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A Question of Smart Government and the Interagency  
Working Group on Food Marketed to Children:  
The Unintended Consequences of the Proposed  
Nutrition Principles on Women, Children and At-Risk  
Communities and Constitutional Considerations

Michelle D. Bernard and Dr. Anne Rathbone Bradley  
September 2011



# BERNARD CENTER

For Women, Politics & Public Policy

## A Question of Smart Government and the Interagency Working Group on Food Marketed to Children: The Unintended Consequences of the Proposed Nutrition Principles on Women, Children and At-Risk Communities and Constitutional Considerations

By Michelle D. Bernard and Dr. Anne Rathbone Bradley September 2011



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# Executive Summary

The incidence of childhood obesity in the United States has increased dramatically over the last twenty-five years<sup>1</sup>. In 2009, in response to this crisis, the U.S. Congress, through the 2009 Omnibus Appropriations Act (H.R. 1105) (Congress), established the Interagency Working Group on Food Marketed to Children (IWG). The IWG is comprised of representatives from four groups: the Centers for Disease Control (CDC), the Federal Trade Commission (FTC), the Food and Drug Administration (FDA), and the United States Department of Agriculture (USDA).

Congress charged the IWG with “conducting and develop[ing] recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children”.

This report suggests that there is no empirical evidence that the IWG’s proposed nutrition principles for foods marketed to children would help lower childhood obesity by (a) encouraging children to choose foods that make a meaningful contribution to a healthful diet; or (b) minimize[ing] consumption of foods with significant amounts of nutrients that could have a negative impact on health or weight ...” The proposed voluntary guidelines also raise questions over constitutionally protected free commercial speech in violation of the First Amendment of the U.S. Constitution and improper expansion of regulatory powers.

What we may conclude is that if the IWG recommendations for voluntary advertising bans stand, we can expect the following:

- The bans will not reduce the childhood obesity rate, because they do not address the specific variables that cause childhood obesity.
- The cost of reformulating food products will increase food prices.

“We should have no more regulation than the health, safety and security of the American people require. Every rule should meet that common-sense test.” Here, the proposed guidelines of the IWG do not meet this common-sense test and are not smart government.

—President Barack Obama,  
September 8, 2011

- Increased food prices will disproportionately impact low-income and minority families.
- The advertising ban will limit information that parents and nutritionists can access in order to make the best food choices.
- Jobs will be lost in agriculture, manufacturing, and marketing and will affect every state.

In his September 8, 2011 “American Jobs Act” address before a joint session of Congress, President Obama stated that “... there are some rules and regulations that do put an unnecessary burden on businesses at a time when they can least afford it.”<sup>2</sup> Additionally, President Obama stated that “We should have no more regulation than the health, safety and security of the American people require.<sup>3</sup> Every rule should meet that common-sense test.”<sup>4</sup>

Here, the proposed guidelines of the IWG do not meet this common-sense test and are not smart government.

The “Smart Government” approach would be to increase access to healthful and affordable foods by allowing the market to function, innovate, and compete, unhampered by ill-founded government regulations. Producers are bound by the demand of their consumers—and the market has delivered. Food and beverage producers continue to change their products in response to what consumers want, including: lower sodium, lower saturated fat, lower or zero *trans* fat, reduced sugar options, portion-controlled options, and even gluten-free options. Producers and the competitive markets have actually increased the number, variety, and quality of healthful products on the market. All of this has occurred at lower costs to the consumer. Between 1950 and 2000, the relative price of food fell, on average, by 0.2 percentage points per year<sup>5</sup>. But restricting the ability to advertise would only hinder consumers’ access to information about food options and limit their ability to make the best choices for their families.

The proposed guidelines would not serve their purpose: lowering childhood obesity. This almost certain failure is not only due to the lack of any real correlation between advertising and obesity, but even more, the result of the proposal’s bizarre ban on advertising foods positively associated with healthier body weights, such as cereal and some yogurts, while inexplicably ignoring calories as an integral part of the obesity equation. Additionally, the IWG’s proposed guidelines wholly fail to address the lack of access to healthful and affordable foods in low-income, rural, and underserved communities or variables like household structure, education and language, poverty, employment status and income, and various state indicators like

housing, health environment, food environment, and physical environment, all of which influence the probability of being obese for children aged 6 to 17 years old.

Given the above, one may reasonably argue that policies that address the childhood obesity epidemic in communities most at risk, such as promoting policies that will encourage the elimination of food deserts will be more effective in promoting the welfare of children at risk than sweeping new “voluntary” bans on the advertising and marketing of foods to children.



Photograph by Erinn Cosby

“[T]he IWG’s proposed guidelines wholly fail to address the lack of access to healthful and affordable foods in low-income, rural, and underserved communities or variables like household structure, education and language, poverty, employment status and income, and various state indicators like housing, health environment, food environment, and physical environment, all of which influence the probability of being obese for children aged 6 to 17 years old.”

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# Introduction

The incidence of childhood obesity in the United States has increased dramatically over the last twenty-five years<sup>6</sup>. In response to this crisis, in 2009, the U.S. Congress, through the 2009 Omnibus Appropriations Act (H.R. 1105), established the Interagency Working Group on Food Marketed to Children (IWG). The IWG is comprised of representatives from the Centers for Disease Control (CDC), the Federal Trade Commission (FTC), the Food and Drug Administration (FDA), and the United States Department of Agriculture (USDA).

Unfortunately, the governmental response to obesity has largely been to focus on a non-problem that makes a convenient scapegoat (advertising) instead of tackling the tougher societal conditions that come with a decline in economic freedom, which are actually behind the recent surge in obesity rates. Congress charged the IWG with “conducting and develop[ing] recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the of diets of children.”<sup>7</sup> In conducting that study, Congress directed the IWG to consider “(1) positive and negative contributions of nutrients, ingredients, and food (including calories, portion size, saturated fat, *trans* fat, sodium, added sugars, and the presence of nutrients, fruits, vegetables, and whole grains) to the diets of such children; and (2) evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children. The [IWG] will determine the scope of the media to which such standards should apply.”<sup>8</sup> Finally, Congress directed the IWG to submit a report to Congress containing its findings and recommendations no later than July 15, 2010<sup>9</sup>.

In preparing its report to Congress, the IWG established preliminary, proposed “voluntary” nutrition principles that would guide industry self-regulatory efforts over the advertising and marketing of foods to children<sup>10</sup>. Not only do these proposed nutritional principles contradict virtually all existing federal policies and regulations on the dietary needs of children and adolescents, but the principles also wholly fail

to address the decline in physical activity across the country, issues like playground safety and access, parenting in the digital age and technological changes, and the lack of access to healthful and affordable foods in low-income, rural, and underserved communities. Additionally, the IWG fails to take into consideration community variables like household structure, education and language, poverty, employment status and income, and various state indicators like housing, health environment, food environment, and physical environment, all of which influence the probability of being obese for children aged 6 to 17 years old.<sup>11</sup> For example, in a 2007 study, The Urban Institute found that “the communities where childhood obesity is predicted to be highest face disadvantages across multiple dimensions.”<sup>12</sup>

Most interestingly, in comparing census tracts predicted to be at highest risk for obesity for children aged 6 to 17 years old, The Urban Institute concluded that these tracts are “more likely to have minority residents, higher unemployment rates, higher proportions of children living in households headed by a non-parent and of single families, higher poverty rates, lower female labor force participation, lower education and income levels, and lower home ownership rates than tracts at average or below average risk for obesity.”<sup>13</sup> Given the above, one may reasonably argue that policies that address the childhood obesity epidemic in communities at risk and promoting policies like comprehensive education reform, school choice, and overall gains in economic freedom that will increase education and income levels, will be more effective in promoting the welfare of children at risk than sweeping “voluntary” bans on the advertising and marketing of foods to children. Here, government is ignoring these real (but complicated) issues in favor of merely looking like they are taking a tough stance on obesity by going after advertising.

There is no empirical evidence that the IWG’s proposed nutrition principles for foods marketed to children would help lower childhood obesity by “(a) encouraging children, through advertising and marketing, to choose foods that make a meaningful contribution to a healthful diet; or (b) minimize[ing] consumption of foods with significant amounts of nutrients that could have a negative impact on health or weight.”<sup>14</sup> The nutrition standards proposed by the IWG are so strict, and advertising definitions proposed by the IWG are so broad, that the IWG approach could make it extremely costly to market many foods, including healthful foods that provide nutritional benefits. Should the proposed nutrition principles and definitions of advertising, promotion, and marketing be implemented, they would have devastating consequences on food prices and would add to unemployment, both of which would have the greatest impact on low-income families. The proposed “voluntary” guidelines also raise questions over constitutionally protected free commercial speech in violation of the First Amendment of the U.S. Constitution and improperly expand the regulatory powers of the federal government in an extra-constitutional way. This report analyzes the objectives, definitions, and pro-

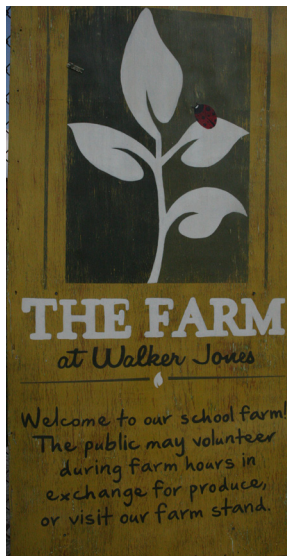


posed nutrition principles of the proposed ban on the marketing of certain foods to children as outlined in the published IWG proposal. It discusses the extra-constitutional ramifications of the IWG proposal for “voluntary” adoption. Finally, this report discusses the impact of the IWG proposal on vulnerable communities and asks the critical questions: Are the IWG’s proposed guidelines, in fact, smart government? Will they promote a decrease in the nation’s childhood obesity epidemic? Will they further the national goal of eradicating food deserts and of decreasing the number of children who live in “food-insecure” households? Will the IWG guidelines promote or undermine economic prosperity? Will they cause economic harm to individuals or businesses? Are the actions of the IWG constitutional?



Photograph by Erinn Cosby

# IWG Objectives, Definitions, and Findings



Photograph by Erinn Cosby

## Objectives

The IWG's objective is to develop recommendations for nutrition principles for foods marketed to children 2 to 17 years old when such food represents a significant component of their diets, in an effort to promote children's health through better diet with an emphasis on reducing the incidence of childhood obesity<sup>15</sup>. The IWG recommends that industry focus on categories of foods that are most heavily marketed directly to children, such as breakfast cereals, carbonated beverages, restaurant foods, and snack foods. Additionally, the IWG recommends that industry try to reformulate nutrition standards to meet interim requirements by 2016 and final requirements by 2021, and concedes that if the proposed nutrition principles were fully implemented as proposed, a large percentage of food products currently on the market would not meet the proposed nutrition principles.

The IWG relies on a 2008 FTC report to Congress entitled *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation* (Commission)<sup>16</sup>, which reports that 70% of food marketing expenditures directed at children less than 12 years old falls into three categories: (1) breakfast cereal; (2) restaurant foods; and (3) snack foods. For children aged 12 to 17 years old, 69% of marketing expenditures fall into three categories: (4) carbonated beverages; (5) restaurant foods; and (6) non-carbonated beverages. The IWG went further to identify ten categories of food products for which the industry spent at least \$50 million in 2006 on marketing to children aged 2 to 17 years old: (7) breakfast cereals; (8) snack foods; (9) candy; (10) dairy products; (11) baked goods; (12) carbonated beverages; (13) fruit juice and non-carbonated beverages; (14) prepared foods and meals; (15) frozen and chilled desserts; and (16) restaurant foods. As further discussed below, the IWG is recommending that the food industry focus its efforts on ensuring that any advertising or marketing of food products within these categories meet their two nutrition principles, Principle A and Principle B.<sup>17</sup>

The IWG recommends the following definitions for these ten food categories, based on standard industry Product Classification Codes:

1	Breakfast cereals	All cereals, whether intended to be served hot or cold (PCC F122);
2	Snack foods	snack chips (such as potato chips, tortilla chips, and corn chips), Pretzels, snack nuts (salted and roasted), popcorn, snack bars (including breakfast and cereal bars), crackers, cookies, processed fruit snacks (such as fruit leather), gelatin, and pudding (PCC F115, F163, F212);
3	Candy	Chocolate and other candy bars, other chocolate candy, hard candy, chewy candy (including licorice, gummi candy, and jelly beans), and sour candy (PCC F211, excluding gum and breath mints);
4	Dairy products	Milk (including flavored milk drinks), yogurt, yogurt drinks, and cheese (PCC F131, excluding butter, eggs, and cream, F132, F139, excluding cottage cheese and sour cream, F223);
5	(5) Baked goods	Snack cakes, pastries, doughnuts, toaster baked goods (such as frozen waffles, French toast sticks, and toaster pastries), bread, rolls, bagels, breadsticks, buns, croissants, taco shells, and tortillas (PCC F161, F162);
6	Carbonated beverages	All carbonated beverages, both diet and regular (PCC F221, F222);
7	Fruit juice and non-carbonated beverages	Fruit juice, juice drinks, fruit-flavored drinks, vegetable juice, tea drinks, energy drinks, sports drinks, cocoa, bottled water, and all other non-carbonated beverages, including ready-to-pour beverages as well as those sold in concentrated or powdered form (PCC F171, excluding all varieties of coffee, F172, F173, F224);
8	Prepared foods and meals	Frozen and chilled entrees, frozen pizzas, canned soups and pasta, lunch kits, and non-frozen packaged entrees (such as macaroni and cheese) (PCC F121, F125, F126);
9	Frozen and chilled desserts	Ice cream, sherbet, sorbet, popsicles and other frozen novelties, frozen yogurt, and frozen baked goods (such as frozen pies and cakes) (PCC F133);
10	Restaurant food	Menu items offered in a restaurant (including both quick-serve and other types of restaurants) (PCC G330).

Source: Interagency Working Group on Food Marketed to Children: Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts.

## Food Definitions

“Principle A” of the IWG’s preliminary proposal for voluntary principles to guide industry self-regulatory efforts to improve the nutritional profile of foods marketed to children is “drawn from the principles of the 2010 [Dietary Guidelines for

Americans (DGA)] and is meant to ensure that children achieve a healthful diet, without overeating, by choosing individual foods that make a meaningful contribution to the diet and avoiding foods that do not<sup>18</sup>.” Under the proposed principles, foods that meet Principle A would contribute a significant amount of at least one of the following food groups: fruits, vegetables, whole grains, fat-free or low-fat milk products, fish, extra lean meat or poultry, eggs, nuts and seeds, or beans.

There are two options for meeting Principle A:

**Option 1:** Individual foods should contain at least 50% by weight of one or a combination of more than one of the above list. Main dishes should contain at least 50% by weight from a combination of at least two of these groups, and meals should contain at least 50% by weight from a combination of at least three of these groups.

**Option 2:** Individual foods should contain one of the following or a proportionate combination of more than one of the following. Main dishes and meals should contain one or more of the following or a proportionate combination, per 100 g, with main dishes fulfilling at least two of the following and meals fulfilling at least three of the following:

.5 cups fruit or fruit juice
.6 cups vegetables or vegetable juice
.75 oz. equivalent of whole grain
.75 cups fat-free or low-fat (1%) milk or yogurt; 1 oz. fat-free or low-fat (1%) natural cheese; 1.5 oz. fat-free or low-fat processed cheese
1.4 oz. meat equivalent of fish or extra lean meat or poultry
.3 cups of cooked dry beans
.7 oz. nuts or seeds
1 egg or egg equivalent

“Principle B” of the IWG’s preliminary proposal for voluntary principles to guide industry self-regulatory efforts to improve the nutritional profile of foods marketed to children targets and sets limits on foods that have minimum quantities of nutrients and therefore could have a negative impact on health and weight. With the exception of nutrients naturally occurring in food contributions under Principle A, under the IWG’s proposed guidelines, foods marketed to children would not contain more than the following:

Saturated Fat:	1g or less per Reference Amount Customarily Consumed (RACC) and 15% or less of calories for individual foods.
Trans Fat:	0 g (<0.5 g) per RACC for individual foods.
Added Sugars:	No more than 13 g of added sugars per RACC for individual foods.
Sodium:	No more than 210 mg per serving for individual foods, 450 mg per serving for main dishes <sup>19</sup> and meals by 2016; and no more than 140 mg per RACC for individual foods and 300 mg per serving for main dishes and meals by 2021.

It is important to note that there is an enormous difference between RACC and a serving. Because the IWG has used rules from other contexts (whose relevance is questionable) that suggest that foods with a small RACC be evaluated on the basis of a 50 g serving size, rather than their actual RACC size of 30 g or less, food like cereals (which have a 30 g RACC) have to meet the standards as if their RACC were 50 g. This means that, though a 30g serving of Cheerios (which has 160 mg of sodium) is relatively close to the 140 mg sodium limit, it actually comes nowhere close under the IWG standards, because the 140 mg sodium limit is applied to 50 g of Cheerios, not 30 g. This ensures that virtually no cereals could be advertised to children. Virtually no cereal will ever be able to meet these standards. There is no logical or empirical reason for evaluating cereals against such an inflated serving size, even though this is not done for other (heavier) foods. Fifty (50) grams of many cereals is about two cups of cereal; very few people would eat this much, and the average child would not eat this much.

## Marketing Definitions

The IWG’s definitions of marketing include 20 categories of advertising, marketing, and promotional activities as identified by the FTC’s 2006 food marketing study definitions, which they presented to Congress in their 2008 report *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*<sup>20</sup>. They include: “television; radio; print advertising; company-sponsored web sites; ads on third-party Internet sites; other digital advertising such as email and text messaging; packaging and point-of-purchase displays and other in-store marketing tools; advertising and product placement in movies, videos, and video games; premium distribution; contests; sweepstakes; cross promotions, including character licensing and toy co-branding; sponsorship of events; sports teams; individual athletes; word-of-mouth and viral marketing; celebrity endorsements; in-school marketing; philanthropic activity tied to branding opportunities; and a catch-all other category”<sup>21</sup>.

For measured media, including television, radio, print, and some Internet advertising, the IWG's definitions refer to audience share. For children aged 2 to 11 years old, the audience share that is considered "targeted" to children is 30%; for children aged 12 to 17 years old, it is 20%. For Internet ads, the criteria are a 20% viewer share. For all promotional activity categories, if the marketing plan indicates the promotion is directed to or designed to appeal to children or teenagers, it is considered targeted to that group. For other advertising or promotional criteria for which there are no objective criteria (i.e., audience share, opinion data, or company marketing plan) the IWG proposes using the FTC's subjective indicators of targeting children, including:

- Use of child- or teen-oriented animated or licensed characters (including characters like Santa Claus, the Easter Bunny, Tony the Tiger, or the Pillsbury Doughboy), even when the product and/or the advertising is actually being directed exclusively to adults;
- Use of words like "child" or "kid" or "teen" on a package, even when the communication is directed solely to adults;
- Use of celebrities or athletes that are "highly popular" with children or teens, which would include nearly any celebrity or athlete, even when the communication is directed to adults;
- Use of child or teen models and child or teen oriented themes, activities, or incentives; and
- Whether the company actively seeks the participation of children or teens in some aspect of promotion<sup>22</sup>.



Photograph by Erinn Cosby

# Challenging the Assumptions

In order to understand the overall impact of these proposed nutrition principles and marketing definitions, it is important to understand and challenge the assumptions the IWG made that led them to the conclusions detailed above. The legitimacy of those assumptions is a critical factor in determining whether the IWG program can have any positive impact on childhood obesity relative to the costs.

There are three critical assumptions made by the IWG that inform their decisions and lead them to their current conclusions.

## *IWG Assumption 1: Advertising products increases consumption of those products for children aged 2-17 years old.*

In other words, more advertising of Product A equals greater consumption of Product A. The premise is that (a) an advertisement can change one's preference for one product over another and thus, consumers increase their demand for the newly preferred product; (b) children are less able to defend themselves against advertising; and (c) unhealthful foods are more aggressively advertised than healthful foods<sup>23</sup>.

This assumption is problematic for many reasons. First, the age range addressed by the IWG is large, but it does not include the persons most responsible for shopping and food choices—parents. If a 6-year old views an ad, it may arguably create an impression, or even shape a preference for trial. Few 6-year-olds, however, shop or buy food products. Food and beverage producers generally do not advertise to very young children (under age 6), but even children aged 2-10 who at some point in their cognitive development can understand the distinction between an advertisement and a program rarely have the means or the opportunity to go to a store and make a purchase. Typically, developing children aged 13 to 17 can clearly understand an advertisement and can independently make or influence a purchase. With parental consent, it would be their right to do so; but in most cases, parents are

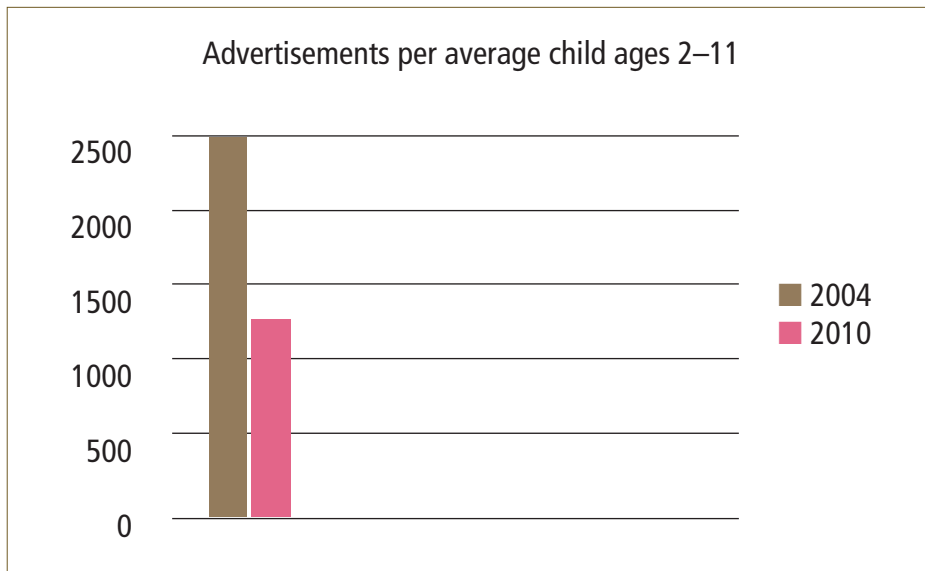
“[T]he age range addressed by the IWG is large, but it does not include the persons most responsible for shopping and food choices—parents.”

primarily responsible for food purchases even at the higher end of the 2- to 17-year-old age range.

Setting the age range problem aside, it is unclear whether marketing using characters, cartoons, toy co-branding, and athletic sponsorships, among other strategies, leads to long-term obesity rates. Until we analyze these factors on an individual level, how can we know? For example, in 2009, Burger King Corporation partnered with the newest SpongeBob movie, “SpongeBob vs. The Big One,” to promote a kids’ meal and toy. The kids’ meal contained a two-pack of BK Burger Shots, a Minute Maid calcium-fortified apple juice, and BK fresh apple fries with a low-fat caramel packet and a SpongeBob toy. Did this promotion increase the long-term consumption of BK Burger Shots for children aged 2 to 17 years old? Did it encourage children to become dependent on dipping all their apples into caramel sauce? Did it increase their long-term consumption of apple juice? Even if it did, which is unknown, would it be a bad or good thing? There is not a universal answer to this question. Some parents and guardians would rather have their kids eating BK Burger Shots than pizza; some would rather have them dip apples in caramel than not eat apples at all. Even if these spot advertisements and campaigns are effective in terms of changing short-term choices, or even long-term choices, the individual results of such choices on a child may or may not be deemed a healthful choice by the parent or guardian—and such choices may or may not fit into a balanced and appropriate diet for a particular child. Any advertisement in isolation may or may not have an impact on a child’s long-term nutritional choices, and empirical evidence of the effects of brand advertising on overall demand is quite mixed, with results varying across industries.<sup>24</sup> The question may actually be put much more simply: Does a parent adhere to what the child wants, or does a parent override the child’s preference, whatever it may be, for a “healthier” option as determined by the parent?

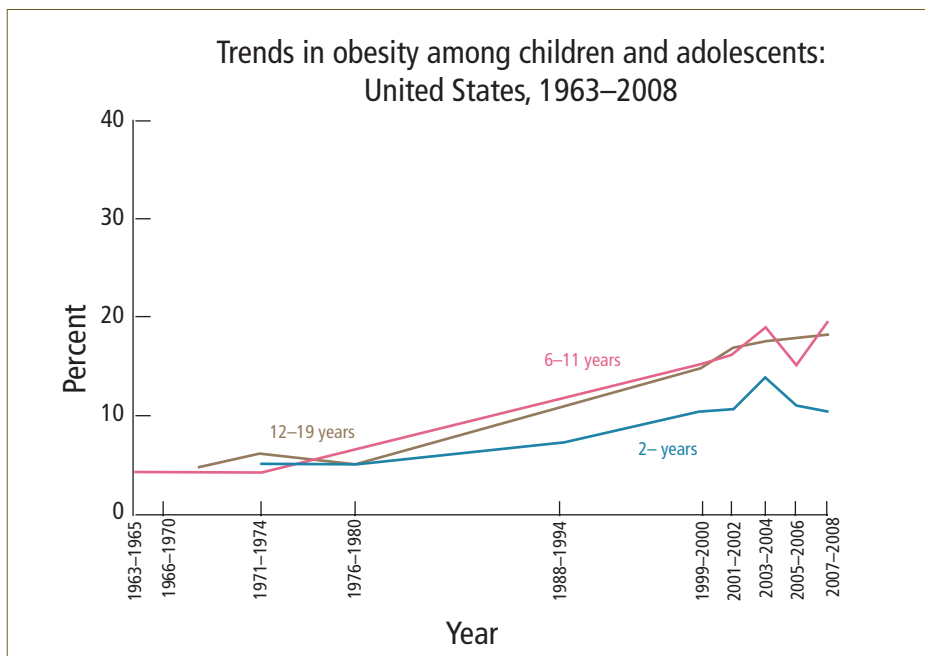
Another important question to ask regarding this assumption is whether advertising has an aggregate impact on obesity. Studies show that television viewing of food and beverage advertisements among children has decreased over the past twenty years<sup>25</sup>. Add to this fact, three things: (1) the advent of the remote control makes it much easier for children to skip over commercials to view more content<sup>26</sup>; (2) evidence suggests that children are switching away from broadcast television toward cable television, which has fewer advertisements overall<sup>27</sup>; and (3) evidence suggests that children are multi-tasking while watching television, and that those watching prime-time television already miss 43% of the advertisements<sup>28</sup>. Additionally, there is evidence that suggests that the quantity of food advertisements directed at children is decreasing<sup>29</sup>. From 2004 to 2010, food and beverage advertisements per average child aged 2 to 11 years old decreased from 2,500 to around 1,250. In that same time-period, advertising for cookies, snacks, snack bars, candy, and gum/mints decreased 65%-99%<sup>30</sup>.





**Source:** Nielson Media Research, Monitor-Plus, 2011 Nielson Company.

Technology has changed such that a variety of media devices are available to children, and they are spending more time playing video games and using handheld devices to text, play games, and listen to music, suggesting a greater sedentary lifestyle overall. According to the CDC, childhood obesity has more than tripled in the past 30 years. The prevalence of obesity among children aged 6 to 11 increased from 6.5% in 1980 to 19.6% in 2008. The prevalence of obesity among adolescents aged 12 to 19 years old increased from 5.0% to 18.1%.<sup>31</sup> If food and beverage advertising actually declined over a similar period, the data simply does not establish that



**Source:** CDC/NCHS, National Health Examination Surveys II (ages 6-11) III (ages 12-17) and the National Health and Nutrition Examination Surveys (NHANES) I-III and NHANES 1999-2000, 2001-2002, 2003-2004, 2005-2006, and 2007-2008.

advertising has caused this rapid rise in obesity rates. The relationship is almost inverse. The causation could run in the other direction—obesity may cause children to engage in more sedentary activities, including television<sup>32</sup>. If one focuses strictly on television advertising, for which the most data exists, the empirical evidence suggests that children are watching less television per day<sup>33</sup> and are exposed to fewer advertisements. In fact, the same evidence suggests that much of children’s media exposure is “overlapping,” suggesting, for example, that they are watching television and playing a video game at the same time, indicating that they likely pay less attention to the advertisements. If the IWG’s assumption is correct, this should result in less obesity overall or decreasing rates of obesity.

“Cereal is far and away the single food product most affected by the IWG standards. Nearly all cereals fail the standard, clearly by design. And since cereal accounts for around half of all packaged food advertising to kids, the principal impact of the IWG standards will be to ban advertising of this food that is associated strongly with lower Body Mass Index (BMI).”

### *IWG Assumption 2: Banning advertising will decrease obesity (if it decreases consumption of so-called “bad” foods and increases consumption of so-called “good” foods).*

If no advertising were allowed for any products that did not fit into Principle A (maximizing healthful foods), can one assume that they would have no market demand? This comes down to a question of whether the market delivers what consumers want or whether producers of food products trick consumers into liking products they otherwise would not. It is unclear that eliminating advertising will decrease demand. Rather, advertising advances competition and is a way for suppliers to demonstrate the benefits of their products over others. Should the IWG’s proposed nutrition principles be implemented, only one cereal—plain shredded wheat—could be advertised. Essentially, all other types of cereal (hot and cold) would be banned from advertising. How would parents and nutritionists be able to differentiate the benefits of one cereal over another in the absence of advertising? How would they do their own research? And would it be more difficult to make what they deem to be the best choices for their children? Does it follow that consumers would simply abandon cereal and make the switch from cereal to, say, beans or fruit?

Just at breakfast alone, there are many reasons why parents choose cereal over other healthful breakfast choices. Affordability, access, convenience, and time all play a large role in what foods parents choose to offer their children. Additionally, breakfast cereals are the most common mechanism parents use to give their children milk, which is a healthful source of calcium and vitamin D<sup>34</sup>. Furthermore, federal government data have demonstrated that children who eat cereal for breakfast, whether sweetened or not, are less likely to be overweight than children who do not eat cereal<sup>35,36,37</sup>. It is not obvious that decreasing advertisements for foods that do

not meet Principle A will change demand for foods that do meet Principle A of the IWG's proposed voluntary nutrition principles, which would guide industry self-regulatory efforts over the advertising and marketing of foods to children.

Cereal is far and away the single food product most affected by the IWG standards. Nearly all cereals fail the standard, clearly by design. And since cereal accounts for around half of all packaged food advertising to kids, the principal impact of the IWG standards will be to ban advertising of this food that is associated strongly with lower Body Mass Index (BMI).

What is obvious is that the IWG proposal will increase the price of food products. Advertising is a mechanism that actually lowers the prices of goods and services. It provides a venue in which suppliers compete on the margins of price and quality, and through that competition, the products become better and it lowers the consumers' cost of acquiring information<sup>38</sup>. Food prices are at a record high. The Department of Labor reports that in February of 2011, food prices increased by 3.6 percent—the highest increase since 1974. Much of the increase is due to fruit, dairy, and vegetable price increases<sup>39</sup>. Imposing regulations that would exacerbate already high prices would impact all Americans, but it would hit moderate- and low-income consumers and WIC beneficiaries the most.

It seems especially ironic that the FTC—the federal agency charged to “prevent unfair methods of competition in commerce” and to guard against “anti-competitive effects”<sup>40</sup>—is itself advancing a proposal that would significantly decrease competition by banning, in advertising and marketing, one of the main means of promoting competition.

### *IWG Assumption 3: Advertising is the most important causal factor in obesity and thus should be targeted.*

According to the CDC, childhood obesity is “the result of eating too many calories and not getting enough physical activity”<sup>41</sup>. This conclusion is both scientifically accurate and statistically inescapable, yet this conclusion is altogether absent from the design of the IWG proposal.

The general causes of obesity in children can be attributed to: (1) genetic factors, (2) overall energy intake (measured in calories), and (3) overall energy expenditure. Essentially, calories consumed relative to calories burned.

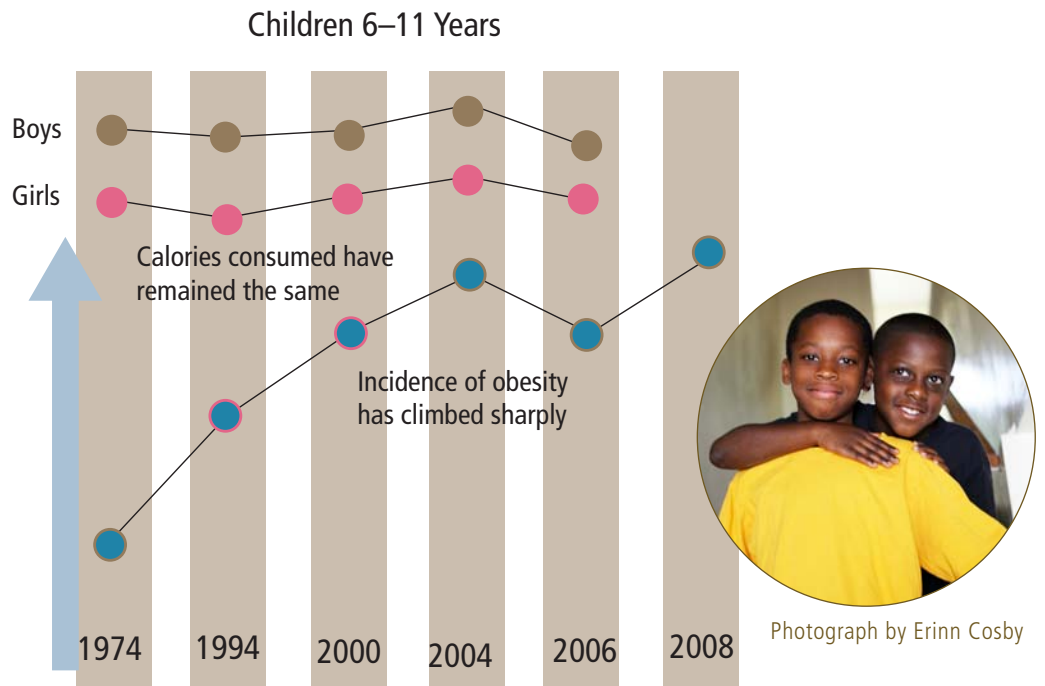
A 1997 World Health Organization (WHO) study found that 25% to 40% of childhood obesity is inheritable.<sup>42</sup> If this finding is accurate, then advertising should

have no impact on the health and BMI of those children.

Overall energy intake is comprised of the energy density of food (sugar, fat, sodium) and the frequency and quantity of eating those foods. Even if advertising encourages the consumption of foods high in fat, sugar, sodium, or calories, it is not clear that those who eat those foods on occasion do not offset that intake with lower quantities of energy, and some studies show that offsetting does occur<sup>43</sup>. For example, if my child has a heavy pasta lunch, he/she might offset those calories later in the day with a much lighter dinner.

Overall energy expenditure occurs through the body's basic daily operations (dietary thermogenesis) and through physical activity. If sedentary activities crowd out physical activities, then (all things being equal) we can expect obesity rates to increase. The evidence suggests that time children spend on physical activities is decreasing. According to the U.S. Department of Health and Human Services (HHS), fewer than 33% of children and adolescents aged 6 to 17 years old engage in 20 minutes of vigorous physical activity five days per week, despite that their 2008 Physical Activity Guidelines for Americans recommends 60 minutes of daily physical activity for children and adolescents. Evidence suggests that for children aged 6-11 years, overall calorie intake has remained relatively constant since 1974<sup>44</sup>. Therefore, if calories are roughly flat, if food and beverage advertising is in decline, and if obesity is rising, what correlation exists between advertising and obesity? How can advertising be causing more obesity if more calories are not being consumed?<sup>45</sup>

"If calories are roughly flat, if food and beverage advertising is in decline, and if obesity is rising, what correlation exists between advertising and obesity? How can advertising be causing more obesity if more calories are not being consumed?"



Source: NHANES 1971-2006; Centers for Disease Control.

One measure of activity level is the time children spend in physical education classes during school hours. The School Health Policies and Programs Study (SHPPS) indicated that only 3.8% of elementary schools, 7.9% of middle schools, and 2.1% of high schools provided daily physical education or its equivalent (150 minutes per week in elementary schools; 225 minutes per week in middle schools and high schools)<sup>46</sup>. Evidence suggests that overall levels of activity have declined. Daily enrollment in physical education classes among high school students decreased from 42% in 1991 to 25% in 1995, subsequently increasing slightly to 28% in 2003<sup>47</sup>. The percentage of trips to school that children walked declined from 20% in 1977 to 12% in 2001<sup>48</sup>. In suburban areas, the evolution of “sprawl” changes the cost to residents from walking or biking and contributes to greater dependence on rising vehicle use<sup>49</sup>. All of these factors are occurring while childhood obesity rates are rising, suggesting that they could be positively correlated.



Photograph by Erinn Cosby

**Source:** School Health Policies and Programs Study. (2010). *Healthy youth! SHPPS: School health policies and programs study*. Retrieved from [www.cdc.gov/HealthyYouth/](http://www.cdc.gov/HealthyYouth/).

What matters most is the relative ratio of overall energy consumption to overall energy expenditure. The evidence cited above suggests that children are moving less and eating more. Changes and improvements can obviously be made on both sides of that equation. If the IWG is strictly concerned with BMI as an indicator of obesity, then children can eat the same and move more, which, all things being equal, would decrease obesity. There are additional health benefits associated with moving more, which may also indicate that targeting increased energy expenditure will be more effective than changing children’s consumption by targeting advertising of certain foods over others.

# Self-Regulation as an Option

Add to this that the food industry has been regulating itself, both in terms of the nutritional content of food and their advertising to children. In 2006, the Council of Better Business Bureaus and ten leading food and beverage companies, as part of the Children's Food and Beverage Advertising Initiative (CFBAI), pledged to shift the mix of advertising directed primarily at children to encourage healthier choices. In 2010, there are now 17 companies participating, and they have made changes to their food and beverage products to provide healthier alternatives for children (fewer calories; lower in fats, calories, and sugars; and more nutrient-dense). Within the CFBAI, more than 100 products have been reformulated, and not one of those cereals has more than 12 grams of sugar per serving; more than half provide 8 grams of whole grains per serving<sup>50</sup>. Many producers have added front-of-package labels that give calorie, fat, sodium, and sugar content, so that it is easier to access product information. This suggests that the market has been, and continues to be, responsive to the demands of consumers—and, importantly, that industry is capable of self-regulation. For example, the CFBAI has been enormously successful. Consider the following:

- Due to the efforts of the CFBAI, food advertising expenditures on children's television (adjusted for inflation) decreased almost two-thirds, from almost \$600 million in 2004 to approximately \$200 million in 2010.
- From 2004 to 2010, total food advertisements viewed by children on children's television programming fell by 50%<sup>51</sup>.

On July 14, 2011, CFBAI member companies announced the CFBAI Uniform Nutrition Standards, which require that nearly one-third of the food products currently advertised to children must be reformulated by the end of 2013 or they will violate the CFBAI's self-regulatory guidelines. This includes voluntarily limiting the sugar content in cereals to 10 grams per serving to qualify for marketing to children<sup>52</sup>. That represents an additional 24% decrease over the 2006 sugar reductions.

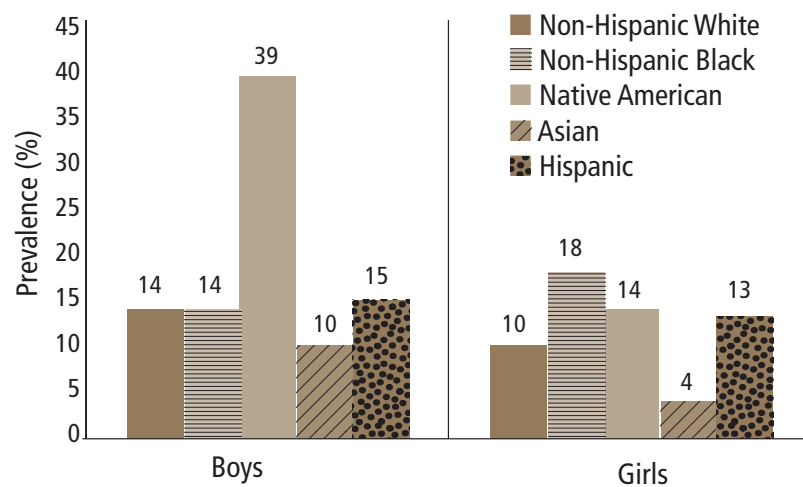
Clearly, if consumers demand healthier options, the burden is on the market to supply those goods and services. In this sense, the market must be proactive in meeting consumer demand. There is no reason to believe these healthy alternatives and trends in food options will not continue without government intervention. The IWG's consensus is reactive and overly broad in terms of the choices it will remove from consumers, which are healthful alternatives like cereal and milk.



Photograph by Erinn Cosby

# Unintended Consequences and the Impact on Vulnerable Communities

Should the IWG recommendations be implemented, there are specific costs that will ripple throughout the economy and harm the very people the group is intending to help: obese children. For example, implementation of the IWG’s proposed nutrition principles will raise prices to consumers, decrease available food options, and increase unemployment across many sectors of the American economy. All of the above will have the greatest negative impact on lower-income families, and they will undermine the IWG’s objective of reducing childhood obesity and promoting children’s health through “better diet.” Empirical evidence suggests that there are ethnic and racial disparities in obesity trends among children (see figure below).



**Source:** Youfa Wang and May Beydoun “The Obesity Epidemic in the United States—Gender, Age, Socioeconomic, Racial/Ethnic, and Geographic Characteristics: A Systematic Review and Meta-Regression Analysis” *Epidemiologic Reviews*, (2007) 29 (1): 6-28.



# Disproportionately Negative Impact on Low-Income Families

The economic downturn has had a dramatic, negative impact on American households throughout the nation and has been even more disastrous for low-income families. Nationally, the unemployment rate still hovers around 9.1%. The unemployment rate in the African-American community is approximately 15.5%, and in the Hispanic community, it is 35%<sup>53</sup>.

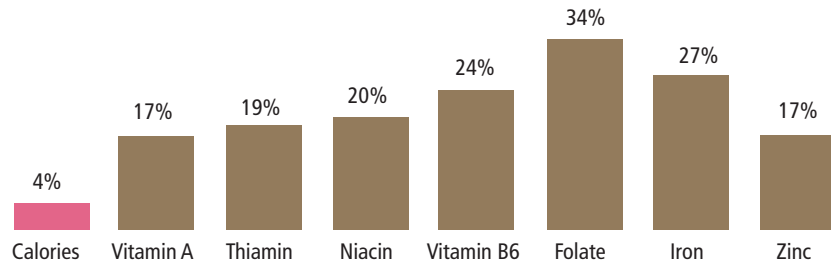
Household income declined during the recession, with significant differences by race and ethnicity. Median household income fell for all groups between 2007 and 2009, but the impact was more severe for African-American and Latino households. The number of children living with at least one unemployed parent doubled between 2007 and 2010, and African-American children are almost twice as likely to have an unemployed parent as white children<sup>54</sup>. These are the very same demographics of children who experience obesity. Regulations that increase the prices of food by banning advertising make providing healthful food options for ones children more difficult, and the increased prices mean one has less overall disposable income to spend on food.

Rising prices, fewer food choices, and increasing unemployment will have a greater impact on lower-income families, because they spend a higher portion of their overall income on food. For example, cereal is a low-cost breakfast option, at about \$.50 per serving, with milk. It is also viewed as a gateway to milk consumption among children; 41% of milk consumption is a result of cereal consumption, and that percentage is higher in minority and lower-income communities. For Hispanic and African-American children, those percentages are 48% and 54%, respectively; 40% of calcium in children's diets comes from cereal consumption<sup>55</sup>. Cereal is also a leading source of ten nutrients in children's diets, according to a study, cereal consumption as part of an overall healthy lifestyle may play a role in maintaining a healthy BMI and adequate nutrient intake<sup>56</sup>

Additionally, children who are regular cereal eaters tend to have lower BMIs<sup>57</sup>. It is plausible to think that some low-income families may use foods like cereal as a

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**Cereal provides key nutrients for children**  
 Percent of selected nutrients provided by ready-to-eat cereal, children aged 4–12



**Source:** Centers for Disease Control and Prevention (CDC). National Center for Health Statistics (NCHS). National Health and Nutrition Examination Survey Data. Hyattsville, MD: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, [2005-06] [[http.cdc.gov/nchs/nhanes](http://cdc.gov/nchs/nhanes)].



Photograph by Erinn Cosby

nutritious snack or supplement to another meal because of its low cost and its nutrition properties. Furthermore, children who are regular cereal eaters tend to have lower BMIs [and better nutrient intakes]. If the IWG proposals are accepted, both cereal and milk will be effectively banned from advertising to children and from many other marketing avenues as well, which will reduce the competitive information available to those who rely heavily on cereal as a low-cost, healthy meal or meal supplement option, including reductions in the use of couponing, for example, which may also fail the IWG tests. Evidence suggests that minority and low-income families have higher rates of childhood obesity<sup>58</sup>. It is difficult to understand how increasing prices of healthful foods like cereal and milk will help minorities and low-income families lower their obesity rates.

The other impact is that the products that can be advertised are far more expensive foods to begin with. A family trying to eat the way the IWG suggests will pay 60% more for their food than a family does today. The IWG proposal is elitist and unrealistic for most Americans, especially minority and

low-income families. The impact will also be felt by those families who rely on the availability of processed foods at food shelves—the government is seeking to ban (or at least diminish the production of) processed foods, and this will not have a positive impact on those struggling with food insecurity.

# Impact on the Federal School Lunch Program and Other Federal Programs

One of the most startling and incomprehensible aspects of the IWG proposal is that the nutrition principles as defined by the IWG contradict virtually every existing FDA, HHS, and USDA guideline on what constitutes a healthful food or whose health benefits have been expressly encouraged by federal food policy.

For example, the USDA's dietary guidelines govern food and beverage choices made under the Women, Infant and Children Program (WIC), school lunch programs, and school breakfast programs, all of which are federally funded. Beth Johnson, former Acting Under Secretary and Deputy Chief of Staff for the USDA and a registered dietician, points out that foods that meet the standards of the WIC program have been determined to be important supplements to kids' diets<sup>59</sup>. Yet under the IWG's proposed nutrition principles, foods like cheese, yogurt, and milk, whose consumption is encouraged under the WIC program, all fall within the penumbra of the guidelines' advertising ban.

The IWG's advertising ban would apply to foods expressly included in the USDA WIC program, such as whole grain breads and cereals, in addition to enriched grains, which are a primary source of folic acid. Folic acid has been added to some foods, such as enriched breads, pastas, rice, and cereals. A few cereals have 100% of the folic acid encouraged for pregnant women/teenagers to prevent birth defects in a developing fetus<sup>60</sup>.

The IWG standards are so sweeping that they contradict virtually all other standards for federally funded programs. Across four categories: (1) trans-fat, (2) saturated fat (3) sugar, and (4) sodium, the IWG standards are more stringent than, and conflict with, the standards of the: USDA's Proposed Rule for School Lunches under the National School Lunch Program; Healthier US Schools Challenge; 2010 Dietary Guidelines for Americans (in fact, many of the would-be banned foods are encouraged here); FDA's definition of healthy for food labeling (which, incidentally, is different the USDA's definition of healthy)<sup>61</sup>; and the WIC program. The only two instances where IWG's proposed nutrition principles do not conflict with the

"One of the most startling and incomprehensible aspects of the IWG proposal is that the nutrition principles as defined by the IWG contradict virtually every existing FDA, HHS, and USDA guideline on what constitutes a healthful food or whose health benefits have been expressly encouraged by federal food policy."

guidelines of other federal agencies, including some of its own member agencies, is the trans-fat guideline set by the Proposed Rule for School Lunches under the National School Lunch Program and the saturated fat requirements necessary in order to meet the FDA’s definition of healthy<sup>62</sup>.

The IWG recommendations and advertising ban are incompatible with established FDA definitions of “healthy” and defies FDA-authorized health claims. It also bans foods which: satisfy the USDA’s standards for its WIC food assistance program, are encouraged for consumption under the 2010 U.S. Dietary Guidelines, and are purchased for families using federal funds through the SNAP (food stamp) program and thus, appears capricious. Though there is nothing “wrong” with the 12 commonly consumed foods (out of the top 100) that actually meet the IWG standards (listed below), there is no evidence that they are more healthful than the banned foods. This arbitrary and insupportable result is a direct consequence of the IWG’s use of non-scientific standards in determining what makes the approved list and what does not.

The 12 commonly consumed foods that satisfy the standards are as follows <sup>63</sup> :
Raw bananas
Raw apples
Raw grapes
Raw oranges
Raw peaches
Raw strawberries
Raw carrots
Fresh broccoli (cooked without salt or fat)
Frozen mixed vegetables
100% fruit juice
Applesauce
Non-fat yogurt

“These foods represent only small parts of three of the five food groups, as established by the U.S. Dietary Guidelines. No grain-based products and no meat products in the top 100 make the approved list, they would all be subject to the advertising ban. The goal of any advertising ban of certain products, like that proposed by the IWG, is to limit consumption of products subject to the ban. Here, where the category of products involved does not involve discretionary items, but rather involves food (which obviously is required for human survival), the goal is necessarily to shift consumption away from banned foods to foods that meet the IWG’s standards. But there is simply no legitimacy to a public policy that suggests that there should be no grain products (like cereals and whole wheat breads) in our diet, and that these foods should be eliminated in favor of foods like applesauce and fruit juice”<sup>64</sup>

In addition to the above-referenced contradictions, the guidelines set forth by the IWG contradict previously issued statements by the USDA and CDC (both of whom are part of the IWG) about the impact of added sugars. According to the USDA/HHS, “foods containing...added sugars are no more likely to contribute to weight gain than any other source of calories in an eating plan that is within calorie limits,” and the CDC reports that a healthy lifetime weight depends on balance—balancing the number of calories consumed with those burned<sup>65</sup>. Those well-founded conclusions did not stop the USDA, HHS, or CDC from recommending a ban on advertising and marketing of most added sugars. One must conclude that the IWG recommendations lack a consistent research methodology, which leads them to these unfounded and contradictory conclusions.

It is perhaps most stunning to note that the IWG’s proposed nutrition principles do not contain any references to, or requirements regarding, calories, but rather, they target only specific micronutrients. It is difficult to understand why the IWG focuses on such sweeping and complicated definitions of nutrition and advertising, rather than just acknowledging and recommending a calorie limit. Perhaps one argument would be that setting a calorie limit, even one characterized by the agencies as “voluntary,” would be such an egregious violation of consumer rights that the political backlash would overturn their recommendation immediately. Another possibility is that a reasonable and rational calorie guideline would have logically supported and encouraged low-calorie, nutrient-dense food options, including, and perhaps especially, ready-to-eat breakfast cereals, which are inherently low in calories and nutrient rich.

Finally, this issue of whether to impose overly strict regulations for nutrient standards is not a new one for federal agencies. Prior to the FDA’s participation in the IWG, the FDA had historically recognized that setting overly strict regulations can be counter-productive when the goal is to encourage healthful eating. “For example, in 1993, the FDA determined that setting overly strict disqualifying levels for fat, saturated fat, cholesterol, and sodium (i.e., levels beyond which health claims could not be made) was undesirable because to do so might serve as impediments to providing consumers with important information on diet and health by precluding health claims for major food groups, such as fish and whole grain cereals, that can be significant foods in a balanced and healthy diet.”<sup>66</sup>

## Rising Food Prices

“Rising food prices in an environment where the unemployment rate is around 9%, and almost 16% in communities of color, is not the solution to the nation’s childhood obesity problem; it could even exacerbate it.”

The IWG’s proposed definitions and recommendations would likely raise food prices in two ways. First, they would limit the ability of producers to advertise their products. Second, there are significant costs associated with reformulating manufactured products (costs of compliance) that do not currently meet the IWG standards, and those costs will raise prices to consumers of those products due to certifying compliance with even “voluntary” regulations. Not only would the IWG guidelines ban much mainstream advertising, but they also would serve as a ban on a broad range of marketing and programming, much of which benefits communities across the country. The definitions of advertising are so broad under the IWG proposed guidelines that companies would be prohibited from using specific shapes, sports analogies, and even specific language that might appeal to children. Add to this that the IWG’s “voluntary” ban on advertising would apply even when the viewing audience is 70%-80% adult<sup>67</sup>.

The costs of compliance with these nutritional standards could be devastating for food and beverage companies. To re-brand, re-package, and reformulate the recipes of thousands of food and beverage products could cost millions of dollars for each company, and sometimes millions for each product reformulated. It could even bankrupt some.

Empirical evidence supports the theory that prices will rise with the ban. In 1980, Quebec banned advertising to children under age 13, and prices rose<sup>68</sup>. In Quebec, prices of children’s cereals are higher than in the rest of Canada by 2.5% or more. In the adult/family cereal market, which is not affected by the advertising ban, prices in Quebec are no higher than in the rest of Canada. Additionally, it is noteworthy that childhood obesity levels in Quebec are no better than elsewhere in Canada, despite the advertising ban. Rising food prices in an environment where the unemployment rate is around 9%, and almost 16% in communities of color<sup>69</sup>, is not the solution to the nation’s childhood obesity problem; it could even exacerbate it.

# Limiting Consumer Choice

The IWG’s proposed nutrition principles would also eliminate the advertising of relatively healthful meal and snack options. The transcendent breadth of the ten food categories subject to the voluntary ban on advertising to children, as defined by the IWG, include bottled water, pretzels, and, as previously mentioned, most breakfast cereals. The IWG based its determination to include these ten categories of foods in the proposed, voluntary advertising ban, not upon scientific evidence, but solely on whether advertisers spent at least \$50 million on advertising in 2006. If a category had at least \$50 million in advertising support in 2006, the IWG included it in its voluntary ban. There was no consideration given to how effective the advertising was, where the advertisements were placed, or the nutrition value of said food. This arbitrary \$50 million benchmark served as a tool allowing the IWG to make their definitions so categorical that they eliminated the advertisement of a great many healthful options. The effect is to throw the proverbial baby out with the bathwater: eliminating many healthful options in an effort to include all options under the blanket ban proposed by the IWG’s representatives.

The Sensible Food Policy Coalition, an organization of food and media companies, released a list of the top 100 most commonly consumed foods and determined that only 12 of those foods could be advertised under the IWG guidelines—and that 88 of those 100 foods would fall within the IWG’s proposed voluntary advertising ban. Examples of foods falling within this category include, but are not limited, to: bagels, 2% milk, peanut butter, canned tuna, carrot juice, ready-to-eat cereals (only unflavored shredded wheat makes the cut), leaf salad with low-fat dressing, hot cereal, canned corn, rice, wheat bread, pretzels, and scrambled eggs<sup>70</sup>. The implications of the above are that many parents and guardians who are making food decisions for their families will not be informed, under the proposed IWG guidelines, about 88 of the 100 most commonly consumed food and beverage products when making nutritional and healthful choices for their children. Beth Johnson, former Acting Under Secretary and Deputy Chief of Staff for the USDA and a registered dietician, has stated that there is “significant concern over taking away information

“The transcendent breadth of the ten food categories subject to the voluntary ban on advertising to children, as defined by the IWG, include bottled water, pretzels, and... most breakfast cereals.”

and therefore taking away the opportunity to learn about new products” from the public<sup>71</sup>. Many of those products are already seeing increased demand (i.e., added fiber and lower added sugar and sodium), and that change is because of market demand.

The risk goes beyond just limiting information. If the IWG’s nutrition principles are implemented, foods that would be deemed unhealthy, but which are today an important part of the food and beverage manufacturers’ production portfolio, could no longer be advertised, and they might no longer be offered on the shelves at all. If the IWG makes it overly costly to produce items subject to this proposed voluntary advertising ban, they will go away, resulting in fewer overall choices for consumers.



Photograph by Erinn Cosby



## Lost Jobs

Substantial resources in the farming sector are currently committed to producing products such as corn or wheat. But farmers would also be impacted by the proposed IWG guidelines. The markets for grains such as corn or wheat would clearly be affected if companies could no longer advertise products such as Corn Flakes or whole wheat bread. Under the regime envisioned by the IWG proposal, only raw products such as fruits or vegetables could be advertised. If implemented, and if Americans were actually to eat the way the IWG proponents envision, current food production lands and regions would have to be reallocated to different ends. But not all regions of the United States are equally well suited to growing fruits and vegetables, so the impacts would fall disparately across the country. For example, the IWG guidelines will impact the dairy industry if milk and cheese are no longer options under federally funded food programs. This has raised concern among dairy farmers who, under the Congressional Dairy Farmers Caucus, wrote a letter to the U.S. Secretary of Agriculture in July 2011, warning against the negative impact of the IWG guidelines to dairy farmers<sup>72</sup>.

It is entirely likely that some individual food items and meals would no longer be viable, and that some food and beverage producers could even go bankrupt or shut down production of certain food categories. Studies also point to job losses in the marketing and advertising sectors in every state and every congressional district if the proposed IWG advertising ban goes into effect. One study in particular estimates that the IWG proposal, if enacted, will bring a 20% decrease in food and beverage expenditures, which would result in a decrease in annual sales of \$28.3 billion and eliminate 74,000 jobs in 2011<sup>73</sup>.

“Studies also point to job losses in the marketing and advertising sectors in every state and every congressional district if the proposed IWG advertising ban goes into effect.”

## Monitoring Costs

It is unclear how the IWG would even monitor the very standards they propose. To defend their supposedly “voluntary” approach, some IWG agencies have even suggested that no attempt to monitor or enforce the guidelines would be made. Considering that three of the IWG agencies are directly responsible for monitoring and/or regulating advertising and the food and beverage industries, that does not seem credible. But the principles are complicated enough that specific calculations would need to be made to determine whether an individual food, let alone a meal, meets the IWG’s proposed standard. The IWG may be able to monitor the degree of television advertising, but how would they monitor a child’s exposure to some product on a video game or the ads that pop up on a child’s Facebook page or Internet advertisements? How would they determine what “language” is oriented towards children versus language that is not? How would they ensure that a child is not watching a program directed at adults? Would we monitor the food purchases of parents at the grocery store based on the ages of their children? It would take countless hours and resources to monitor the 20 advertising forms that fall under the IWG guidelines. The cost of maintaining these voluntary guidelines would be higher than the cost of enacting the guidelines themselves.

# The IWG, the U.S. Constitution, and Regulatory Power

## Are the Proposed Guidelines Really Voluntary? Or even Constitutional?

Although the IWG states that its proposed advertising ban and nutritional principles are voluntary, there is a real threat of retaliation by the regulatory giants who oversee the process in the event food manufacturers decline to adopt the guidelines. In a letter from 15 Pennsylvania house delegates to the Secretary of the USDA, the Chairman of the FTC, and the Secretary of HHS, state legislators warn that not only did the IWG fail to complete the study as was required by the FY 2009 Omnibus Appropriations Act<sup>74</sup>, but that they instead propose “sweeping industry marketing guidelines.” The letter goes on to state that “While the principles put forth...are ‘voluntary’ they are still cause for concern as they appear to be an attempt to regulate absent congressional action.”<sup>75</sup>

Under U.S. administrative law, federal administrative agencies have the power to promulgate rules that have the effect of substantive law. In the furtherance of our nation’s system of checks and balances, any “rules” promulgated by federal agencies are subject to judicial review. In this case, not only did Congress not authorize the IWG to promulgate the proposal at issue<sup>76</sup>, but also, the IWG’s proposed “voluntary” guidelines are an extra-constitutional and unconstitutional expansion of regulatory power. By simply saying the guidelines would be “voluntary,” the IWG clearly seeks to escape the judicial review guaranteed by the U.S. Constitution, which allow courts of competent jurisdiction to determine the validity of the decisions made by federal agencies—including the four IWG agencies.

Northwestern law professor and commercial free speech expert Martin Redish writes, “The IWG effectively seeks to gain the benefit of its suppression of lawful expression while simultaneously insulating itself from judicial review... Government cannot be permitted to establish a regulatory framework, the sole intent and effect of which will be to suppress speech, while that framework remains immune from judicial review.” He explains the dilemma this will put food companies in:

“In this case, not only did Congress not authorize the IWG to promulgate the proposal at issue, but also, the IWG’s proposed “voluntary” guidelines are an extra-constitutional and unconstitutional expansion of regulatory power.”

abandoning their current marketing efforts, which are critical to the success of their business, or face consequences, including even harsher regulation, which “will almost inevitably follow absent compliance with these regulations, risking enforcement actions, and garnering the opprobrium of the agencies that have the greatest power over virtually every aspect of the food companies’ businesses,” among other consequences<sup>77</sup>.

The IWG’s proposed voluntary guidelines are also a form of insidious regulatory creep. The IWG proposal would set an extra-constitutional precedent in its intrusion into the legal, private decisions made by parents and guardians about how to rear their children, and the business practices of those in industries like agriculture, health, nutrition, advertising and marketing—specifically through the IWG’s naked attempt to avoid congressional and judicial review with an entirely new form of “voluntary” regulation. If the IWG’s proposed guidelines were in fact implemented, one would have to ask how often the IWG standards would change. Additionally, could such voluntary guidelines somehow subject parents and guardians to lawsuits related to child neglect and custody by the state, as one academic has suggested? Will the proposed guidelines subject food and beverage producers inevitably to class action lawsuits?<sup>78</sup> Will recipients of the WIC or others negatively affected by the conflicting definitions of “healthy” under programs like the USDA’s National School Lunch Program have standing to bring lawsuits against the U.S. government? If obesity does not decrease in five years, will the IWG’s proposed voluntary guidelines get stricter and their advertising limitations even broader—perhaps even extending directly to adults? With such uncertainty about the environment, will companies who may have entered the market, or that may have already been a part of the market, choose to abandon these businesses? And will less industry competition increase food prices and reduce support for innovation?

# Policy Recommendations

Americans, for the most part, agree that childhood obesity is a problem—and that it needs to be addressed. But Americans also have mixed feelings about how to solve the obesity problem. In a survey conducted in 2003, 48% of Americans thought it was a private issue people need to deal with on their own, and 47% thought it was a public health issue that *society* needs to help solve (note the word “society” and not necessarily “government”). Of those surveyed about which institutions should play a “major role” (healthcare providers, schools, government, and employers): 74% thought healthcare providers should play a major role, 65% thought schools should play a major role, and only 35% thought government should play a major role. Overall, the survey found that Americans support some public measures to curb childhood obesity (including 76% who strongly support more physical education in schools) but are ambivalent about measures that seem too heavy-handed or that limit personal choices<sup>79</sup>. The IWG’s proposed guidelines clearly fall into the heavy-handed category.

In spite of the fact that childhood obesity in the United States is recognized as a growing problem with long-run health implications, a review of controlled preventive intervention efforts, most of which were school-based, concluded that only three of 22 published trials were effective<sup>80</sup>. As it stands, we have a problem and no obvious policy solution—at least none with any proven correlation in actually helping to lower childhood obesity rates that would not also infringe on the rights of consumers or food and beverage producers’ legal right to market and advertise legal and healthful products.

Alternatives to the IWG’s proposed voluntary guidelines are many, including many more promising ideas that would increase access to healthful foods and increase activity among children, including, but not limited to: bringing physical education back into schools, incentives like the Presidential Active Lifestyle Award, creating incentives for the private sector to expand access to healthful foods at lower prices, and increasing public awareness of the nation’s childhood obesity problem and the long-run implications on children’s lifetime health and even educational success.

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## Private-Public Partnerships and Increased Access to Healthful and Affordable Foods

The “Smart Government” approach would be to increase access to healthful and affordable foods by allowing the market to function, innovate, and compete, unhampered by ill-founded government regulations. Producers are bound by the demand of their consumers—and the market has delivered. Food and beverage producers continue to change their products in response to what consumers want, including: lower sodium, lower saturated fat, lower or zero trans fat, reduced sugar options, portion-controlled options, and even gluten-free options. Producers and the competitive markets have actually increased the number, variety, and quality of healthful products on the market. All of this has occurred at lower costs to the consumer. Between 1950 and 2000, the relative price of food fell, on average, by 0.2 percentage points per year<sup>81</sup>. But restricting the ability to advertise would only hinder consumers’ access to information about food options and limit their ability to make the best choices for their families.

It is important to keep in mind that, on an average evening, most parents do not choose between a balanced meal in which a variety of food groups are represented and going to a burger joint. For many, the burger joint is a treat—it saves time and it even tastes good. However, for most Americans, these choices come down to cost. It simply costs more to buy fresh fruits and vegetables than to go to the burger joint, so many individuals and families may opt for the occasional visit to the burger joint. Not every day, because that can also be expensive, but occasionally. Just as a meal of fruits and vegetables may not be an affordable everyday option, a meal of pasta may be an affordable alternative. Many college students can relate to this. They eat boxed macaroni or noodles almost every night, because it’s inexpensive relative to homemade options, and it is filling. They do occasionally go out for a burger. Concurrently, as people move to higher income brackets, they move away from the necessity of boxed macaroni for more healthful and nutritious options. For the poor, such choices may not ever be an option if we do not allow markets to do what they do best: increase access to healthful and affordable foods in low-income and rural areas.

Another way to improve access is through innovative tax and business policies and partnerships that incentivize greater access at a lower cost. A current partnership between PepsiCo and the local government in Chicago delivers breakfast and lunch to children five days a week during the summer<sup>82</sup>. This is just one of many opportunities for public-private partnerships to provide assistance and alternatives for nutritious meals.



Source: <http://www.letsmove.gov/>.

First Lady Michelle Obama's "Let's Move!" initiative is:

[D]edicated to solving the challenge of childhood obesity within a generation, so that children born today will grow up healthier and able to pursue their dreams. Combining comprehensive strategies with common sense, *Let's Move!* is about putting children on the path to a healthy future during their earliest months and years. Giving parents helpful information and fostering environments that support healthy choices. Providing healthier foods in our schools. Ensuring that every family has access to healthy, affordable food. And, helping kids become more physically active<sup>83</sup>.

Among other things, the "Let's Move!" Initiative is creating partnerships with companies like Walgreens, SuperValu, and Wal-Mart to eradicate "food deserts."<sup>84</sup> These companies are signing memorandums of understanding with the First Lady's "Partnership for a Healthy America Initiative" (part of "Let's Move!" that encourages commitments to healthier lifestyles from partner organizations) and are committing to open or expand 1,500 stores, providing fresh food options in underserved communities across the United States<sup>85</sup>. Ironically, stores like Wal-Mart, which are best able to provide low-cost fresh and packaged food options, typically receive political resistance to opening stores in underserved areas. This memorandum of understanding is a win both for Wal-Mart and for all families who lack access to low-cost fresh food and produce. Incidentally, the opening of these stores will also create much-needed local jobs.

The California Fresh Works Fund is a “private-public loan fund that has raised \$200 million to invest in bringing grocery stores and other forms of healthy food retailers to underserved communities”<sup>86</sup>. Other retailers are engaging in community support programs as well. For example, the W.K. Kellogg Foundation, through its “Food and Fitness Collaboratives” has been helping provide access to healthful, affordable, and locally grown food since 2007<sup>87</sup>.

These types of public awareness campaigns and the development of private-public partnerships may well be one of the most important tools available in the war on childhood obesity. They are also, by far, more reasonable than the imposition of “voluntary” advertising bans on the marketing of food to children that unduly intrude in the childrearing decisions that are the role of parents and guardians, not the federal government. It is parents, not the government, who must make choices and who must “make ends meet” as best they can. Parents decide what groceries to purchase and what to serve their children at meals and snack times. It is not the proper role of government to control what foods are available to parents to feed their children. Nor is it the proper role of government to cause unfettered economic harm to businesses such as agriculture and other food producers and distributors, media, and advertising and marketing ventures.



Photograph by Erinn Cosby



# Promoting Increased Physical Activity

The “Let’s Move!” campaign provides facts about healthful options and serves as a venue for public service announcements and information for a more active lifestyle for children<sup>88</sup>. It also suggests activities that families can participate in together. Individuals and families can receive presidential recognition through the Presidential Active Lifestyle Award. The goal of the award is to encourage participants to be active on a regular basis and suggests over 100 activities. The participants can log their activities and compete for the award.

Pediatricians and healthcare providers are well poised to be a source of information on what types of activities children can engage in that will get them moving more. Unlike the IWG, healthcare providers are able to work in a personal way with parents to build nutritional programs focusing on both diet and activities that are catered to the needs of each child. Bringing back physical education programs in schools is another option for allocating specific time each day for physical activity that gets children moving more.

Safe and accessible playground areas where children can burn energy and play will help children move more and decrease sedentary activities in favor of vigorous activities. This addresses the “calories out” side of the obesity equation. Moving more, playing outdoors, and overall increases in energy expenditure will help address the obesity question. These are choices that are most effectively monitored by parents, pediatricians, and teachers. To a large extent, this requires a paradigm shift among caregivers and parents and can be achieved by increased education about how to live a more active lifestyle and the dangers of childhood obesity, rather than achieved through regulatory over-reach.



Photograph by Erinn Cosby

## Greater Understanding of the Predictors of Childhood Obesity



Photograph by Erinn Cosby

It will be important to advance and promote private-public partnerships to examine the influence of community variables in predicting childhood obesity based upon all of the nation's census tracts (characteristics of child's tract and county). There are unanswered questions on the causes of childhood obesity, and more research should be done to understand the impact of specific variables. Variables such as the location of food outlets relative to children who experience high levels of obesity; the impact of food prices on type of food purchased and those income and substitution effects; the impact on the general

safety of a neighborhood to the time children spend engaged in physical activity, such as the impact of crime, among other variables. Understanding these relationships will allow us to focus on fixing the problems that create an increased risk for childhood obesity in these areas.

# Conclusions

It is important to keep in mind that food choices, whether at school, home, or a snack on the go, are relative, not absolute, choices. If one American chooses to have a burger one night, it does not mean that that American is choosing a burger every night. The constraints that surround such relative choices are vast, constantly changing, and known only to the individual. Factors like convenience, proximity, tastes and preferences, and affordability are important determinants of what one chooses. Additionally, community variables like higher unemployment rates, higher proportions of children living in households headed by a non-parent and of single families, higher poverty rates, lower female labor force participation, lower education and income levels, and lower home ownership rates are all determinants of the risk of childhood obesity.

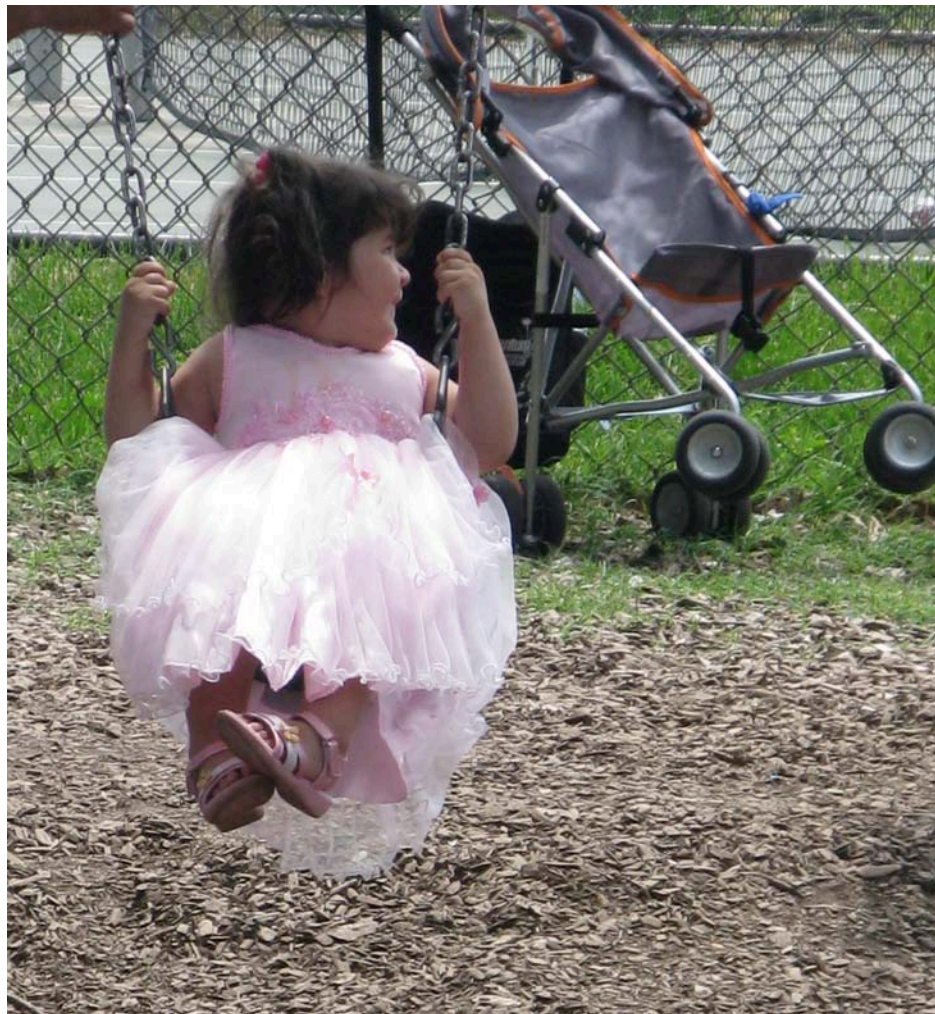
The IWG's proposed guidelines, as stated, assume away these choices and community variables. They put government-proposed guidelines ahead of consumers and the companies competing to serve them. They rule out healthful options advocated and even subsidized by other government programs that outline products that are served in school programs and purchased by mothers for their children to eat at home. The assumptions underlying the IWG proposal are not supported by empirical evidence, and in many cases the evidence is directly controverted. Nevertheless, the four faceless agencies of the government, none of whom have published any scientific basis for their sweeping proposals, have recommended a virtual ban on advertising and marketing of scores of products in an entirely new and extra-constitutional, likely unconstitutional, approach that breathtakingly expands the scope of avenues of potential government regulation, not only in this instance but in many others as well.

If implemented, the IWG would not only raise prices for many food products, it also would likely reduce the number of products from which consumers can choose, limit readily available information about food and beverage products, and reduce competition—all while creating potentially significant job losses at a time of distressingly high unemployment.

The guidelines would not increase access to healthful and nutritious foods; they may actually have the perverse effect of reducing access to healthful and nutritious foods by eliminating the incentive to create them.

Ultimately, they would not serve their purpose: lowering childhood obesity. This almost certain failure is not only due to the lack of any real correlation between advertising and obesity, but even more, the result of the proposal's bizarre ban on advertising foods positively associated with healthier body weights, such as cereal, while inexplicably ignoring calories as an integral part of the obesity equation.

Given the above, one may reasonably argue that policies that address the childhood obesity epidemic in communities most at risk, such as promoting policies like comprehensive education reform and school choice, which will increase education and income levels, will be more effective in promoting the welfare of children at risk than sweeping new “voluntary” bans on the advertising and marketing of foods to children.



Photograph by Erinn Cosby

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60 According to the FDA a food can be labeled “healthy” if: (d) *General nutritional claims*. (1) This paragraph covers labeling claims that are implied nutrient content claims because they:

(i) Suggest that a food because of its nutrient content may help consumers maintain healthy dietary practices; and

(ii) Are made in connection with an explicit or implicit claim or statement about a nutrient (e.g., “healthy, contains 3 grams of fat”).

(2) You may use the term “healthy” or related terms (e.g., “health,” “healthful,” “healthfully,” “healthfulness,” “healthier,” “healthiest,” “healthily,” and “healthiness”) as an implied nutrient content claim on the label or in labeling of a food that is useful in creating a diet that is consistent with dietary recommendations if:

(i) The food meets the following conditions for fat, saturated fat, cholesterol, and other nutrients:

If the food is...	The fat level must be...	The saturated fat level must be...	The cholesterol level must be...	The food must contain...
(A) A raw fruit or vegetable	Low fat as defined in 101.62(b)(2)	Low saturated fat as defined in 101.62(c)(2)	The disclosure level for cholesterol specified in 101.13(h) or less	N/A
(B) A single-ingredient or a mixture of frozen or canned fruits and vegetables <sup>1</sup>	Low fat as defined in 101.62(b)(2)	Low saturated fat as defined in 101.62(c)(2)	The disclosure level for cholesterol specified in 101.13(h) or less	N/A
(C) An enriched cereal-grain product that conforms to a standard of identity in part 136, 137 or 139 of this chapter	Low fat as defined in 101.62(b)(2)	Low saturated fat as defined in 101.62(c)(2)	The disclosure level for cholesterol specified in 101.13(h) or less	N/A
(D) A raw, single-ingredient seafood or game meat	Less than 5 grams (g) total fat per RA <sup>2</sup> and per 100 g	Less than 2 g saturated fat per RA and per 100 g	Less than 95 mg cholesterol per RA and per 100 g	At least 10 percent of the RDI <sup>3</sup> or the DRV <sup>4</sup> per RA of one or more of vitamin A, vitamin C, calcium, iron, protein, or fiber
(E) A meal product as defined in 101.13(l) or a main dish product as defined in 101.13(m)	Low fat as defined in 101.62(b)(3)	Low saturated fat as defined in 101.62(c)(3)	90 mg or less cholesterol per LS <sup>5</sup>	At least 10 percent of the RDI or DRV per LS of two nutrients (for a main dish product) or of three nutrients (for a meal product) of: vitamin A, vitamin C, calcium, iron, protein, or fiber
(F) A food not specifically listed in this table	Low fat as defined in 101.62(b)(2)	Low saturated fat as defined in 101.62(c)(2)	The disclosure level for cholesterol specified in 101.13(h) or less	At least 10 percent of the RDI or the DRV per RA of one or more of vitamin A, vitamin C, calcium, iron, protein or fiber

<sup>1</sup>May include ingredients whose addition does not change the nutrient profile of the fruit or vegetable.



<sup>2</sup>RA means Reference Amount Customarily Consumed per Eating Occasion (101.12(b)).

<sup>3</sup>RDI means Reference Daily Intake (101.9(c)(8)(iv)).

<sup>4</sup>DRV means Daily Reference Value (101.9(c)(9)).

<sup>5</sup>LS means Labeled Serving, i.e., the serving size that is specified in the nutrition information on the product label (101.9(b)).

(ii) The food meets the following conditions for sodium:

If the food is...	The sodium level must be...
(A) A food with a RA that is greater than 30 g or 2 tablespoons (tbsp).	480 mg or less sodium per RA and per LS
(B) A food with a RA that is equal to or less than 30 g or 2 tbsp.	480 mg or less sodium per 50 g <sup>1</sup>
(C) A meal product as defined in 101.13(l) or a main dish product as defined in 101.13(m)	600 mg or less sodium per LS

<sup>1</sup>For dehydrated food that is typically reconstituted with water or a liquid that contains insignificant amounts per RA of all nutrients (as defined in 101.9(f)(1)), the 50 g refers to the “prepared” form of the product.

(iii) The food complies with the definition and declaration requirements in this part 101 for any specific nutrient content claim on the label or in labeling, and

(iv) If you add a nutrient to the food specified in paragraphs (d)(2)(i)(D), (d)(2)(i)(E), or (d)(2)(i)(F) of this section to meet the 10 percent requirement, that addition must be in accordance with the fortification policy for foods in 104.20 of this chapter.

[58 FR 2413, Jan. 6, 1993; 58 FR 17343, Apr. 2, 1993, as amended at 59 FR 394, Jan. 4, 1994; 59 FR 24249, May 10, 1994; 59 FR 50828, Oct. 6, 1994; 62 FR 49858, Sept. 23, 1997; 63 FR 14355, Mar. 25, 1998; 70 FR 56848, Sept. 29, 2005]

**The USDA definition of “healthy” (Code of Federal Regulations Title 9 - Animals and Animal Products Volume: 2 Date: 2010-01-01 Original Date: 2010-01-01) follows:**

317.363 Nutrient content claims for “healthy.” (a) The term “healthy,” or any other derivative of the term “health,” may be used on the labeling of any meat or meat food product, provided that the product is labeled in accordance with § 317.309 and § 317.313.(b)(1) The product shall meet the requirements for “low fat” and “low saturated fat,” as defined in § 317.362, except that single-ingredient, raw products may meet the total fat and saturated fat criteria for “extra lean” in § 317.362.(2) The product shall not contain more than 60 milligrams (mg) of cholesterol per reference amount customarily consumed, per labeled serving size, and, only for foods with reference amounts customarily consumed of 30 grams (g) or less or 2 tablespoons (tbsp) or less, per 50 g, and, for dehydrated products that must be reconstituted with water or a diluent containing an insignificant amount, as defined in § 317.309(f)(1), of all nutrients, the per-50-g criterion refers to the prepared form, except that: (i) A main-dish product, as defined in § 317.313(m), and a meal-type product, as defined in § 317.313(l), and including meal-type products that weigh more than 12 ounces (oz) per serving (container), shall not contain more than 90 mg of cholesterol per labeled serving size; and (ii) Single-ingredient, raw products may meet the cholesterol criterion for “extra lean” in § 317.362.(3) The product shall not contain more than 480 mg of sodium per reference amount customarily consumed, per labeled serving size, and, only for foods with reference amounts customarily consumed of

30 g or less or 2 tbsp or less, per 50 g, and, for dehydrated products that must be reconstituted with water or a diluent containing an insignificant amount, as defined in § 317.309(f)(1), of all nutrients, the per-50-g criterion refers to the prepared form, except that: (i) A main-dish product, as defined in § 317.313(m), and a meal-type product, as defined in § 317.313(l), and including meal-type products that weigh more than 12 oz per serving (container), shall not contain more than 600 mg of sodium per labeled serving size; 1 and

**Footnote(s):**1 This regulation previously provided that, after January 1, 2006, individual meat products bearing the claim “healthy” (or any derivative of the term “health”) must contain no more than 360 mg of sodium and that meal-type products bearing the claim “healthy” (or any other derivative of the term “health”) must contain no more than 600 mg of sodium. Implementation of these sodium level requirements for products bearing the claim “healthy” (or any derivative of the term “health”) has been deferred indefinitely due to technological barriers and consumer preferences.

(ii) The requirements of this paragraph (b)(3) do not apply to single-ingredient, raw products.

Code of Federal Regulations /Title 9 - Animals and Animal Products/Vol. 2 /2010-01-01233

(4) The product shall contain 10 percent or more of the Reference Daily Intake or Daily Reference Value as defined in § 317.309 for vitamin A, vitamin C, iron, calcium, protein, or fiber per reference amount customarily consumed prior to any nutrient addition, except that:(i) A main-dish product, as defined in § 317.313(m), and including main-dish products that weigh less than 10 oz per serving (container), shall meet the level for two of the nutrients per labeled serving size; and (ii) A meal-type product, as defined in § 317.313(l), shall meet the level for three of the nutrients per labeled serving size.

Code of Federal Regulations Title 9 - Animals and Animal Products Volume: 2, Date: 2010-01-01, Original Date: 2010-01-01.

The irony here is that these two federal agencies are charged with “protecting consumers,” and it’s not clear that they coordinate with one another over their definitions, which come down to differences in the levels of acceptable micrograms.

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- 75 H.R. 1105, Omnibus Appropriations Act, 2009. Available at: <http://www.govtrack.us/congress/bill.xpd?bill=h111-1105>.
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- 77 Redish, M. Childhood Obesity, Advertising and the First Amendment, A White Paper, June 8, 2011.
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