COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

U.S. DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE

Concerning

PROPOSED LOCAL WELLNESS POLICY IMPLEMENTATION UNDER THE HEALTHY, HUNGER-FREE KIDS ACT OF 2010 (Docket No. RIN 0584–AE25)

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Ms. Julie Brewer
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P.O. Box 66740
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Re: Comments Concerning Local School Wellness Policy Implementation under the Healthy, Hunger-Free Kids Act of 2010

Dear Ms. Brewer:

The Washington Legal Foundation (WLF) appreciates the opportunity to submit these comments questioning the constitutionality of the speech restrictions in the Food and Nutrition Service's Local School Wellness Policy Implementation under the Healthy, Hunger-Free Kids Act of 2010 (79 Fed. Reg. 10693).

I. Interests of WLF

Founded in 1977, the Washington Legal Foundation is a public-interest law firm and policy center with supporters throughout the United States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF consistently champions protection of commercial speech under the First Amendment to the U.S. Constitution.

While WLF believes that the government can play a role in ensuring that commercial speakers do not provide false or misleading information to consumers, WLF has consistently opposed government efforts to censor speech or otherwise prevent consumers from hearing truthful commercial speech. WLF has done this both by participating in the regulatory process and via litigation in federal and state courts. *See, e.g.*, *In Re: Proposed Collection of Information on Consumer Reaction to Disclosures Regarding Additional Risks in Direct-to-Consumer Prescription Drug Television Advertisements* (Apr. 21, 2014); *In Re Interagency Working Group Proposal on Food Marketed to Children* (July 14, 2011); *Educational Media Co. at Va. Tech., Inc. v. Insley*, 731 F.3d 291 (4th Cir. 2013); *Sorrell v. IMS Health*, 131 S. Ct. 2653 (2011).

Furthermore, WLF's Legal Studies Division frequently produces and distributes articles on a wide array of legal issues related to commercial free speech and Government's attempted limitation of such speech. *See, e.g.*, Richard Frank and David Weinrieb, *Updated Medical Privacy Rules Under Federal HITECH Act Constitutionally Suspect*, WLF LEGAL BACKGROUNDER, July 19, 2013; Sarah Roller and Donnelly McDowell, *Biotech Food Labeling Proposal Raises First Amendment Concerns*, WLF LEGAL OPINION LETTER, Oct. 19, 2012.

II. Summary of Comments

WLF generally supports the interests the Food and Nutrition Service (FNS or the Service) purports to advance in this proposed rule: "promot[ing] student health and reduc[ing] childhood obesity." 79 Fed. Reg. at 10698. We are concerned, however, with the means FNS has chosen to advance those interests, and in particular, its proposed "goals for nutrition promotion" through local education agencies' (LEAs)[1] wellness programs. The proposed rule dictates LEAs should meet those goals by not only supporting "marketing and advertising of nutritious foods and beverages" in the schools, *id*. at 10695, but also by prohibiting promotion of "disfavored" products. These comments will focus on this content- and speaker-based discrimination against commercial speech.

Rather than prohibit advertising of *all* food and beverage products in local schools, the proposed rule targets specific "competitive" foods[2] that fail to meet federal "Smart Snacks" guidelines. FNS's decision to make certain foods unavailable in school cannot constitutionally justify prohibiting speech about those products. Government's authority to regulate commercial speech is at its apex when targeting speech that proposes an illegal transaction. But unlike tobacco or alcohol, no laws prohibit primary or secondary school-age children from purchasing government-disfavored foods. FNS

[1] A technical term analogous to "school district." *See* http://www.ed.gov/race-top/district-competition/definitions.

[2] FNS defines competitive foods as "all other foods available on campus" other than those meals reimbursable under programs authorized by the National School Lunch Act and the Child Nutrition Act. The proposal states: "This would include foods and beverages that are available for sale to students, which are subject to the interim rule, *Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010* (78 FR 39068), also known as the 'Smart Snacks in School' rule, as well as any other foods and beverages available (such as in classroom parties, classroom snacks brought by parents, or foods given as incentives) on the school campus during the school day."

cannot plausibly argue that disqualifying a product for sale in school somehow renders it *illegal* for children to purchase. In addition to speech about illegal transactions, courts have found that government has an interest in protecting consumers from false or misleading commercial speech. FNS does not claim in its proposal that advertising about disfavored foods and beverages is false or misleading.

Because the speech restrictions in the proposed rule are aimed neither at false or misleading advertising nor at marketing for illegal transactions, they are extremely vulnerable to a constitutional challenge. The U.S. Supreme Court held in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), that speaker- or content-based speech restrictions are subject to "heightened scrutiny," and that in such situations "it is all but dispositive [of the inquiry] to conclude that a law is content-based. *Id*. at 2667. A content-based law or regulation can only survive if government can offer a persuasive "neutral justification." FNS does not offer any such justification for this rule.

The Service would not prevail even if its proposed rule were judicially scrutinized under the somewhat lower standard of review of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). Though FNS is arguably addressing a substantial governmental interest, the proposal does not "directly advance" that interest and it attempts to do so in a manner that burdens far more speech than necessary.

The Local School Wellness Policy Implementation proposal not only infringes on the First Amendment rights of the restricted speakers (food and beverage manufacturers and distributors) and listeners (consumers), but it also treads on the constitutional rights of local education agencies. As the Supreme Court recently ruled in *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l*, 133 S. Ct. 2321, 2330 (2013), a federal agency cannot condition the receipt of federal funding on an action which infringes on the recipient's constitutional rights. FNS not only requires LEAs to embrace and advance its viewpoint on food and beverage marketing, it also prevents school districts from exercising their own First Amendment rights by permitting advertising in their schools.

III. The Proposed Rule Unconstitutionally Imposes Content- and Speaker-Based Restrictions on Truthful Speech

The proposed rule emphasizes the importance of promotional marketing in achieving the goals of the Healthy, Hunger-Free Kids Act of 2010. It requires LEAs to promote "nutritious foods and beverages to students" through integrating such messages into core subject classes and placing posters and signage throughout the school, among other means. 79 Fed. Reg. 10693, 10695. The proposal also authorizes advertising for

"competitive" food and beverage products that meet the standards of the Smart Snacks in School interim rule. *Id*. at 10698.

But in explicitly permitting certain private advertising, FNS also prohibits commercial messages regarding "disfavored" foods and beverages: "The rule proposes to *require* . . . that LEAs include in their local wellness plans policies that allow marketing *only* of those foods and beverages that may be sold on the school campus during the school day." *Ibid*. (emphasis added). Thus, a soda maker can provide schools with drink cups to be used during gym class that bear its logo and promote its *diet* soda, but not cups that promote its *non-diet* soda. And if a soda maker does not offer a line of diet alternatives, it cannot provide such cups. A yogurt maker whose yogurt contains one gram of sugar more than allowed under the Smart Snacks rule cannot pay to promote that product in a public school newspaper, but it can advertise a lower-sugar alternative.

FNS may lawfully make choices between foods and beverages of different nutritional value when deciding how local schools expend federal funds. It cannot, however, discriminate against certain speech and speakers in favor of preferred messages and messengers. Such speaker- and content-based limits on truthful speech run afoul of the First Amendment.

The federal courts have long recognized that the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages conveyed by private individuals. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989). "As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979)). While the courts have very occasionally upheld content-based speech restrictions, they have always imposed on the government a heavy burden of demonstrating the necessity of such restrictions. *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid," and the government bears the burden to rebut that presumption.); *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

The Supreme Court concluded in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011), that "[c]ommercial speech is no exception" to these principles. After all, "[a] consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." (internal quotation marks omitted).

The Court also stated in *Sorrell* that "The First Amendment requires heightened scrutiny whenever the government creates a 'regulation of speech because of disagreement with the message it conveys." *Ibid*. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1986)). In *Sorrell*, the Vermont legislature banned holders of anonymized prescription data from selling the data to pharmaceutical company salespeople, but permitted such data to be used by other entities, including "counter-detailers" paid by the government to convince doctors to prescribe less expensive drugs.

FNS is following a similar approach in its proposal to the one struck down in *Sorrell*. Vermont favored one group of speakers and increased the chances its counter-detailing would succeed by burdening competing speakers. Likewise, FNS silences speech on products it has deemed nutritionally deficient while it permits marketing of preferred products. By suppressing speech on disfavored products, FNS's plan to inculcate students into "wiser" consumption choices undoubtedly has a better chance of success. As the Court explained in *Sorrell*, government can express its views "through its own speech," *id*. at 2671, but it cannot impose content-based limits on other speech to pursue its goals.

"Content-based restrictions on protected expressions are sometimes permissible," the Court noted, "and that principle applies to commercial speech." *Id*. at 2672. But to succeed, government must provide a "neutral justification" for its actions. The only acceptable justifications the Court recognized in *Sorrell* were the prevention of fraud and the correction of false or misleading speech. *Id*.

FNS cannot offer any such neutral justification. The Service has argued in its proposal neither that marketing of "unhealthy" foods in school is fraudulent nor that it is false or misleading. The proposed Local School Wellness Policy Implementation reflects the firmly held but misguided convictions of federal health and nutrition officials that food and beverage marketing compels poor consumption choices, and that children can only develop better eating habits if advertising is removed from their view. But the Supreme Court has stated repeatedly that "the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens." *Sorrell*, 131 S. Ct. at 2670-71 *citing Thompson v. Western States Medical Center*, 535 U.S. 357, 374 (2002).

IV. The Proposed Rule Also Fails to Directly and Materially Advance a Governmental Interest and Impacts More Speech than Necessary

The Food and Nutrition Service's selective marketing ban would also be found unconstitutional under the traditional "*Central Hudson*" test.

Under *Central Hudson*, the government has the burden to justify its commercial speech restriction as consistent with the First Amendment. Courts must first assess whether the targeted speech proposes an unlawful transaction or is misleading, and whether the restriction being reviewed advances a "substantial" governmental interest. If the speech is found lawful and non-misleading, and if the interest being advanced is substantial, the government must establish that the regulation "directly advances" that interest and that there is a reasonable fit between the government's ends and the means chosen to pursue those ends.

WLF does not dispute that the federal government is pursuing a substantial interest—"promot[ing] student health and reduc[ing] childhood obesity," 79 Fed. Reg. at 10698—with this proposed rule. However, FNS does not advance that interest in a constitutional manner.

With regard to the other preliminary inquiry, FNS may argue that the products are "illegal" because students cannot purchase them in school.[3] The government cannot plausibly equate certain food products being withheld from school vending for nutritional reasons with products that children cannot purchase lawfully anywhere, such as tobacco or alcohol. No laws prohibit primary or secondary school-aged children from purchasing government-disfavored foods in general. Also, as we noted above, FNS does not argue in the proposal that ads for the targeted foods are misleading, nor could it successfully do so if faced with a constitutional challenge. FNS may argue, as have some activists and academics, that advertisements are inherently misleading to children.[4] Such a novel theory has not found favor in federal courts, however.

Nor does FNS advance its asserted governmental interest in a direct and material way. The government's burden on this question "'is not satisfied by mere speculation and conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will alleviate them to a material degree.'" *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 770-71 (1993)).

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[3] At the White House announcement of the FNS proposal, Agriculture Secretary Vilsack declared "If you can't sell it, you ought not to be able to market it." Maggie Fox, "First Lady Proposes Ban on Junk Food Marketing in Schools," NBCNews.com, Feb. 25, 2014, *available at* http://www.nbcnews.com/health/kids-health/first-lady-proposes-ban-junk-food-marketing-schools-n38201.

[4] *See, e.g.*, Samantha Graff, Dale Kunkel, and Seth E. Mermin, *Government Can Regulate Food Advertising to Children Because Cognitive Research Shows That it Is Inherently Misleading*, HEALTH AFF., Feb. 2012, vol. 31 no. 2 392-398.

The Service's decision to prohibit sales of the same food and beverage products that cannot be advertised on school property severely undermines the government's ability to prove its speech ban will materially impact student health. If such food were available for sale at school, perhaps FNS could argue that ads for such products would inspire impulsive children to make spontaneous purchasing decisions. Reduction in sales from an ad ban would be the type of evidence the school could use to defend the ban. But since the ad ban will not prevent already unavailable purchases, FNS would have to demonstrate that not viewing ads for disfavored foods in school impacts children's consumption decisions outside of school, a rather daunting task.

FNS states baldly that "food and beverage marketing is prevalent in schools," and "[r]esearch shows that food marketing influences children's food preference, dietary intake, and overall health." 79 Fed. Reg. at 10698. The proposal cites one nine-year-old study to support the latter statement and concedes later in the document, "The extent of peer-reviewed research in these areas [food and beverage marketing in schools and policies restricting them] is relatively limited." *Id*. It is uncertain what studies commenters on the proposal will offer to FNS, but without stronger empirical support, government's proof that its speech restriction will directly advance its interest smacks of "mere speculation and conjecture."

A number of exceptions and other features of the proposal also undermine the advertising ban's ability to directly and materially advance the government's interest. First, it does not prevent companies whose logos or brands are synonymous with the types of foods and beverages for which ads cannot appear from advertising "acceptable" products. For instance, Coca-Cola can use the iconic Coke logo and image to promote Diet Coke or Diet Sprite. Certainly the logo is a subtle reminder that Coca-Cola also sells Coke. Second, the proposal does not prevent children from bringing the prohibited products in from home or purchasing them off-campus before school. For many products, the packaging is itself a marketing device, and such products would be out on cafeteria tables for all to see. Third, the proposal states it is "not intended . . . to apply to clothing or personal items used by students or staff." 79 Fed. Reg. at 10698-99. Just as soda cans or cookie packages can be visible marketing devices when brought in from home, t-shirts and other wearable items with product names and brands can play the same

undermining role. Fourth, the proposal does not apply "to marketing that occurs at events outside of school hours such as school sporting or other events."[5]

Finally, FNS cannot satisfy the final prong of the *Central Hudson* inquiry: that there is a reasonable "fit between the legislature's ends and the means chosen to accomplish those ends." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480-81 (1989). When evaluating a speech restriction under this final prong, the Supreme Court has pronounced that if "the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson v. Western States Medical Center*, 535 U.S. 357, 371 (2002).

Numerous methods exist for federal regulators to promote student health and prevent childhood obesity which do not involve the prohibition of speech. FNS in fact mandates that LEAs utilize two less-restrictive alternatives in the Local School Wellness Policy Implementation proposal itself. First, it prohibits the sale of products which do not meet the federal Smart Snack guidelines on school grounds during school hours. Second, it requires LEAs to integrate promotion of "healthy" foods into the core subjects, place nutrition and health posters and other signage in the schools, and provide students with nutrition materials they can take home to their parents, among other actions. 79 Fed. Reg. at 10696-67.

FNS cannot, however, take those less-restrictive alternative actions and still impose a ban on commercial speech in the same proposal. The federal government must first see if the less-restrictive alternatives successfully advance their interests before it can consider restrictions on truthful speech. Without evidence that it cannot achieve its goals without a speech ban, FNS cannot satisfy *Central Hudson*'s "reasonable fit" final prong.

To summarize, while the Food and Nutrition Service may advance a substantial governmental interest in improving nutrition among school children by prohibiting advertising of food products that fail to meet the Smart Snack standards, it fails to demonstrate that its speech ban would advance that interest in a direct and material way, and the Service cannot demonstrate that a reasonable fit exists between the proposal's means and ends. The marketing ban thus runs afoul of the First Amendment under the *Central Hudson* test for commercial speech restrictions.

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[5] *Id.* The proposal adds, however, that local education agencies could at their discretion, extend the ad ban to such outside-school events and locations. Such a decision would of course implicate greater First Amendment concerns, though those go beyond the scope of these comments.

V. The Proposed Rule Violates the Rights of Local Education Agencies by Requiring them to Accept the Government's Viewpoint as a Condition of Receiving Federal Funds

The speech restrictions in the Local School Wellness Policy Implementation proposal infringe upon the First Amendment rights of the speakers (food and beverage manufacturers and distributors) and listeners (consumers). They also arguably tread on the constitutional rights of the local education agencies. The burden of designing and implementing local school wellness policies falls on LEAs, which must follow the federal government's dictates to the letter, or risk losing federal funding. Some LEAs may disagree with the Food and Nutrition Service's viewpoint[6] on which marketing should be permissible and which should not, but to receive funds, those agencies must embrace FNS's entire perspective.

The Supreme Court has "recognized limits on Congress's power under the Spending Clause[7] to secure state compliance with federal objectives." *Nat'l Fed. of Indep. Business v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2602 (2012). In *NFIB*, the Court found that the Medicaid provisions of the Affordable Care Act unconstitutionally coerced states into adopting the law's changes by threatening to withhold all of an objecting state's Medicaid grants. While "Congress may use its spending power to create incentives for States to act in accordance with federal policies," when "pressure turns into compulsion," the congressional action "undermine[s] the status of States as independent sovereigns in our federal system." *Ibid.*

The rationale of *NFIB* applies here where a federal agency is implementing a federal law, and its regulations impose mandates on state funding recipients. The dictates of the Food and Nutrition Service's proposal go beyond pressure into compulsion.

Such compulsion is especially offensive to the rights of state actors when federal law requires those actors to adopt and advance the federal government's viewpoint on an issue of public importance. The Supreme Court addressed such a situation last year in

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[6] A spokesperson for the School Superintendents Association stated in reaction to FNS's proposal, "The market is already correcting itself. We just question the proper role of the federal government. Do we need a regulation here?" Lyndey Layton, *In a First, Agriculture Dept. to Regulate Food Marketing in Schools*, WASH. POST, Feb. 25, 2014, *available at* http://www.washingtonpost.com/local/education/agriculture-dept-plans-to-regulate-food-marketing-in-schools/2014/02/25/8de7231a-9e3d-11e3-9ba6-800d1192d08b_story.html.

[7] U.S. CONST., ART. I, § 8, cl. 1.

Agency for Int'l Dev. v. Alliance for Open Society Int'l, 133 S. Ct. 2321 (2013). Under a federal AIDS education law, non-governmental organizations (NGOs) could seek funding grants, but those grantees had to embrace the federal government's view on legalization of prostitution. The Court held that the law's "ongoing condition on recipients' speech and activities" infringed those NGOs' First Amendment rights. *Id*. at 2330.

FNS is taking an analogous approach with its implementation of the Healthy, Hunger-Free Kids Act of 2010. Some local education agencies may disagree with FNS's viewpoint that marketing of "disfavored" food and beverage products inspire students to make poor consumption choices, and thus must be prohibited on school grounds. LEAs may also take issue with the proposal's mandate that they must advance the Service's message through placards, integration into core school subjects, and by sending children home with nutrition information. Finally, some school districts may not want to part with the extra revenues which permitting advertising for health *and* "unhealthy" products can provide, and will thus not want to cast aside their own First Amendment rights in allowing such marketing.

Local school officials need federal funds to operate school lunch programs, however, so they are unlikely to oppose to the federal government's viewpoint or refuse to implement the speech ban. The rationale of *Alliance for Open Society Int'l* applies not only in situations where a federal law imposes a political viewpoint on an NGO, but also where federal regulations compel state-level recipients of funds to embrace regulators' view on commercial speech.

VI. Conclusion

WLF agrees that local school agencies, with support from the federal government, have an important role to play in promoting student health and combatting childhood obesity. But the federal government must tread very carefully when it targets not only conduct, but speech in pursuit of those goals. In its February 26, 2014 proposal, the Food and Nutrition Service targeted conduct: it chose which food and beverage products may and may not be sold as "competitive foods" in schools during school hours.

But instead of taking that action and then evaluating whether it was sufficient to meet its goals, FNS also proposed a ban on truthful speech regarding "disfavored" products. Such a content-based restriction on speech violates the First Amendment rights of food and beverage producers and distributors, consumers of those lawful products, and local school agencies.

The Department of Agriculture, through its Food and Nutrition Service, has taken an unprecedented step in proposing this advertising ban. The public relations offensive which accompanied its release[8] emphasized how the ban was targeted at advertising of "junk food" on school grounds where children were a supposedly captive audience. But the proposal itself plants the seeds of how FNS might expand the ban, or how other agencies could adopt similar measures, if the Department successfully implements FNS's plan. The proposal openly encourages local education agencies to expand the ban to after-school activities held outside of the immediate school grounds. Marketing at high school football games, where an audience of both adults and children would be present, comes to mind as one future target. The proposal also seeks comment on whether the ban could apply to "broadcast media conducted by or used in schools, including media used by schools for educational purposes that may be provided by outside entities." 79 Fed. Reg. at 10699. Finally, the proposal infers that the ban might extend to all advertising by companies who produce a single product which fails to comply with the Smart Snacks criteria. Such an expansion of this proposed ban could lead to a *de facto* prohibition on *all* advertising in schools.

The Department of Agriculture and its entities are under an obligation to regulate in a manner consistent with the U.S. Constitution. It must do so even when pursuing such an enviable goal as combatting childhood obesity. WLF has successfully taken action against other federal agencies which acted as if they were exempt from the First Amendment because their governmental mission was protecting public health. *See, e.g.*, *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd,* 202 F.3d 331 (D.C. Cir. 2000); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012). We will monitor the Food and Nutrition Service's consideration of our comments, and its finalization of the Local School Wellness Policy Implementation proposal, with similar concern and interest.

In conclusion, WLF urges the Food and Nutrition Service to withdraw that portion of its proposed rule which limits marketing in public schools to government-approved "Smart Snack" food and beverage products.

[8] *See, e.g.*, Fox, *supra* note 3; Layton, *supra* note 6.