

# WebMemo



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## The Diet Dictators' Attack on Consumer Choice and Free Speech

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Federal regulators recently unleashed plans intended to radically restrict food choices for American children. Nutritional staples such as Cheerios, peanut butter, and yogurt are verboten under the proposed standards, which effectively constitute a government-regulated grocery list. Proponents contend they have only the best interests of overweight children in mind. Whether pursuing weight loss or some other high-minded goal, however, the action is unproductive and likely unconstitutional.

**Nanny-State Nutritionists.** The focus of this latest caloric crackdown is government censorship of food advertising, disguised as “guidelines” crafted by the four federal agencies that wield extensive regulatory powers over the nation’s foodstuffs.<sup>1</sup> This so-called “Interagency Working Group” (IWG) believes that suppressing advertising and promotion about dietary choices will eliminate obesity among the playground set—despite overwhelming evidence to the contrary.

Congress established the IWG in the 2009 Omnibus Appropriations Act to “study” childhood obesity and present recommendations to lawmakers. It is a charge the regulators have stretched beyond recognition.

The group’s “principles”<sup>2</sup> set forth nutrition criteria—calories per serving, fat, sodium, and sugar content, among them—that would have to be met in order for a food product to be advertised or promoted, as well as allowable forms of marketing. The IWG defines “acceptable” foods as those that “make

a meaningful contribution to a healthful diet” and “minimize consumption...of nutrients that could have a negative impact on health or weight.”

According to the IWG, the proposal is designed “to encourage children to choose” only the foods that comply with the group’s stringent standards. There is not a single mention of “parent,” “mother,” or “father” in the IWG’s 27 pages of “principles.”

**Standards Violate First Amendment.** It is all too convenient that the IWG formulated the advertising standards as “voluntary.” As such, they are not subject to the rulemaking requirements of regulatory mandates. If they were, a legal challenge would likely strike them down as an unconstitutional violation of free speech rights—firmly secured in precedent.

However, the ad restrictions are voluntary in name only. Food manufacturers can hardly ignore “recommendations” from the very federal agencies that exercise regulatory authority over their every move. It is akin to a cop asking for ID or to search one’s vehicle: While the law treats such citizen cooperation as voluntary, most individuals would not view it as such, nor would the police look kindly on anyone who denies their requests.

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Government officials on more than one occasion have alluded to the potential for regulation if the industry does not voluntarily comply with advertising limits. The Federal Trade Commission, in fact, sought comment on whether the IWG guidelines would suffer from First Amendment issues if enacted into law.<sup>3</sup> And the White House Task Force on Childhood Obesity report to the President suggests that failure to comply would provide sufficient cause for statutory limits on advertising: “Effective voluntary reform will only occur if companies are presented with sufficient reasons to comply,” the report states. “The prospect of regulation or legislation has often served as a catalyst for driving meaningful reform in other industries and may do so in the context of food marketing as well.”<sup>4</sup>

Moreover, the legitimate concern of advertisers that their failure to comply with voluntary requirements will trigger regulation will necessarily have a chilling effect on speech and thus makes even this “voluntary” program constitutionally suspect.

Beyond the constitutional concerns, the limits on food advertising carry economic consequences. Even the working group has acknowledged that the guidelines would have significant economic impacts. A study by IHS Global Insight concluded that the guidelines would result in a 20 percent reduction in ad expenditures that would in turn cause losses of \$28.3 billion in manufacturing and retail sales and 378,000 jobs lost by 2015. The costs will also be

borne by children’s programming, which gets considerable sponsorship from the food industry.

**Excessively Stringent.** The IWG nutritional standards would restrict advertising to foods that contain no more than 1 gram of saturated fat; zero trans fats; no more than 13 grams of sugar; and less than 210 milligrams of sodium. In effect, this limits advertising “for children”<sup>5</sup> to fruits and vegetables, whole grains, fish, extra-lean meat and poultry, eggs, fat-free or low-fat milk, and nuts, seeds, and beans.

These standards are far more stringent than any other government nutrition guidelines, including those established by the USDA,<sup>6</sup> upon which most federal food programs are based. Peanut butter and jelly, tomato soup, and 2 percent milk fail to meet the nutrition standards, as would 100 percent juices, many yogurts, and even a variety of frozen vegetables. Indeed, many of the USDA’s own recipe recommendations for children would not pass muster, including Lentil Chili, Roasted Root Vegetables, and Bulgur Chickpea Salad.<sup>7</sup>

So extreme are the standards, in fact, that 88 of the 100 most commonly consumed foods and beverages would be in violation, according to the Association of National Advertisers.<sup>8</sup>

The criteria that defines advertising “targeted to children” is likewise excessive. For television, it is advertising that accompanies programming for which children ages 2–11 comprise an audience share of 30 percent or more or 20 percent of ado-

1. The U.S. Department of Agriculture, the Food and Drug Administration, the Federal Trade Commission, and the Centers for Disease Control and Prevention.
2. Interagency Working Group on Food Marketed to Children, *Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts*, at <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf> (August 26, 2011).
3. *Ibid.*
4. White House Task Force on Childhood Obesity, *Solving the Problem of Childhood Obesity Within a Generation*, May 2010, at [http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce\\_on\\_Childhood\\_Obesity\\_May2010\\_FullReport.pdf](http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf) (August 26, 2011).
5. The excessively broad definition of advertising targeting “children” captures a significant number of programs with an adult audience.
6. See U.S. Department of Agriculture and U.S. Department of Health and Human Services, *Dietary Guidelines for Americans*, 2010, at <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/PolicyDoc.pdf> (August 26, 2011).
7. U.S. Department of Agriculture, SNAP-Ed Connection Recipe Finder, at <http://recipefinder.nal.usda.gov/index.php> (August 26, 2011).
8. Dan Jaffe, “Regulatory Supersizing,” *Regulatory Rumbblings*, July 5, 2011, at <http://www.ana.net/blogs/home/id/rumbblings> (August 26, 2011).

lescents ages 12–17 years. That means only government-approved advertising for such programs as the Super Bowl, *American Idol*, *Dancing with the Stars*, *Glee*, and *Modern Family*.

The restrictions extend well beyond television, encompassing virtually every means of promotion, including radio and print advertising; company-sponsored Web sites, ads on third-party Internet sites, and other digital advertising (including e-mail 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.

**Advertising Does Not Cause Childhood Obesity.** The standards are based on the notion that food advertising causes obesity in children. But a variety of research has failed to establish any such link. For example, the Institute of Medicine reported in 2006 that there was insufficient evidence to associate advertising with the diets of adolescents.<sup>9</sup>

In fact, children’s exposure to food advertising has lessened significantly in recent years. The average number of food and beverage advertisements viewed by kids (ages 2 to 11) during children’s programming fell by 50 percent between 2004 and 2010, according to the Georgetown Economic Service.<sup>10</sup> During the six-year period, ads for snack bars fell by nearly 100 percent, cookies by 99 per-

cent, soft drinks by 96 percent, and frozen and refrigerated pizza by 95 percent.

The scholarly literature offers solid evidence that physical inactivity—not food intake—is the primary cause of childhood obesity. As noted by Dr. Mark McClellan, a former commissioner of the FDA, actual levels of caloric intake among the young have not appreciably changed over the last 20 years. “The lack of evidence of a general increase in energy [food] intake among youths despite an increase in the prevalence of overweight suggests that physical inactivity is a major public health challenge in this age group.”<sup>11</sup>

Nor have advertising crackdowns elsewhere proven effective. Quebec banned food advertising to children in 1980, but childhood obesity rates there are no different from those in other Canadian provinces.<sup>12</sup> Sweden’s advertising ban has existed for more than 10 years with no discernable effect on obesity rates.<sup>13</sup>

**Congress Should Halt Perverse Plan.** The IWG appears to have also overlooked the fact that now, more than ever, parents themselves can restrict children’s access to advertising by television, cable, and DVR settings that block or skip commercials.

For all of these reasons, the crackdown on free speech represents flawed policy. It increases government interference into decisions that are the sole province of parents and tramples on constitutionally protected free speech rights. Congress should put a stop to this ineffective and costly attack on consumer choice and free speech.

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9. Institute of Medicine, *Food Marketing to Children and Youth: Threat of Opportunity?* (Washington, D.C.: National Academies Press, 2006), pp. 306–309.

10. Supermarket News, “Study: Kids See Fewer Food Ads,” April 28, 2011, at [http://supermarketnews.com/news/kids\\_ads\\_0428/index.html](http://supermarketnews.com/news/kids_ads_0428/index.html) (August 26, 2011).

11. Mark B. McClellan, speech before the National Food Policy Conference, May 8, 2003, at <http://www.fda.gov/NewsEvents/Speeches/ucm053705.htm> (August 26, 2011).

12. See J. D. Willms, M. S. Tremblay, and P. T. Katzmarzyk, “Geographical and Demographic Variation in the Prevalence of Overweight in Canadian Children,” *Obesity Research*, Vol. 11 (2003), pp. 668–73.

13. See T. Lobstein and M.-L. Frelut, “Prevalence of Overweight Among Children in Europe,” *Obesity Reviews*, Vol. 4 (2003), pp. 195–200.