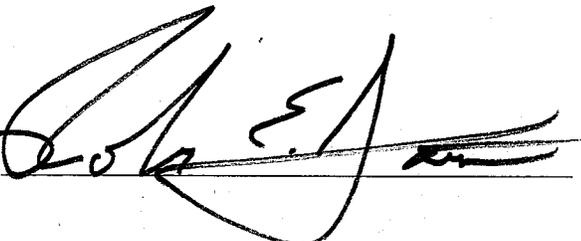
Leonard Lance



Phil King



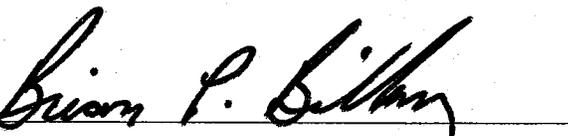
Bill Cassidy



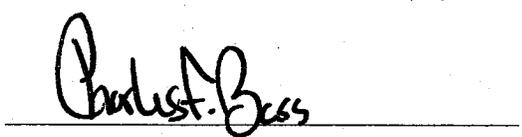
Bob E. Latta



Tom King



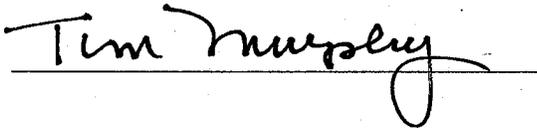
Brian P. Babin

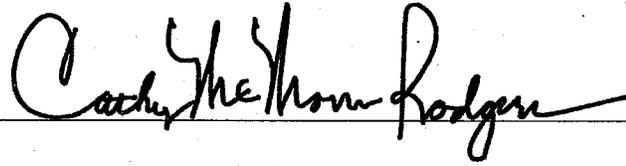


Robert C. Byrd



J. Morgan Kousser





cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Frank Pallone, Jr., Ranking Member
Subcommittee on Health

The Honorable G.K. Butterfield, Ranking Member
Subcommittee on Commerce, Manufacturing, and Trade

The Honorable Gene Green, Ranking Member
Subcommittee on Environment and the Economy