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Before the
House Energy and Commerce Committee
Subcommittee on Commerce, Manufacturing, and Trade
and the
Subcommittee on Health

October 12, 2011

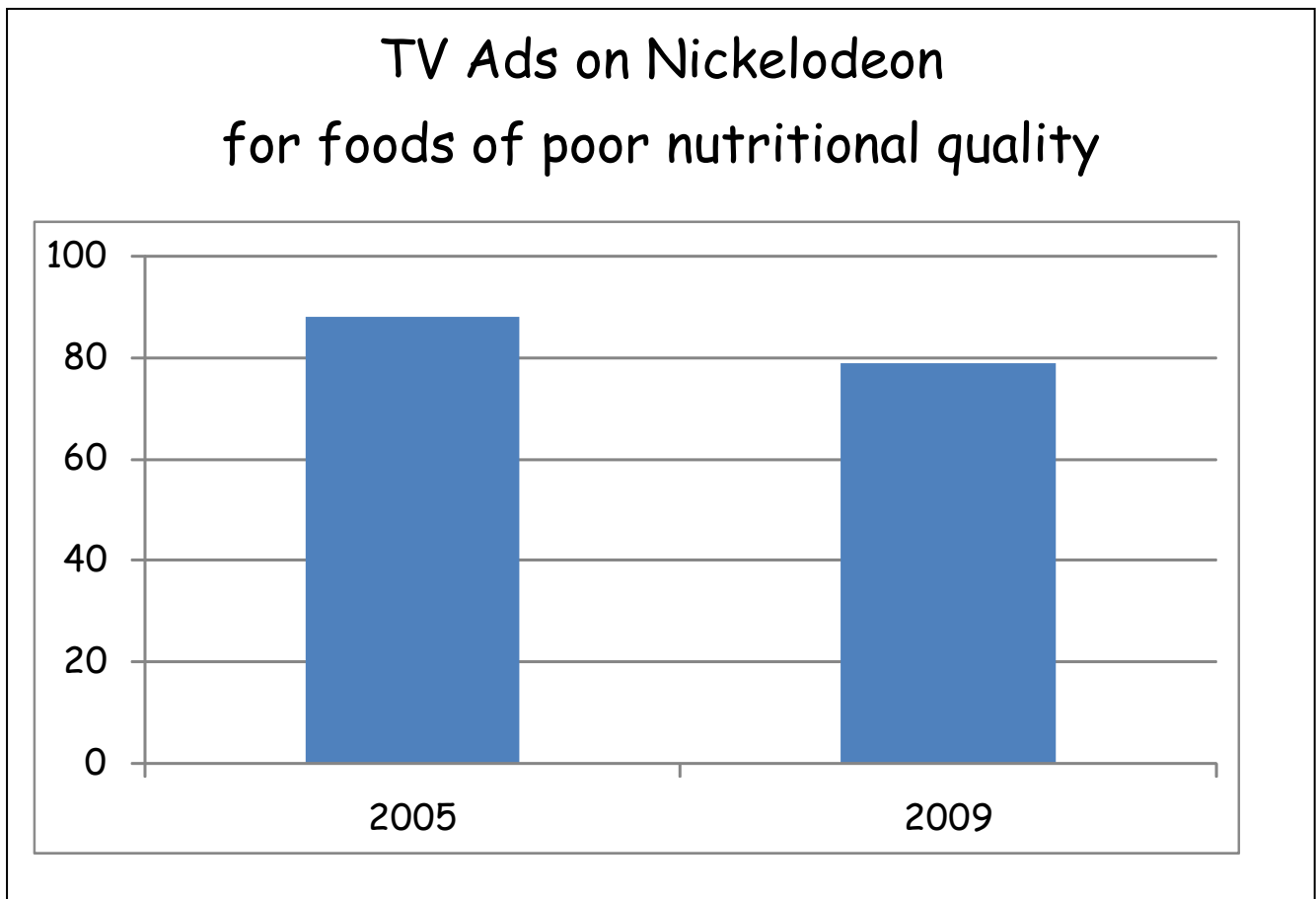
Good morning. I'm Margo Wootan, the director of nutrition policy at the Center for Science in the Public Interest. CSPI is a nonprofit organization that focuses on improving nutrition and food safety for all Americans. I'm supposed to say that I am happy to have the opportunity to testify, but truth is that as a nutrition professional and a mother, I'm troubled by the focus of this hearing and the food, advertising, and entertainment industries' aggressive lobbying to prevent the Interagency Working Group from providing even voluntary recommendations on how industry could strengthen self-regulation of food marketing to children.

Over the last year, I've often wondered, why are companies so afraid of voluntary suggestions on food marketing to children? Perhaps it's because the IWG process has revealed the weakness of the current self-regulatory system.

The Children's Food and Beverage Advertising Initiative has been in place since 2006. CSPI has worked closely with many companies on food marketing to children and has successfully encouraged many companies to join the CFBAI.

Yet, notwithstanding those self-regulatory efforts, numerous studies show that the overwhelming majority of food marketed to children is still for foods of poor nutritional value. In a study of Nickelodeon, the most popular children's television station, ads for foods of poor nutritional quality decreased only slightly, from about 90% to 80% of food ads from 2005 and 2009, that is from before self-regulation was in place to after the CFBAI was implemented. A study by researchers at the University of Illinois at Chicago found that while the percentage of television advertisements for unhealthy packaged food products has decreased in recent

years, children’s exposure to fast-food advertising increased during this time. They found that in 2009, 86% of food-related ads seen by children were for products high in saturated fat, sugar, or sodium, down from 94% in 2003. In addition, three-quarters of chain restaurants and 80% of entertainment companies that market to children are not addressing unhealthy food marketing to children at all. After five years of self-regulation, progress is modest and insufficient given the high rates of childhood obesity and children's poor diets.



I worked with Senators Harkin and Brownback on the bipartisan 2009 provision that required the formation of the Interagency Working Group on Food Marketed to Children. I know firsthand that the intent was *not to supplant self-*

regulation of food marketing to children, but to *strengthen it*. IWG guidelines would simply be suggestions for how companies could strengthen their food marketing policies to make them more effective. In fact, the Centers for Disease Control and Prevention, U.S. Department of Agriculture, and Food and Drug Administration lack regulatory authority over food advertising. And since 1980, Congress has explicitly forbidden the Federal Trade Commission from issuing regulations for food advertising to children.

The Interagency Working Group's proposed guidelines are based on science and what's best for children. Those recommendations have overwhelming support from health groups and researchers (see letter below in support of the Interagency Working Group from 75 of the nation's leading health researchers and nutrition experts and another letter in support from more than 80 health organizations. In addition, the IWG received 29,000 comments about its recommendations; 28,000 of those comments, from professionals to parents alike, were in full support of the voluntary guidelines.). Industry has proposed its own new marketing guidelines that are what business wants. As much as we support the IWG's proposal, we expect there will be compromise and that the final IWG recommendations will be somewhere in between. I urge Congress to support the work of the agencies to fulfill their congressional directive and finalize specific voluntary guidelines and provide advice to companies on ways to improve the current state of food marketing to children.

Unfortunately for children and families, the food, advertising, and entertainment industries have mounted an aggressive lobbying effort and misinformation campaign to kill the IWG and intimidate the federal agencies involved. Industry asserts that its self-regulation is so perfect that it isn't open to any outside advice on ways to improve the current system. It's disappointing to witness the extent of industry's political maneuvering, the misleading nature of its arguments, and just how far food and entertainment companies have been willing to go to put company's self-interests before the health of our nation's children.

Few deny that childhood obesity and children's poor diets are national health concerns. One-third of children are obese or overweight, increasing their lifetime risk of diabetes, cancer, heart disease, and other costly health problems. Obesity is costly for families, businesses, and governments, costing approximately \$150 billion a year, half of which is paid for by taxpayers through Medicare and Medicaid.

Of course there are multiple contributors to those problems, and we and others are working on a number of possible solutions. However, food marketing plays a key role. A comprehensive review by the National Academies' Institute of Medicine and numerous other studies show that food marketing affects children's food preferences, food choices, diets, and health. And watching commercial television is associated with obesity.

More recent studies continue to build on and strengthen that evidence base. Studies show that marketing increases children's consumption of soda, snack foods, and other unhealthy foods. Research also shows that marketing causes children to

like the taste of marketed food more than they otherwise would and makes it harder for parents to feed their children healthfully. In a study published just last week, researchers found that 71% of children who saw a commercial for a fast-food meal including French fries chose the fries if their parents didn't try to influence their choice. When this group of children was encouraged by their parents to choose apples, 55% did. Among the children who saw a commercial for a fast-food meal including apples, 46% picked French fries when parents didn't try to influence their choice, and 33% chose the fries when their parents encouraged the more healthful selection.

Industry representatives have been arguing that food marketing isn't effective. If marketing doesn't work, why are companies so worried about these voluntary marketing standards and why spend \$2 billion year on marketing their products to children? The reason marketing has a negative effect on children's diets is that the overwhelming majority of products marketed to children is of poor nutritional value.

Recently, the CFBAI announced a common set of nutrition standard for food marketing to children. That's a positive step forward. However, unlike the Interagency Working Group, the industry standards were developed through a closed-door process, totally by industry, and without any input from the public or public health experts.

Some of the proposed industry standards are reasonable, such as those for calories, saturated fat, and trans fat. Others are weak, including those for sodium,

sugars, and how the food provides a meaningful positive nutritional value. Under the CFBAI's new standards, Cocoa Puffs, some varieties of Kool-Aid, sugary imitation fruit snacks, and sugary Popsicles are considered healthy. Seems like companies could use a little advice.

Of course parents bear much of the responsibility for feeding their children healthfully. But we are outgunned by industry that has psychologists, market research, great music, cartoon characters, and other sophisticated marketing techniques at its disposal. Parents' job is hard enough. Companies should support parents by not encouraging our children to desire and expect to be fed food that undermines their diets and health.

In closing, I ask you to let the Interagency Working Group finish its work. And I urge the food, entertainment, and advertising industries to work with the Interagency Working Group, not against it. The IWG is simply giving companies some much-needed advice on how they could continue to strengthen self-regulation. Then, it will be up to companies what to do next.

Thank you for the opportunity to testify.



July 14, 2011

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Subject: Interagency Working Group on Food Marketed to Children: Proposed Nutrition Principles, General Comments, and Proposed Marketing Definitions: FTC Project No. P094513

Dear Secretary Vilsack, Chairman Leibowitz, Director Frieden, and Commissioner Hamburg:

We, the undersigned, strongly support the Interagency Working Group (IWG) on Food Marketed to Children's proposed nutrition principles and marketing definitions. This is an important time to address food marketing to children and youth. Our nation faces unprecedented rates of obesity and other nutrition-related diseases.

Food companies have taken steps to address food marketing, but the current self-regulatory program is flawed. Studies show that the overwhelming majority of foods marketed to children are still high in calories, saturated fat, sugars, or salt. The IWG's guidelines will provide a strong model for companies to develop or strengthen marketing policies and address current weaknesses in the self-regulation of food marketing to children.

In developing the standards, the IWG fulfilled the congressional directive set out in the 2009 Omnibus Appropriations Act (H.R. 1105). As directed by Congress, the IWG has carefully studied food and beverage marketing and developed a set of principles that are strongly based in science and consensus nutrition and marketing recommendations from authoritative sources.

We enthusiastically support the IWG's proposal to use a food-based approach to ensure that the foods marketed to children make a meaningful contribution to a healthful diet. That approach is essential given the basic premise of the *Dietary Guidelines for Americans (DGA)*: that nutrient needs be met primarily by

consuming nutrient-dense foods. To be consistent with the *Dietary Guidelines*, those recommendations should be based on serving sizes of foods (Principle A, option 2), except in the case of whole grains, for which the *Dietary Guidelines* makes a recommendation based on percentages (50% of grains should be whole grains; i.e., use Principle A, option 1 for grains).

While we strongly support the overall proposed nutrition principles, we offer several recommendations to clarify and strengthen them:

- Revise the suggested timeframe for implementation of the proposed nutrition principles to two-years, with a five-year timeframe for implementation of the final sodium standards. Allowing companies ten years to fully comply with the nutrition principles would mean that a whole generation of children would not be protected by the IWG recommendations.
- Clarify that the proposed nutrition principles apply to *all* foods marketed to children, not just those most heavily marketed to them. It would be unfair to companies, confusing to parents, and unhelpful to children to have the principles apply to some marketed foods and not others.
- Include calorie limits. The *DGA* stresses that obesity results from a caloric imbalance, not a nutrient imbalance.
- Combine fish, extra lean meat, poultry, eggs, nuts, and beans into a single food group, to be consistent with MyPlate and the *DGA*. Separating those groups overemphasizes protein, which is not a nutrient of public health concern for children.
- We strongly support the IWG's interim and long-term sodium benchmarks for individual foods. We suggest that the IWG adjust the standard for main dishes and add a separate standard for meals.

We support the IWG's comprehensive view of marketing to children and its proposal to define child-directed marketing according to the existing definitions developed by the FTC for its expenditures studies (*Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, Appendix B), with a few exceptions as noted below. However, we strongly recommend that the IWG adapt those to develop a set of clearly-stated model definitions that could be easily adopted by companies and incorporated, as is, into company marketing policies. This would make it easier for companies to apply the definitions and increase consistency between company marketing policies.

We applaud Congress and the IWG for considering marketing targeted to both children and adolescents. We strongly support the IWG's proposal to fully apply the nutrition principles to all marketing approaches aimed at children ages 2-11. Research shows that teens also are uniquely vulnerable to food marketing and

are aggressively targeted by food marketers. We urge companies to be responsible in how they market to teens and ask the IWG to include a section in the self-regulatory marketing principles on the unique vulnerabilities of adolescents to marketing, especially digital marketing.

We urge the IWG to make the following additions and clarifications to the final marketing definitions:

- Apply subjective criteria to *all* types of marketing approaches. Subjective criteria (such as whether the marketing includes child-oriented themes) should be applied not only to Internet, on-package, premiums, events, celebrities, and mobile devices, but also to television, radio, and print advertisements, as well as to movies, toys/premiums, and the use of licensed characters.
- Define brand marketing and require brand marketing to meet IWG nutrition principles. Many marketing efforts aimed at children do not promote individual products, but instead promote a line of products, one brand within a company, or a whole company.
- Provide a more detailed definition of in-school marketing to clearly delineate the wide variety of marketing techniques that are covered on the whole school campus for the extended school day. Include preschools, and elementary, middle, and high schools in that definition.
- Make clear that the definition of premiums includes toys used to promote restaurant meals; toy premiums make up more than half of fast-food marketing expenditures.
- Include PG-rated movies in the definitions of product placements and movie advertising. Child-directed movies have undergone a noticeable “ratings creep” over the past several years, with many child-directed movies now rated PG.

We urge the IWG to address the above issues and look forward to the release of the final recommendations by the end of 2011. We also urge the IWG to review and update the nutrition principles and marketing definitions every five years, given the changing nature of the media landscape and food environment for children.

Thank you for taking up this serious and important issue. As the Institute of Medicine and numerous researchers have demonstrated, marketing to children influences their food preferences, purchases, and ultimately what they eat. Right now, their environment is filled with marketing for unhealthy foods. We hope our nation’s food marketers will make children’s health a priority and adopt these voluntary principles.

Respectfully,

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American Institute for Cancer
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American Public Health Association

American School Health Association

American Society of Bariatric
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Association of State and Territorial
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Berkeley Media Studies Group, a
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Black Women's Health Imperative

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California Center for Public Health
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Campaign for a Commercial-Free
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CATCH - Coordinated Approach to
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Open Letter on the First Amendment and
the Interagency Working Group Principles

The undersigned professors of law write to convey our conclusion that the draft nutrition principles issued this spring by the federal Interagency Working Group on Food Marketed to Children (IWG) embody a constitutionally permissible set of government recommendations. Despite a number of comments submitted to the IWG claiming the contrary, the nutrition principles, in their current form, do not violate the First Amendment.

Simply put, voluntary principles that food and beverage businesses are free to ignore do not “abridg[e] the freedom of speech.”¹ The draft nutrition principles pose no threat to any rights guaranteed by the First Amendment.

The Free Speech Clause applies only to government mandates restricting or compelling private speech.² The draft nutrition principles, which are designed “to guide industry self-regulatory efforts,”³ do not restrain or compel anyone’s speech. They are not, in fact, government regulation at all. Instead, they are the speech of the government itself.

The Supreme Court has made clear that “the Government’s own speech . . . is exempt from First Amendment scrutiny.”⁴ The principles were issued in response to a congressional request for a “report” containing “findings and recommendations.”⁵ The agencies have now issued their draft report, and the principles constitute their draft recommendations.

¹ 1 U.S. Const. amend. I.

² *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010).

³ Interagency Working Group, Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts, Request for Comments, <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>.

⁴ See *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 553 (2005); *Donaggio v. Arlington Cty., Va.*, 880 F.Supp. 446, 453-54 (E.D.Va. 1995).

⁵ Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84.

The report and recommended nutrition principles contain no mandates. None of the four agencies will seek to “enforce” the principles, which lack any legally binding effect under agency statutes or the Administrative Procedure Act. Accordingly, no federal agency can impose legal repercussions on a company for following the IWG principles in only a piecemeal fashion, for ignoring them entirely, or—for that matter—mounting a wide-ranging public relations campaign disparaging them, as the food and beverage industry has done.

Nonetheless, attorneys retained by industry have invoked a variety of First Amendment arguments, a tactic with the potential effect of diverting policymakers’ attention from the substance of the draft nutrition principles. Nothing in the cases cited by these commenters bears on the IWG principles. The doctrines of “informal censorship,” “unconstitutional conditions,” and “de facto coercion” are completely inapt. The government is neither explicitly nor implicitly forcing industry to espouse any messages or to silence its expression. The IWG is not requiring loyalty oaths,⁶ threatening criminal prosecution,⁷ or confiscating real estate.⁸ It is not establishing or invoking a legal regime. It is simply following a congressional mandate to issue a report with recommendations based on the agencies’ expert analysis of the relevant facts.

The IWG is better characterized as a routine governmental advisory body than an oppressive censorship panel. The situation here is akin to the Environmental Protection Agency promoting the Energy Star guidelines for energy efficiency⁹ or the Department of Agriculture announcing the new MyPlate recommendations.¹⁰ The IWG is making suggestions regarding the content of food marketed to children in the same way the National Institutes of Health has called for a reduction in youth exposure to smoking in movies;¹¹ the Surgeon General has attempted to promote breastfeeding by encouraging hospitals to refuse infant formula advertisements;¹² and Congress has called on the entertainment industry to reduce the exposure of underage audiences to “programs with unsuitable alcohol content.”¹³

The conclusion is straightforward. The principles proposed by the IWG do not violate the First Amendment.

⁶ *Speiser v. Randall*, 357 U.S. 513 (1958); but see *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁷ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); but see *Meese v. Keene*, 481 U.S. 465 (1987).

⁸ *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), but see *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009).

⁹ <http://www.energystar.gov>

¹⁰ <http://www.choosemyplate.gov>.

¹¹ National Institutes of Health, Healthy People 2020 objectives, <http://healthypeople.gov/2020/topicsobjectives2020/pdfs/tobaccouse.pdf>, TU-18.

¹² The Surgeon General’s Call to Action to Promote Breastfeeding (2011) at 43, <http://www.surgeongeneral.gov/topics/breastfeeding/calltoactiontosupportbreastfeeding.pdf>.

¹³ The Sober Truth on Preventing Underage Drinking (STOP) Act, 42 USC § 290bb-25b, 120 Stat. 2890, Public Law 109-422 (2006).

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September 27, 2011

President Barack H. Obama
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Dear President Obama:

We, the undersigned researchers with expertise in nutrition, marketing, medicine, and public health, write to ask you to ensure that the Interagency Working Group (IWG) on Food Marketed to Children completes its congressionally required task to release a strong set of nutrition guidelines and marketing definitions for food marketed to children.

You and the First Lady have helped Americans understand that child nutrition and obesity are national health concerns, with 1 in 3 children either overweight or obese. While numerous factors contribute to obesity and children's poor diets, food marketing plays a key role. The Institute of Medicine's comprehensive study of 30 years of research concluded that food marketing affects children's food choices, food preferences, diets, and health.ⁱ The \$2 billion a year that food companies spend marketing to children is testament to the fact that food marketing works.ⁱⁱ

Many major food companies are recognizing the deleterious consequences of their marketing. Seventeen companies participate in self-regulation through the Council of Better Business Bureaus' (CBBB) Children's Food and Beverage Advertising Initiative (CFBAI). While the CFBAI has prompted modest reductions in unhealthy food marketing to children and product reformulation, studies show that the vast majority of marketed products remain high in calories, saturated fat, sodium, or added sugars and/or are low in fruits, vegetables, and whole grains.^{iii,iv,v} In 2009, with the industry's self-regulatory program in effect, 86% of food ads seen by children featured products high in saturated fat, sugar, or sodium, down from 94% in 2003 (before self-regulation).^{vi} At that rate, children will not be fully protected from unhealthy food ads until 2033.^{iv}

To make self-regulation more effective, the Federal Trade Commission and public health advocates have called on companies to 1) strengthen their nutrition standards for marketing to children, 2) adopt a consistent set of nutrition criteria for food marketing, and 3) expand the scope of marketing to cover all approaches aimed at children. An essential step toward helping companies address the key weaknesses in the current self-regulatory approach is for the IWG to finalize and release a clear set of marketing guidelines.

We understand that the CFBAI recently released a new set of food marketing standards. The adoption of a single set of nutrition guidelines is a positive step forward. However, the CFBAI guidelines permit many unhealthy foods to be marketed to children. For instance, though the *Dietary Guidelines for Americans* stresses that nutrient needs should be met primarily by consuming nutrient-dense foods, low-nutrition foods can meet the CFBAI standards if companies fortify them with small amounts of nutrients, including nutrients that are not lacking in children's diets.

While industry has urged the Administration to abandon the IWG, we strongly urge the federal agencies to complete the process to protect children and support parents' ability to feed them healthfully. And we are not alone in this request; we understand that the overwhelming majority of public comments submitted to the IWG support the proposed marketing principles.

We urge you and your Administration to finalize and release voluntary food marketing guidelines as the Congress requested and so many parents, health professionals, and researchers support. The nation's children are counting on you.

Respectfully,

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