

Interagency Working Group on Food Marketed to Children

Preliminary Proposed Nutrition Principles
to Guide Industry Self-Regulatory Efforts

Request for Comments



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The Interagency Working Group on Food Marketed to Children (Working Group), comprised of representatives from the Federal Trade Commission (FTC), the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the United States Department of Agriculture (USDA), seeks public comment on a preliminary proposal for voluntary principles to guide industry self-regulatory efforts to improve the nutritional profile of foods marketed to children. The Working Group has drafted these principles pursuant to a directive from Congress, as set out in the 2009 Omnibus Appropriations Act. As directed by Congress, the Working Group has developed this proposal based on the nutrition, health, and marketing expertise of the member agencies, with the goal of improving children's diets and addressing the high rates of childhood obesity. Marketing can be an effective tool to encourage children to make better food choices, and voluntary adoption by industry of strong, uniform nutrition and marketing principles, like those proposed here, will advance the goal of promoting children's health.

Public comment is sought to help inform the Working Group in shaping its recommendations for enhanced industry self-regulatory efforts as part of a report requested by Congress. Comments are not being requested as the basis for regulation. The recommendations include principles addressing the nutritional quality of foods that are most heavily marketed to children. They also include proposed definitions of advertising, promotion, and other marketing activities targeting children ages 2-11 years and adolescents ages 12-17 years to which the nutrition principles would apply. The Working Group seeks public comment on both the nutrition principles and the definitions of marketing targeted to children and adolescents. Comments must be received no later than June 13, 2011.

Interested parties are invited to submit written comments electronically or in paper form, by following the instructions in Section V below. The Working Group will share responsibility for review of comments among the member agencies, based on each agency's expertise. All comments should be submitted to the FTC, which will coordinate the review by the Working Group agencies. Comments on issues relating to the proposed nutrition principles, including comments on the food categories identified in the principles, will be reviewed primarily by the CDC, FDA, and USDA. Comments on issues relating to the proposed definitions of marketing and all other general comments will be reviewed primarily by the FTC. The Working Group therefore requests that, to the extent possible, comments be submitted separately on these two aspects of its recommendations.

I. Establishment of Working Group and Charge

The 2009 Omnibus Appropriations Act (H.R. 1105) included a provision calling for the establishment of an Interagency Working Group on Food Marketed to Children, made up of members from FDA, CDC, USDA, and FTC. The accompanying statement to the FY

2009 Omnibus Appropriations Act provided the following description of the Working Group's charge:

The FTC, together with the Commissioner of the Food and Drug Administration, the Director of the Centers for Disease Control and Prevention, and the Secretary of Agriculture, who have expertise and experience in child nutrition, child health, psychology, education, marketing, and other fields relevant to food and beverage marketing and child nutrition standards shall establish the Interagency Working Group on Food Marketed to Children (Working Group). The Working Group is directed to conduct a study and develop 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. In developing such standards, the Working Group is directed 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 Working Group will determine the scope of the media to which such standards should apply. The Working Group shall submit to Congress, not later than July 15, 2010, a report containing the findings and recommendations of the Working Group.¹

Each of the four agencies appointed representatives to the Working Group, which was formally convened with an initial meeting on May 5, 2009. As the first phase of preparing a report to Congress, the Working Group has developed a set of recommendations for proposed voluntary nutrition principles to guide industry self-regulatory efforts to improve the nutritional profile of foods that are most heavily marketed to children. The recommendations set forth below include the proposed nutrition principles. They also include proposed definitions of advertising, promotion, and other marketing activities targeting children and adolescents to which the nutrition principles would apply. The Working Group now seeks input from interested parties both on these recommendations and on the impact that they would have on children's food marketing and on children's diets, if fully implemented by industry. The Working Group will consider this input in developing its recommendations to Congress.

¹ Omnibus Appropriations Act, 2009 (H.R. 1105), Financial Services and General Government, Explanatory Statement, Title V, Independent Agencies, 983-84. Congressional staff have been advised that the Working Group was unable to meet this proposed deadline.

II. Proposed Nutrition Principles

A. Underlying Objectives and Reference Materials

The primary objective of the Working Group in developing recommendations for nutrition principles for foods marketed to children has been the promotion of children's health through better diet, with particular – but not sole – emphasis on reducing the incidence of childhood obesity. The proposed recommendations are therefore designed to encourage children, through advertising and marketing, to choose foods that make a meaningful contribution to a healthful diet (Principle A) and minimize consumption of foods with significant amounts of nutrients that could have a negative impact on health or weight – specifically, sodium, saturated fat, *trans* fat, and added sugars (Principle B).

The Working Group recommends that, as industry develops new products and reformulates existing products, it should strive to create foods that meet both of these two basic nutrition principles. It further recommends that industry focus these efforts on those categories of foods that are most heavily marketed directly to children, such as breakfast cereals, carbonated beverages, restaurant foods and snack foods. The proposed principles, if fully implemented by industry for these categories, should lead to significant improvements in the overall nutritional profile of foods marketed to children.

The Working Group recommends that industry work toward the goal that all foods within the categories most heavily advertised or otherwise marketed directly to children and adolescents would meet the nutrition principles by the year 2016. The Working Group acknowledges that this is an ambitious goal, but believes it is warranted by the urgent need to improve children's diets and health and address the epidemic of childhood obesity.

In developing the proposed nutrition principles, the Working Group has been guided primarily by dietary recommendations developed by HHS and USDA as set out in the 2010 Dietary Guidelines for Americans (DGA),² and by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990 (NLEA), and by USDA, governing nutrient content and health claims in food labeling.³ The Working Group has also relied on the Dietary Reference Intake (DRI) reports issued by the Institute of Medicine of the National Academies of Science (IOM) and the IOM report on “Strategies to Reduce

² Dietary Guidelines for Americans 2010 (USDA/DHHS 2010) (hereinafter “2010 DGA”), and the Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans (USDA/DHHS 2010), available at www.dietaryguidelines.gov.

³ Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified in part at 21 U.S.C. § 343(i), (q), and (r)); USDA Nutrition Labeling Regulations, 9 C.F.R. §§ 317.300 *et seq.* and 381.400 *et seq.*

Sodium Intake in the United States.”⁴ In addition, the Working Group has considered existing nutrition standards for the advertising and marketing of foods in children’s media. These included two reports issued by the IOM relating to nutrition standards for foods marketed and sold in schools either as competitive foods⁵ or as part of the school meal program.⁶

The Working Group recognizes that various self-regulatory programs, some in place since 2006, have already begun to have a positive impact on the nutritional quality of foods marketed to children.⁷ The Working Group has examined these programs, including the self-regulatory pledges developed and implemented by individual companies and industry groups as part of the Council of Better Business Bureau’s Children’s Food and Beverage Advertising Initiative (CFBAI),⁸ as well as other nutrition standards for children’s food marketing developed by private/public partnerships.⁹ The Working Group has also considered similar proposals for restrictions on food marketed to children developed by public health advocates, and U.S. and international government and public health organizations.¹⁰ In addition to proposals specifically designed to address children’s

⁴ See Institute of Medicine, *Dietary Reference Intakes: The Essential Guide to Nutrient Requirements* (The National Academies Press 2006); Institute of Medicine, *Strategies to Reduce Sodium Intake in the United States* (The National Academies Press 2010).

⁵ The term “competitive foods” refers to any foods offered at school, other than meals served through USDA’s school meals programs, including but not limited to foods sold in school snack bars and vending machines.

⁶ Institute of Medicine, *Nutrition Standards for Foods in Schools: Leading the Way Toward Healthier Youth* (The National Academies Press 2007); Institute of Medicine, *School Meals: Building Blocks for Healthy Children* (The National Academies Press 2009).

⁷ See Federal Trade Commission, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, A Report to Congress (July 2008) (2008 Food Marketing Report), at 60-80, available at <http://www.ftc.gov/os/2008/07/P064504foodmktgreport.pdf>.

⁸ Council of Better Business Bureaus, “Children’s Food and Beverage Advertising Initiative,” *core principles and company pledges* available at <http://www.bbb.org/us/children-food-beverage-advertising-initiative/>.

⁹ See, e.g., Alliance for a Healthier Generation, “Competitive Foods and Beverage Guidelines,” available at <http://healthiergeneration.org/schools.aspx?id=3425>.

¹⁰ See, e.g., Center for Science in the Public Interest (CSPI), “Guidelines for Responsible Food Marketing to Children” (Jan. 2005), available at www.cspinet.org/marketingguidelines.pdf; U.K. Office of Communications (Ofcom), “Television Advertising of Food and Drink Products to Children” (Feb. 2007), available at http://www.ofcom.org.uk/consult/condocs/foodads_new/statement/statement.pdf (applying U.K. Food Standards Agency “Nutrient Profiling Model” available at www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/nutprofmod); World Health

marketing, the Working Group has also examined industry nutrition standards developed as part of front-of-package labeling programs to help consumers identify more healthful food choices.¹¹

The purpose of the Working Group’s proposed nutrition principles is to guide the industry in determining which foods would be appropriate and desirable to market to children to encourage a healthful diet and which foods industry should voluntarily refrain from marketing to children. The proposed principles should not be interpreted as a change in federal dietary guidance or nutrition policy or as a revision to any regulation defining health claims or nutrient content claims, such as “healthy” or “low sodium,” nor do the proposed principles signal any departure from the 2010 DGA. The Working Group recognizes that the DGA provide science-based dietary recommendations for building healthy eating patterns and, thus, are focused on the total diet in a day, week, month, or longer, whereas food and nutrition labeling regulations are intended to provide information about the ingredients and nutrients in individual foods to enable consumers to make healthful dietary choices among foods. The Working Group’s proposed nutrition principles are designed for the specific purpose of guiding the industry in determining which foods are appropriate to market to children. The proposed nutrition principles, therefore, include adjustments in specific recommendations to reflect the fact that the principles would apply to individual products and, specifically, to foods that are most heavily marketed to children ages 2-17 years, rather than to an overall diet.

The goal of the Working Group is to recommend principles that both improve the nutritional quality of foods marketed to children and can be feasibly implemented by industry with sufficient time to accomplish reformulation. The Working Group recognizes that, if the proposed nutrition principles were fully implemented by industry as proposed, a large percentage of food products currently in the marketplace would not meet the principles. The Working Group also recognizes that, while it may be feasible to reformulate some food products to meet the proposed nutrition principles, in many cases reformulation would require substantial changes in the nutritional profile of the food, such as significant reductions in added sugars or sodium content. Making substantial changes to the formulation of a food product may present both technical difficulties and challenges in maintaining the palatability and consumer acceptance of the product. Certain elements of the

Organization (WHO), “Set of Recommendations On the Marketing of Foods and Non-Alcoholic Beverages to Children” (May 2010), *available at* <http://www.who.int/dietphysicalactivity/publications/recsmarketing/en/index.html>; USDA, “HealthierUS School Challenge” *available at* <http://www.fns.usda.gov/tn/healthierus/index.html>.

¹¹ See Institute of Medicine, Examination of Front-of-Package Nutrition Rating Systems and Symbols: Phase 1 Report (Oct 2010), *available at* <http://iom.edu/Reports/2010/Examination-of-Front-of-Package-Nutrition-Rating-Systems-and-Symbols-Phase-1-Report.aspx>. See also “NUVal™ Nutritional Scoring System,” NuVal, LLC, *available at* <http://www.nuval.com>; “Smart Choices Program™: Guiding Food Choices,” *available at* www.smartchoicesprogram.com/.

proposed nutrition principles may need to be adjusted to reflect these challenges. The Working Group, therefore, seeks comment on viable alternatives to its proposed nutrition principles, especially alternatives that are drawn from federal nutrition policy and regulations, with focus on foods known to be heavily marketed to children. Thus, for example, the Working Group is open to considering alternatives drawn from federal food labeling regulations defining the nutrient content claim “healthy,” federal regulations establishing disclosure levels for certain nutrients in connection with other nutrient content claims, or the disqualifying nutrient levels used for health claims.¹² Questions about such alternatives are posed in Section IV of this notice.

Finally, the Working Group recognizes that full voluntary industry adoption of the principles may only be possible through phased implementation over a reasonable period of time. As part of its Report to Congress, the Working Group will discuss incremental adoption of the proposed principles and a suggested time frame for full implementation of these principles in the marketplace. The Working Group does not intend to propose a specific process for such phased implementation. Individual companies should develop an implementation process and set interim goals that are most workable for them. The Working Group, however, does seek more general comment on its proposed goal that the industry fully implement the nutrition principles for all foods within the categories most heavily marketed to children by the year 2016.

B. Discussion of Proposed Nutrition Principles

The Working Group seeks comment on its two proposed nutrition principles, including the recommendation that industry focus its self-regulatory efforts on the categories of foods most heavily marketed to children. The Working Group is proposing two possible approaches for assessing whether a food product meets Principle A – making a meaningful contribution to a healthful diet. The Working Group is also proposing specific targets for saturated fat, *trans* fat, added sugars, and sodium content to meet Principle B – minimizing consumption of foods with significant amounts of these nutrients that could have a negative impact on health or weight. Finally, the Working Group is seeking comment on its proposed goal that all foods within the categories most heavily marketed to children meet these two nutrition principles by the year 2016.¹³

Food Categories Most Heavily Marketed to Children

A substantial majority of all food marketing to children and adolescents falls within a few specific categories of food products. As reported in the FTC’s 2008 study on Marketing

¹² See 21 C.F.R. § 101.65 and 9 C.F.R. §§ 317.363 and 381.413 (defining “healthy”), 21 C.F.R. § 101.13 and 9 C.F.R. § 317.313 (establishing disclosure levels for nutrient content claims), and 21 C.F.R. § 101.14(a)(4) (establishing disqualifying nutrient levels for health claims).

¹³ The Working Group has also proposed a second target, of 2021, for additional reductions in the sodium content of foods marketed to children.

Food to Children and Adolescents, three food categories – breakfast cereal, restaurant foods, and snack foods – represented approximately 70% of food marketing expenditures directed to children under 12.¹⁴ Similarly, three categories of foods – carbonated beverages, restaurant foods, and non-carbonated beverages – represented 69% of the food marketing expenditures for adolescents ages 12-17 years.¹⁵ While these categories represent the majority of foods marketed to children and adolescents, the industry also heavily promotes several other categories of food products. Using food marketing data from Nielsen Media Research and data collected by the FTC on marketing expenditures and activities directed to youth, the Working Group has identified ten categories of food products for which the industry spent at least \$50 million on marketing to children and adolescents in 2006. The categories most heavily marketed to children and adolescents, ages 2 -17 years are: breakfast cereals; snack foods; candy; dairy products; baked goods; carbonated beverages; fruit juice and non-carbonated beverages; prepared foods and meals; frozen and chilled deserts; and restaurant foods.¹⁶ The Working Group is therefore recommending that the food industry focus its efforts on ensuring that any advertising or marketing of food products within these ten categories meet the nutrition principles set out below.¹⁷

¹⁴ 2008 Food Marketing Report, *supra* note 7. The report analyzed 2006 food marketing data, based upon the responses of 44 companies to compulsory orders issued by the Commission. The food categories for which data were collected are set forth and defined in Attachment A to Appendix B of the Report, pp. B-10 and B-11. Restaurant food, primarily Quick Service Restaurant (QSR) children’s meals, accounted for \$521 million in marketing expenditures (including the cost of toy premiums), breakfast cereal accounted for \$229 million, and snack foods accounted for \$113 million of the \$1.23 billion reported for 2006 marketing to children under 12 (including toy premiums). *Id.* at 10-11 and Table II.2.

¹⁵ Of the \$1.05 billion reported for teen marketing in 2006, the food industry spent \$474 million on carbonated beverages, \$145 million on restaurant food, and \$109 million on non-carbonated beverages. *Id.* at 10-11 and Table II.2.

¹⁶ A report issued earlier this year by the Yale University Rudd Center further confirms, based on 2008 Nielsen data, that these food categories include the foods most heavily marketed to children and adolescents. Rudd Center for Food Policy & Obesity, *Trends in Television Food Advertising: Progress in Reducing Unhealthy Marketing to Young People?* (Feb. 2010), available at http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddReport_TVFoodAdvertising_2.10.pdf.

¹⁷ The Working Group 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) **Baked goods** – snack cakes, pastries, doughnuts, toaster baked goods (such as frozen waffles, French toast sticks, and toaster pastries), bread, rolls,

Individual Foods, Main Dishes, and Meals

The proposed nutrition principles apply to individual foods, as well as to main dishes and meal products. The Working Group started with a set of proposed food group contributions and nutrient limits for individual foods. It then calculated appropriate adjustments to accommodate main dishes and meals, as those products are defined by federal labeling regulations.¹⁸ The adjustments reflect the fact that main dishes and meals are defined as containing at least two or three 40-gram food portions respectively, and include foods from two or more of four food groups. The adjustments also reflect the fact that a main dish or meal product would represent a larger share of a child's daily diet than an individual food product. The Working Group is therefore recommending that main dish and meal products provide proportionately greater contributions to a healthful diet under Principle A. In addition, the proposed targets set for minimizing consumption of specific nutrients under Principle B are higher for main dish and meal products than for individual foods. As detailed below, the Working Group calculated proposed adjustments for main dish and meal products either on a per 100-gram basis or based on the labeled serving of the product.

Nutrition Principle A: Meaningful Contribution to a Healthful Diet

Nutrition Principle A is drawn from the principles of the 2010 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. Under this principle, individual foods marketed to children would contribute a significant amount of at least one of the following food groups – fruit, vegetable, whole grain, fat-free or low-fat milk products, fish, extra lean meat or poultry, eggs, nuts and seeds, or beans (referred to below as the “listed food groups”). Main dishes would need to include a meaningful contribution from at least two different food groups as part of this contribution and meals would need to include a meaningful contribution from at least three different food groups.

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).

¹⁸ See 21 C.F.R. § 101.13 and 9 C.F.R. §§ 317.313(m) and 381.417(m). A main dish weighs six or more ounces (170 g) per serving and contains at least two 40-gram food portions from different food groups; a meal weighs at least ten or more ounces (283 g) per serving and contains at least three 40-gram food portions from different food groups.

The Working Group’s proposal sets out two alternative approaches for quantifying what constitutes a significant contribution from the listed food groups. The Working Group is requesting public comment on which option would best achieve positive changes in the nutritional profile of foods marketed to children. The Working Group is also requesting comment on the feasibility of implementing each of these options, including data from food pattern modeling exercises.

Option 1: Under this option, food marketed to children would contain at least 50 percent by weight of one or more of the listed food groups. The importance of having these products contain one or more of these food groups derives from the 2010 DGA and the MyPyramid Food Guidance System,¹⁹ which are based on the concept that people should focus on meeting their overall dietary needs by consuming foods from a variety of food groups that are encouraged as part of a healthful diet. The 2010 DGA and MyPyramid provide recommendations for the amount to be consumed of each food group but not recommendations for individual foods. Option 1 is based on the USDA’s view that a food containing at least 50 percent of one or more of the listed food groups could be reasonably expected to contribute a meaningful amount of nutrients to an individual’s diet. An example to support this view is the approach used by USDA’s Food and Nutrition Service (FNS) in the USDA HealthierUS School Challenge criteria, which are based in part on the 2007 IOM report on school meals and competitive foods.²⁰ In considering this approach as it applies to other food groups, expert opinion among USDA nutritionists is that, short of performing a full food pattern modeling exercise, if a food item contains 50 percent by weight of one or a combination of more than one, of the listed food groups, that would also provide a meaningful amount of macro and micro nutrients to an individual’s diet.

Because Option 1 is based on the total weight of the product, the same 50% target would apply both to individual foods and to main dishes and meals. The Working Group recommends, however, that main dishes and meals provide a greater variety of food groups than individual foods. Thus, an individual food could qualify either by providing its entire contribution to a healthful diet from just one of the listed food groups, or from a combination

¹⁹ 2010 DGA, *supra* note 2 at 3; USDA, My Pyramid.gov: Steps to a Healthier You (2005), available at <http://www.mypyramid.gov/index.html>.

²⁰ In the HealthierUS School Challenge criteria, “whole grain food” is defined as having “whole grains as the primary ingredient by weight,” with “primary” defined as greater than 50% by weight. See USDA, “HealthierUS School Challenge: Whole Grains Resource,” available at <http://www.fns.usda.gov/tn/HealthierUS/wholegrainresource.pdf>.

of more than one group.²¹ Main dishes, however, would need to draw from at least two food groups and meals from at least three food groups.²²

Option 2: Under this option, specific minimum contributions are proposed for each of the listed food groups. For individual foods, the product meets the principle if it contains the specified amount of at least one, or a proportionate combination of more than one, of the listed food groups per Reference Amount Customarily Consumed (RACC).²³ For main dishes and meals, the product meets the principle if it contributes the specified amount for each 100 grams. As in Option 1, an individual food could meet the principle by providing an entire amount from one food group or a proportionate contribution of amounts from more than one group.²⁴ Main dishes and meals, however, would meet the principle only if the contributions were drawn from at least two or three of the groups, respectively.

Option 2 is based on recommended daily consumption of food groups using a reference level of a 2,000 calorie diet and the assumption that these food groups will be consumed over an average of four eating occasions per day, based on a typical American eating pattern of three meals and one snack.²⁵ The proposed amounts for each food category under Option 2 thus represent one-quarter of the daily amount for that food category as drawn from current dietary recommendations for a 2,000 calorie diet per RACC and per labeled serving. This is supported by current dietary recommendations in the 2010 DGA and MyPyramid.

²¹ Thus, for example, an individual food would meet Principle A under Option 1, either by contributing 50% by weight whole grain, or by contributing 25% by weight whole grain and 25% by weight fruit. The Working Group is evaluating whether allowing an individual food to draw contributions from multiple food groups will still ensure that the product makes a meaningful contribution to a healthful diet.

²² By definition, a main dish contains at least two 40-gram portions from different food groups and a meal contains at least three 40-gram portions from different food groups. The federal nutrition labeling food groups, however, do not correspond precisely to the listed food groups in Principle A, which specify, for instance that the grain be whole grain and that milk products be fat-free or low-fat.

²³ 21 C.F.R. § 101.12; 9 C.F.R. §§ 317.312 and 381.412. If the meaningful amount of the food category exceeds the RACC, the RACC can be substituted as the amount necessary to make a meaningful contribution to a healthful diet.

²⁴ For example, an individual food could qualify under Principle A, Option 2, either by providing the full listed amount of whole grain (0.75 oz), or by providing half that amount (0.38 oz) and half the listed amount of fruit (0.25 cups).

²⁵ In the final rule for general requirements for health claims for food, FDA determined that the typical American eating pattern is three meals and one snack per day. *See* 58 Fed. Reg. 2475 (Jan. 6, 1993).

Nutrition Principle B: Nutrients to Limit

The Working Group believes that, in addition to making a meaningful contribution to the diet, foods marketed to children should also be those with minimal quantities of nutrients that could have a negative impact on health and weight. Nutrition Principle B therefore proposes targets for limiting the amount of sodium, saturated fat, *trans* fat, and added sugars. In selecting the four specific nutrients, the Working Group is again drawing from recommendations from the 2010 DGA. The Working Group's focus is on the nutrients that play a significant negative role in children's diets either by increasing the risk of childhood obesity or the risk of disease and health conditions associated with childhood obesity, such as heart disease and hypertension.

The 2010 DGA include recommendations to limit consumption of solid fats, in particular, saturated fat and *trans* fat, citing evidence linking both to increased risk of cardiovascular disease.²⁶ The 2010 DGA do not include any recommendation for limiting consumption of total fat, however, recognizing that the types of fatty acids consumed are more important in influencing the risk of disease than is the total amount of fat in the diet.²⁷ Thus, the Working Group has decided to propose goals for limiting saturated fat and *trans* fat, but has not set a goal for limiting total fat. The Working Group also has tentatively decided not to suggest a goal for limiting dietary cholesterol. The 2010 DGA indicates that, although dietary cholesterol has been shown to raise blood LDL cholesterol levels in some individuals, this effect is reduced when saturated fat intake is low, and the potential negative effects of dietary cholesterol are relatively small compared to those of saturated fat and *trans* fat.²⁸

Saturated Fat: The proposed target for saturated fat in individual foods is 1 gram or less per RACC and 15% or less of calories. The proposed target for saturated fat in main dishes and meals is 1 gram or less per 100 grams and less than 10% of calories from saturated fat. Both are based on the federal definition of "low saturated fat" for food labeling.²⁹

Trans Fat: Because there is no daily reference value for *trans* fat, and because the 2010 DGA recommends that *trans* fat intake be kept as low as possible, but does not specify a maximum intake level, the Working Group is proposing to set the target for *trans* fat at 0

²⁶ 2010 DGA, *supra* note 2, at 24-26.

²⁷ *Id.* at 24.

²⁸ *Id.* at 27. In addition, the DGA discussion of cholesterol suggests that the population most likely to exceed the recommended daily cholesterol intake of 300 milligrams is adult men, who average about 350 milligrams per day.

²⁹ 21 C.F.R. § 101.62(c); 9 C.F.R. §§ 317.362 and 381.462.

(<0.5) grams per RACC for individual foods and 0 (<0.5) grams per labeled serving for main dishes and meals.

Added Sugars: The Working Group’s proposed target for limiting added sugars is similarly based on 2010 DGA recommendations to choose prepared foods and beverages with as little as possible added sugars or caloric sweeteners. Added sugars can contribute to weight gain by providing excess calories or by diluting the nutrient density of the total diet. To calculate an appropriate limit for added sugars in foods marketed to children, the Working Group used the concept of “solid fats and added sugars” (SoFAS) as outlined in the 2010 DGA in combination with principles from federal labeling regulations for calculating “high” levels of nutrients. The 2010 DGA estimated that, in a 2,000 calorie daily diet, no more than 258 calories should come from SoFAS, which could include calories derived from solid fats and added sugars (and alcohol). If the entire 258 SoFAS calories came from added sugars, this would represent 64.5 grams of added sugars (4 calories per gram). Federal nutrient content claim regulations incorporate the principle that 20% or more of the daily value of a nutrient is considered high.³⁰ Applying this principle to the 64.5 grams daily of added sugars, a food with 13 grams of added sugars would be considered high in added sugars. The proposed limit for added sugars in foods marketed to children is therefore no more than 13 grams of added sugars per RACC for individual foods and per serving for main dishes and meals.

Sodium: The final nutrient to limit under proposed Principle B is sodium. The 2010 DGA recommends reducing daily sodium intake to less than 2,300 milligrams and further reducing intake to 1,500 milligrams among persons who are 51 years and older and those of any age who are African American or have hypertension, diabetes, or chronic kidney disease. The 2010 DGA recommendation of 1,500 milligrams applies to about half of the U.S. population, including children, and the majority of adults.³¹ The Tolerable Upper Intake Level (UL) is 2,300 milligrams for persons 14 years and older, but is lower for younger children, with not more than 1,900 milligrams per day recommended for children 4 to 8 years, and not more than 2,200 milligrams per day for children 9 to 13 years.³² The Adequate Intake Level (AI) for sodium for individuals ages 9 to 50 years is 1,500 milligrams per day. Lower sodium AIs were established by extrapolation based on lower calorie requirements for children and older adults. The AI for children ages 1 to 3 years is 1,000 milligrams per day. The AI for children ages 4 to 8 years is 1,200 milligrams per day.³³ In addition, the Institute of Medicine recently issued a report noting that Americans consume unhealthy amounts of sodium, far exceeding public health recommendations, and

³⁰ 21 C.F.R. § 101.54(b); 9 C.F.R. §§ 317.354 and 381.454.

³¹ 2010 DGA *supra* note 2, at 21.

³² Institute of Medicine, *Dietary Reference Intakes for Water, Potassium, Sodium, Chloride, and Sulfate* (National Academies Press 2005).

³³ *Id.* See also 2010 DGA *supra* note 2, at 23.

recommending various strategies to reduce sodium intake.³⁴ The evidence is sufficient for children and even stronger for adults that increased sodium intake leads to increased blood pressure. Keeping blood pressure in the normal range reduces an individual's risk of cardiovascular disease, congestive heart failure, and kidney disease.³⁵ Given this evidence and given that taste preferences for sodium likely begin in childhood,³⁶ the Working Group believes that it is important for foods marketed to children to be low in sodium.

The Working Group believes that the industry should work to significantly reduce the amount of sodium in food products, with the ultimate goal of achieving a sodium limit for foods marketed to children that parallels federal labeling regulations for low sodium – 140 milligrams per RACC for individual foods.³⁷ It also is proposing to set an ultimate goal of 300 milligrams per serving for main dishes and meals – half of the 600 milligrams of sodium established by federal labeling regulations for use of the term “healthy” on main dishes and meals.”³⁸

The Working Group also believes that, given the high proportion of foods currently in the marketplace that would not meet these limits, even with significant reformulation, interim targets are warranted. The Working Group is therefore proposing interim targets that represent amounts 50 percent greater than the ultimate targets. The interim target for individual foods would be 210 milligrams per serving³⁹ and the interim target for main dishes and meals would be 450 milligrams per serving.⁴⁰ The Working Group recommends that industry should work to reduce sodium to the interim levels by 2016 and to the final levels by 2021.

³⁴ See Institute of Medicine, *Strategies to Reduce Sodium Intake in the United States* (The National Academies Press 2010).

³⁵ 2010 DGA *supra* note 2, at 21.

³⁶ IOM, *Strategies to Reduce Sodium Intake in the United States* (The National Academies Press 2010) at 78-79.

³⁷ 21 C.F.R. § 101.61; 9 C.F.R. §§ 317.361 and 381.461.

³⁸ 21 C.F.R. § 104.20 and 9 C.F.R. §§ 317.363 and 381.413 (defining “healthy”), and 21 C.F.R. § 101.13 and 9 C.F.R. § 317.313 (establishing disclosure levels for nutrient content claims).

³⁹ The proposed interim sodium target of 210 mg for individual foods is based on a serving, not on the RACC. The ultimate target of 140 mg would be based on the RACC.

⁴⁰ In determining an appropriate interim target for individual foods, the Working Group also considered the limit proposed by the Institute of Medicine as part of its *Nutrition Standards for Foods in Schools*, a standard of 200 milligrams per serving. IOM, *Nutrition Standards for Foods in Schools* (2007) at 7. The IOM proposal includes a provision that the 200 milligrams is a proposed interim level and that industry should work toward reducing sodium content over time to 140 milligrams per RACC.

The interim targets proposed by the Working Group are intended to provide a workable compromise between the low sodium and healthy levels currently in place under federal labeling regulations. The Working Group believes that these interim targets will provide incentive for industry to reduce the sodium content of foods currently marketed to children without being so restrictive as to be technically unfeasible.

Foods with Small RACC (30 grams or less): It is important to note that the proposed targets for nutrients to limit under Principle B, to the extent they are based on amounts per RACC, include adjustments for foods with a small RACC, defined as 30 grams or less. For such foods, the nutrient limits are based not on the RACC, but on the amount per 50 grams of the food. The adjustment for foods with a small RACC is a concept derived from federal food labeling regulations.⁴¹ As one example of how this adjustment would apply, the 13 gram limit per RACC for added sugars would need to be adjusted down for a cereal with a RACC of 30 grams. As a result, the cereal would not meet the proposed principles for marketing to children if it contained more than 8 grams of added sugars in the 30 gram RACC. The proposed interim sodium targets are based on serving, not on RACC. Thus, there would be no adjustment to the interim sodium target for individual foods with a small RACC. The final sodium target is based on the RACC and the Working Group intends that it would be adjusted for individual foods with a small RACC.

Naturally Occurring Nutrients: The Working Group recognizes that, in many instances, the ingredients that provide a meaningful contribution to a healthful diet, under Principle A, also contain naturally occurring amounts of the nutrients to limit under Principle B. For instance, one serving (240 grams/8 ounces) of low-fat (1%) milk contains 1.5 grams of saturated fat and 130 milligrams of sodium, one large egg contains 1.6 grams of saturated fat, and a 50-gram serving of unsalted peanuts contains 2.5 grams of saturated fat. To eliminate any inconsistency between the two principles, the Working Group proposes that nutrients naturally occurring in the foods counted toward a meaningful contribution under Principle A do not need to be counted toward the proposed limits for those nutrients under Principle B. Thus, for example, the naturally occurring saturated fat, *trans* fat, and sodium in a carton of low-fat milk marketed as part of a children's meal would not count toward the nutrient limits for that meal.

C. Working Group Proposal

The full proposal of the Working Group for Nutrition Principles A and B, including specific recommendations and explanatory notes, is set forth below.

Proposed Nutrition Principles for Marketing Foods to Children Ages 2-17 Years

The Interagency Working Group (CDC, FDA, FTC, USDA) recommends that the food industry, through voluntary self-regulatory efforts, make significant improvements in the

⁴¹ 21 C.F.R. §§ 101.13 and 101.14; 9 C.F.R. §§ 317.363 and 381.463.

nutritional quality of foods marketed to children and adolescents ages 2-17 years. By the year 2016, all food products within the categories most heavily marketed directly to children should meet two basic nutrition principles. Such foods should be formulated to: (A) make a meaningful contribution to a healthful diet; and (B) minimize the content of nutrients that could have a negative impact on health and weight.

Food Categories

As industry develops new products and reformulates existing products, it should focus its efforts on foods most heavily marketed to children.

The food products most heavily marketed directly to children and adolescents, ages 2-17 years, fall into the following ten categories: breakfast cereals; snack foods; candy; dairy products; baked goods; carbonated beverages; fruit juice and non-carbonated beverages; prepared foods and meals; frozen and chilled deserts; and restaurant foods.*

* Definitions of these categories, based on standard industry Product Classification Codes, are set out in the FTC's 2008 Food Marketing Report, Appendix B.⁴²

Principle A: Meaningful Contribution to a Healthful Diet

*Foods marketed to children should provide a meaningful contribution to a healthful diet. Individual foods should contain contributions from at least one of the following food groups; main dishes should contain contributions from at least two; and meals should contain contributions from at least three.***

** Main dishes and meals are defined pursuant to federal labeling regulations. 21 C.F.R. § 101.13 and 9 C.F.R. §§ 317.313(m) and 381.417(m).

Option 1: Individual foods should contain at least 50% by weight of one or a combination of more than one of the following: fruit; vegetable; whole grain; fat-free or low-fat (1%) milk products; fish; extra lean meat or poultry; eggs; nuts and seeds; or beans. 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, per RACC[#]; 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:

- 0.5 cups fruit or fruit juice;
- 0.6 cups vegetables or vegetable juice;
- 0.75 oz equivalent of 100% whole grain;
- 0.75 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 (1%) processed cheese
- 1.4 oz meat equivalent of fish or extra lean meat or poultry;
- 0.3 cups of cooked dry beans;

⁴² See *supra* note 17.

- 0.7 oz nuts or seeds;
- 1 egg or egg equivalent.

#For individual foods, if the amount of the specific food group exceeds the RACC, the RACC can be substituted as the amount necessary to make a meaningful contribution to a healthful diet.

Principle B: Nutrients with Negative Impact on Health or Weight

Foods marketed to children should be formulated to minimize the content of nutrients that could have a negative impact on health or weight. With the exception of nutrients naturally occurring in food contributions under Principle A, foods marketed to children should not contain more than the following amounts of saturated fat, trans fat, sugar, and sodium.

- Saturated Fat: 1 g or less per RACC## and 15% or less of calories for individual foods (per 100 g and less than 10% of calories for main dishes and meals)
- Trans Fat: 0 g (<0.5 g) per RACC## for individual foods (per labeled serving for main dishes and meals)
- Added Sugars: No more than 13 g of added sugars per RACC## for individual foods (per serving for main dishes and meals)
- Sodium: No more than 210 mg per serving for individual foods (450 mg per serving for main dishes and meals).§

§ This is an interim level and applies per serving only, not per RACC or per 50 g. Industry should work toward reducing sodium content by 2021 to 140 mg per RACC## for individual foods, and 300 mg per serving for main dishes and meals.

For foods with a small RACC (30 g or less), the recommendations refer to the amount per 50 g of food.

III. Proposed Definition of Marketing Targeted to Children and Adolescents

The proposed nutrition principles are intended to guide industry in determining which foods to market to children ages 2-17 years. To define what constitutes marketing to children, the Working Group is proposing to refer to existing definitions already developed by the FTC and used in connection with both the FTC’s 2006 study of youth-directed food marketing expenditures and activities and its follow-up study.⁴³ The definitions are set out in full in the FTC’s 2008 Report to Congress, *Marketing Food to Children and Adolescents*, and are summarized below.⁴⁴

⁴³ As part of the OMB approval process for the 2006 and 2009 food marketing studies, the Commission published *Federal Register* notices describing the parameters of what constitutes marketing to children and adolescents. See 71 Fed. Reg. 62109 (Oct. 23, 2006); 72 Fed. Reg. 19505 (Apr. 18, 2007); 74 Fed. Reg. 48072 (Sept. 21, 2009).

⁴⁴ Federal Trade Commission, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, A Report to Congress (July 2008) (2008 Food Marketing Report), available at <http://www.ftc.gov/os/2008/07/P064504foodmktgreport.pdf>. The report analyzed 2006 food marketing data, based upon the responses of 44 companies to compulsory orders issued by the Commission.

The Working Group proposes to use the existing FTC template for defining marketing to children and adolescents because it has already been vetted through public comment in connection with the 2006 FTC study. The participating companies in the FTC study represented a significant majority of the food, beverage, and restaurant companies engaged in marketing to children. Those companies were required to apply the FTC's definitions in compiling and submitting marketing data for the study. The Working Group therefore believes that the proposed definitions have already been tested and appear to provide a workable framework for defining marketing to children and adolescents.

The Working Group's proposed definitions, like those used by the FTC, encompass both children, ages 2-11 years, and adolescents, ages 12-17 years. As noted above, in establishing the Working Group, Congress directed the agencies to consider marketing to all children 17 years old or younger. Obesity is prevalent in both age groups, and food marketing targeted to both is substantial as well.

The Working Group recognizes, however, that similarly broad restrictions on marketing to both age groups would not take into account developmental differences between adolescents and younger children and, in particular, differences in how different age groups understand and respond to specific marketing techniques. The Institute of Medicine reported in 2006, for example, that the evidence was insufficient on whether television advertising influenced the diets of adolescents.⁴⁵ At the same time, some studies suggest that adolescents are becoming targets for advertising in social media outlets, including Facebook, MySpace, and other interactive web sites, due to their increased online presence.⁴⁶ The Working Group is unaware of studies concluding whether or not such marketing is any more successful in affecting adolescents' food choices than traditional advertising.

Applying the same restrictions to both age groups also would not take into account the fact that restrictions on marketing targeted to adolescents are more likely to result in limits on food marketing in media that also reach a substantial adult audience. Although Congress directed the Working Group to consider children who are 17 years old or younger as it developed its proposal, the Working Group is considering and seeking comment on whether it would be appropriate to more narrowly define the scope of marketing to which the nutrition principles would apply for adolescents, for example, by limiting the scope to in-school marketing and social media, such as the Internet, digital, word of mouth, and viral marketing.

As currently proposed, the definitions directly track the FTC's categories of marketing techniques and venues and encompass a wide range of media for both children and

⁴⁵ IOM, *Food Marketing to Children and Youth: Threat of Opportunity?* (The National Academies Press (2006) at 306-309.

⁴⁶ See, e.g., Kathryn Montgomery and Jeff Chester, *Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age*, 45 *J. Adolesc. Health* S18 (2009).

adolescents. The Working Group recognizes that the proposed definitions are substantially broader in age range and in scope than those currently used by industry members in connection with existing self-regulatory programs governing foods marketed to children. However, the Working Group believes that to be most effective in encouraging children to make healthier food choices it is important that the proposed nutrition principles encompass a broad range of marketing techniques.

The Working Group's proposed definitions thus incorporate the 20 categories of advertising, marketing, and promotional activities identified in the FTC's food marketing study definitions. These include: television, radio, and print advertising; company-sponsored web sites, ads on third-party Internet sites, and 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, and sweepstakes; cross promotions, including character licensing and toy co-branding; sponsorship of events, sports teams, and 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.⁴⁷ Thus, marketing activities are broadly defined to encompass virtually all kinds of promotional activities directed to youth.

For each of the promotional activity categories, the Working Group proposes to adopt the FTC's specific definitions of when a particular marketing technique is targeted to children and to adolescents.⁴⁸ Objective criteria, such as audience share, are applied where available, with more subjective indicators used where such objective measures are not available. For measured media, including television, radio, print, and some Internet advertising, the definitions refer to audience share. For children ages 2-11 years, the audience share (as measured on an annual basis) that is considered "targeted" to children is 30%, while for adolescents ages 12-17 years, the relevant audience share is 20%. In both instances, the audience share is based on a percentage that is approximately double the proportion of that age group in the U.S. population. The Working Group believes that these audience shares are likely to ensure capturing most programming or publications targeted to children or adolescents, while not also including substantial amounts of adult fare that happen to have some young people in the audience. With respect to Internet ads – for which viewers are sometimes measured – the criteria include a 20% viewer share based on the FTC's determination in developing the criteria that this level represents approximately double the proportion of the two relevant age groups in the population of active Internet users for 2006. For movies, videos, and video games, ratings under industry codes are also included in the proposed criteria.

⁴⁷ Some of these categories overlapped and therefore were grouped together for purposes of reporting expenditures.

⁴⁸ See 2008 Food Marketing Report, Appendix B, available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreportappendices.pdf>.

For all promotional activity categories, the proposed criteria include reference to company marketing plans – if a marketing plan indicates the promotion is directed to, or designed to appeal to, children or teenagers, it is considered targeted to that age group. Other criteria refer to available opinion research data indicating, for example, that a celebrity or athlete or sports team used in the promotion is particularly popular with children or adolescents.

For advertising or promotional activities for which there are no objective criteria, such as audience share, opinion data, or inclusion in a company marketing plan, the Working Group proposes to follow the FTC's set of subjective indicators that the promotion targets children or adolescents. These include use of child- or teen-oriented animated or licensed characters; use of language to appeal particularly to children or teenagers; use of child or teen models; child- or teen-oriented themes, activities, or incentives; and whether the company actively seeks the participation of children or teens in some aspect of the promotion.

The results of the FTC's 2006 food marketing study, as detailed in its 2008 report to Congress, suggest that the FTC's template captured the majority of marketing methods used to reach children 17 years of age and younger, while minimizing marketing directed primarily at an older audience. The Working Group therefore has initially concluded that the measures applied in the FTC's definitions capture most promotional activity targeted to children or adolescents. The Working Group, however, is seeking input on whether the proposed categories and criteria set out in the FTC's definitions should be either narrowed or expanded for the Working Group's recommendations on voluntary principles for foods marketed to children.

IV. Questions for Comment

The Working Group is seeking public comment on both its proposed voluntary nutrition principles for foods marketed to children, as laid out in Section II above, and its proposed definition of what constitutes marketing targeted to children and adolescents, as summarized in Section III above and detailed in the FTC's 2008 Food Marketing Report. The Working Group seeks information concerning the specific nutrition principles and marketing definitions proposed, their potential implications for children's diets and health, and their practical implications for the food industry and children's food marketing. In an effort to facilitate comment, the Working Group poses the questions below and requests that comments include as much specificity as possible, with references to empirical data wherever available and appropriate. The Working Group will consider the comments as it develops final recommendations in its report to Congress.

To facilitate the process, the Working Group will divide review of comments among the member agencies, based on their expertise and authority. The Working Group therefore requests that, to the extent possible, comments on the nutrition principles be submitted as a separate document from comments on issues relating to marketing definitions and the general feasibility and impact of the proposal. Comments on the nutrition principles

(Questions 1 through 17) will be reviewed by CDC, FDA, and USDA. Comments on marketing definitions and general comments (Questions 18 through 30) will be reviewed by the FTC.

Proposed Nutrition Principles: General Questions

(1) Congress directed the Working Group to develop proposed nutrition principles for foods marketed to children and adolescents up to the age of 17. Does the prevalence of obesity in both children and adolescents warrant the same approach to limits on food marketing for both age groups? Given the wide age range, should there be two sets of nutrition principles, one for younger children (2-11 years) and one for adolescents (12-17 years), based on differences in the nutritional needs and recommended caloric intake of adolescents compared to younger children?

(2) The Working Group recognizes that companies often engage in brand advertising and marketing, without reference to a specific food product in the brand line. How should the nutrition principles be adapted to accommodate advertising and marketing of a general brand or an entire product line as opposed to specific food products or menu items?

(3) The proposed nutrition principles do not include a separate proposal setting targets for nutrients to encourage, including specific nutrients of concern as identified in the 2010 DGA, such as calcium, potassium, fiber, magnesium, and vitamins A, C, and E.⁴⁹ Should the Working Group recommendations include targets for nutrients to encourage and, if so, how should the recommendations address the issue of nutrients added to foods through fortification as opposed to nutrients that are inherent in foods?

(4) The proposed nutrition principles do not include limits on portion size or calories for foods marketed to children. Should the Working Group recommendations address portion size or calories directly or is over-consumption adequately addressed by the recommendations that all foods marketed to children make a meaningful contribution to a healthful diet and minimize consumption of saturated fat, *trans* fat, and added sugars?

Food Categories

(5) The Working Group proposal recommends that the industry focus its efforts on improving the nutrition profile of products that fall within ten specific categories of foods most heavily marketed to children. While this approach would address a substantial majority of all products marketed directly to children, some foods marketed directly to children do not fall within any of the specified categories. Examples include hot dogs, jams and jellies, and sauces and dressings. Are there specific food products or categories of foods that should be added to or dropped from the proposed list? What are the advantages and disadvantages of focusing on the most heavily marketed foods rather than on all foods marketed to children?

⁴⁹ 2010 DGA, *supra* note 2, at 7.

Main Dishes/Meals

(6) The Working Group is seeking comment on the proposed adjustments to the nutrition principles for main dish and meal products. For instance, should main dishes and meals make meaningful contributions from at least two and three food groups respectively, as proposed under Principle A? Should the targets set under Principle B be tied to a 100-gram amount, a labeled serving, a 40-gram portion, or some combination of these? What would be the advantages or disadvantages of using a 100-gram basis to set food group contributions and nutrient targets for all individual foods, main dishes, and meals?

(7) The Working Group also seeks comment on alternative approaches to address the marketing of children's meals by restaurants. One possible approach would be to recommend that a minimum number of the offerings on a children's menu be healthier and that at least two out of three components of the meals marketed to children meet certain nutrition principles that make them healthier choices. What would be the advantages or disadvantages of such an approach? Are there other approaches to the marketing of children's meals by restaurants that the Working Group should consider?

Nutrition Principle A

(8) Under both the Option 1 and Option 2 proposals for Principle A, companies can aggregate contributions from more than one of the specified food categories to meet the meaningful amount targets for individual foods. Does this approach diminish the meaningful contribution to the diet by allowing small contributions from multiple food groups? Should the principle recommend that the entire contribution come from one food group?

(9) The list of food groups that make a meaningful contribution to a healthful diet under Principle A includes both the basic food groups to encourage as identified in the 2010 DGA – fruits, vegetables, whole grains, fat-free and low-fat milk products – as well as other food categories that are compatible with an overall healthful diet – fish, lean meat and poultry, beans, nuts and seeds, and eggs. Are there food categories that should be added to or eliminated from Principle A?

(10) The 2010 DGA recommend consuming a variety of vegetables, especially dark-green and red and orange vegetables and beans and peas. Given that children consume starchy vegetables disproportionately to other subgroups like dark-green and red and orange vegetables, should Principle A include recommendations for specific subgroups of vegetables?

(11) The Working Group has included two possible approaches for Principle A. What are the advantages and disadvantages of Option 1 (based on weight) and Option 2 (based on amounts per RACC)?

(12) The food contribution amounts proposed in Option 2 are calculated based on a 2,000 calorie daily diet and assume four eating occasions per day. Should this calculation be adjusted to reflect children’s caloric needs and eating patterns?

Nutrition Principle B

(13) Principle B provides that any nutrients naturally occurring as part of the food contributions under Principle A are not counted toward the proposed limits for specific nutrients under Principle B. This exemption is intended to resolve any inherent inconsistencies between Principle A and Principle B. At the same time, the Working Group recognizes that the calculations involved in partially “netting out” certain nutrients would entail a detailed knowledge of the product recipe or formulation and make it difficult for any third party to verify whether a product meets Principle B. Are there alternative approaches the Working Group should consider in reconciling the provisions of Principles A and B?

(14) Under Principle B, the proposed nutrient targets for individual foods are generally tied to the RACC. The proposal recommends that individual foods with a small RACC (30 grams or less), meet the targets for saturated fat, *trans* fat, added sugars, and sodium per 50 grams (with the exception of the interim sodium value of 210 milligrams per serving). What are the implications of this approach in particular for smaller serving foods like cereals or for foods marketed in smaller children’s portions? What would be the advantages and disadvantages of tying Principle B recommendations to labeled serving instead of the RACC?

(15) Are there other nutrients or ingredients not currently included in Principle B that the Working Group should recommend be limited in foods marketed to children? If so, what is the evidence regarding the nutrition and health justification for including the nutrient or ingredient?

(16) The Working Group proposal recommends a target for added sugars for foods marketed to children. What are the advantages and disadvantages of the proposal for limiting added sugars content as opposed to total sugars content?

(17) The Working Group proposal recommends an interim goal for limiting sodium content for foods marketed to children of 210 milligrams per serving for individual foods and 450 milligrams per serving for main dishes and meals, with a target date of 2016. Is there a nutrition-based rationale for an alternative interim goal for sodium that the Working Group should consider? The Working Group’s final value for sodium is 140 milligrams per RACC for individual foods and 300 milligrams per serving for main dishes and meals, with a target date of 2021. Is there a nutrition-based rationale for an alternative final goal on sodium that the Working Group should consider?

General Feasibility/Marketplace Impact of Proposed Nutrition Principles

(18) What impact will the voluntary principles as proposed have on the nutritional quality of foods marketed to children if industry fully adopts them? Specifically, what percentage of foods currently marketed to children would not meet the proposed principles and to what extent could such foods be reformulated to do so?

(19) Are there specific foods that are nutritional outliers and warrant special consideration under the proposed nutrition principles, either with additional limits or specific exceptions to proposed principles?

(20) Do the proposed nutrition principles create incentives for manufacturers to reformulate a food product in a manner that would diminish the nutritional quality of the product? If so, are there revisions to the proposed nutrition principles that would reduce or eliminate those incentives?

(21) Many food products currently in the marketplace may require substantial reformulation to meet the proposed principles. The Working Group recognizes that such reformulation may present both technical challenges and challenges relating to the palatability and consumer acceptance of the food. What impact will reformulation challenges have on manufacturers' incentive and ability to improve the nutritional quality of the foods they market to children to meet the proposed principles? Given these challenges, what would be the best approach to encourage the greatest participation from the food industry? Should the Working Group develop principles that would encompass a broader range of foods? For example, should the Working Group consider alternative principles drawn from federal food labeling regulations defining the nutrient content claim "healthy" or setting nutrient disclosure levels for other nutrient content claims?

(22) The Working Group proposes that industry work to fully implement the proposed nutrition principles for all foods within the categories most heavily marketed to children by the year 2016, with a target of 2021 for final sodium reductions. The Working Group does not propose any specific implementation process or interim goals for meeting this target date, but encourages individual companies to develop a workable plan for incremental implementation. Are these appropriate target dates for full implementation of the principles and should the Working Group recommend specific interim goals?

Definition of Food Marketing Targeted to Children

(23) The Working Group's proposed voluntary principles apply similarly broad definitions of what constitutes marketing to children ages 2-11 years and adolescents ages 12-17 years. In the case of adolescents, those marketing definitions are more likely to result in limits on food marketing in media that is also reaching a substantial adult audience. What would be the advantages or disadvantages of applying the proposed nutrition principles only to those marketing techniques that are more narrowly focused on adolescents, for example, by limiting the scope to in-school marketing and social media, such as the Internet, digital,

word of mouth, and viral marketing? If the range of covered marketing techniques is narrower for adolescents than for younger children, what techniques should be encompassed and why?

(24) Does the mix of objective and subjective criteria for food marketing directed to children and adolescents that was used by the FTC in preparing its 2008 Food Marketing Report adequately capture promotional activities targeted to the relevant age groups?

(25) For measured media, does the use of a percentage audience share that is approximately double the presence of the relevant group in the general population adequately capture marketing targeted to children or adolescents without being over-inclusive so as to include marketing directed primarily to adults?

(26) For measured media, such as television, radio, print, and the Internet, the Working Group proposes using audience percentages as one of the criteria for determining whether a specific program, publication, or web site is targeted toward children or adolescents. What are the advantages and disadvantages of this approach? Are there alternative approaches that would provide a more accurate and appropriate measure of whether these media are targeted toward children or adolescents?

(27) For unmeasured media, including some social media, such as word of mouth marketing and viral marketing, are the subjective criteria used by the FTC in preparing its 2008 Food Marketing Report sufficiently clear and adequate to encompass promotional activities targeted to children or adolescents? Could these criteria be made more specific, and if so, how?

Overall Impact of Proposed Nutrition Principles and Marketing Definitions

(28) If the proposed voluntary nutrition principles were fully adopted by industry, what impact, if any, would they have on children and family television programming and other children's media? What shifts might occur in the proportion of children's advertising involving food products relative to other categories of products advertised to children? What would be the resulting impact on children's health from any shift in advertising to non-food products?

(29) Are there antitrust implications to industry voluntary adherence to the proposed principles?

(30) Do the proposed voluntary principles raise commercial speech issues? In particular, if Congress were to enact them into law, would such a law raise First Amendment concerns? If so, what are those concerns?

V. Instructions for Submitting Comments

Interested parties are invited to submit written comments electronically or in paper form. All comments must be received no later than June 13, 2011. As noted above, the Working Group will share responsibility for review of comments among the member agencies, based on each agency's expertise and authority. All comments should be submitted to the FTC, which will coordinate the review by the Working Group agencies. Comments on issues relating to the proposed nutrition principles will be reviewed primarily by the CDC, FDA, and USDA. Comments on issues relating to the proposed definitions of marketing and all other general comments will be reviewed primarily by the FTC. The Working Group therefore requests that, to the extent possible, comments on the nutrition principles (Questions 1 through 17) be submitted as a separate document from comments on issues relating to marketing definitions and the general feasibility and impact of the proposal (Questions 18 through 30).

To facilitate the organization and allocation of comments for review among the Working Group agencies, comments relating to the proposed nutrition principles, including comments on the food categories identified in the principles, should refer to "Interagency Working Group on Food Marketed to Children: Proposed Nutrition Principles: FTC Project No. P094513." All other comments related to proposed marketing definitions or general aspects of the proposal should refer to "Interagency Working Group on Food Marketed to Children: General Comments and Proposed Marketing Definitions: FTC Project No. P094513." Please note that your comment – including your name and your state – will be placed on the public record of this proceeding, including on the publicly accessible FTC Website, at <http://www.ftc.gov/os/publiccomments.shtm>.

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential . . ." as provided in Section 6(f) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 46(f), and FTC Rule 4.10(a)(2), 16 C.F.R. § 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 C.F.R. § 4.9(c).⁵⁰

⁵⁰ The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 C.F.R. § 4.9(c).

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comment in electronic form. Comments filed in electronic form should be submitted by using the following weblink: <https://ftcpublic.commentworks.com/ftc/foodmarketedtochildreniwg> (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the <https://ftcpublic.commentworks.com/ftc/foodmarketedtochildreniwg> weblink. You may also visit the FTC website at <http://www.ftc.gov> to read the Notice and the news release describing it.

A comment filed in paper form should include the appropriate reference – either “Interagency Working Group on Food Marketed to Children: Proposed Nutrition Principles: FTC Project No. P094513,” or “Interagency Working Group on Food Marketed to Children: General Comments and Proposed Marketing Definitions: FTC Project No. P094513 ” both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex W), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

Comments received will be available to the public on the FTC Website, to the extent practicable, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy, at <http://www.ftc.gov/ftc/privacy.shtm>.

By direction of the Commission.

Donald S. Clark
Secretary