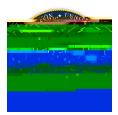
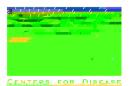
Preliminary Proposed Nutrition Principles







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 iffer egregation 0.0000 TD000 TD(e)Tj5.2800 0.0000 TD(nd R)Tj25.0.0000 TD(e)Tj5.2800 0.0000 TD(e)Tj5.2ibu(eq.)Tj T

k600 0.D(e)Ti5.2800 0.0000 TD(fer)Ti14.6400 0.0000 TD(e)Ti5.28000.0000 TD(ncl)Ti2.6400 0.0000 0.0000 0.00000000 0.00

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.*

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*

<u>http://www.who.int/dietphysicalactivity/publications/recsmarketing/en/index.html</u>; USDA, "HealthierUS School Challenge" *available at* <u>http://www.fns.usda.gov/tn/healthierus/index.html</u>.

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

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 (establishsh

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://wwfb 200060.00 rgB TD2.8813.4404400 0.0000 TD(ck)tw(ca)Tj9.3600 0.0000 TD(rb)Tj8.7600 0.000 Mar

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.

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 pa

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* <u>http://www.mypyramid.gov/index.html</u>.

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* <u>http://www.fns.usda.gov/tn/HealthierUS/wholegrainresource.pdf</u>.

²⁷ *Id.* at 24.

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

 $^{^{28}}$ Id. at 27. In addition, the DGA discussion of cholesterol suggests that the population most

(<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 re

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.

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 orless) 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 ingredie

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 mostheavily marketed directly to children should meet two basic nuttion principles. Such foods should be formulated to: (A) make a meanigful contribution to a healthful diet; and (B) minimize the content of nutrients that could have a negative inpact on healthand weight.

Food Categories

As industry develops new products and reformulates existing products, it should focus its efforts on foods nost 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 means 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

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* <u>http://www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf</u>. 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 inschool 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).

<u>r thes4jlle68</u>00 0.0000 tD(i)Tj2.8800 0.0000 TD(i)Tj2.8800 0.0000 nD(og)Tj10.3200 0.0000 Re(hes)Tj210

 $^{\rm ii}\!{\rm Some}$ of these categories overlapped and therefore were grouped together for purposes of

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 desig

(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 re

⁴⁹ 2010 DGA, *supra* note 2, at 7.

(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 indiv

General Feasibility/Marketplace Inpact of Proposed Natrition 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 W0000 Onutritional outliers and rant spec

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 I mpact 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?