

June 19, 2023

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**Re: Comments of the Association of Canadian Advertisers with respect to Health Canada's Consultation on restricting food advertising primarily directed at children**

Thank you for the opportunity to provide feedback to Health Canada's "Policy update on restricting food advertising primarily directed at children." ("proposed Policy"). I am writing on behalf of the Association of Canadian Advertisers. We have worked extensively with our other major food and beverage Industry coalition partners - Food, Health and Consumer Products Canada ("FHCP"), Canadian Beverage Association ("CBA") and Restaurants Canada for four years with government and a diverse group of stakeholders to develop and launch the Code and Guide for the Responsible Advertising of Food and Beverage Products to Children ("Code" and "Guide") to achieve the shared objective of a comprehensive and workable regime that applies to all advertising, including television and digital media.

The Code recognizes that children are a special audience, and that particular care must be taken in developing advertising for children and messages about the consumption and choice of food and beverage products should be limited.

The Code and Guide will be fully implemented by June 28, 2023. As of this date, advertising will be reviewed and precleared by Ad Standards, the independent body responsible for its administration. All media will be captured by the Code and Guide and Ad Standards' preclearance and complaints mechanisms.

Industry-wide ad standards or codes, enforced by SROs, such as Ad Standards, and as exemplified in the Code and Guide, are comprehensive and collective regulatory systems with enforcement carried out independently from industry. Unlike pledges, **they are de facto mandatory.**

Our comments are captured under the eight key areas and a summary:

- I. Industry is in lockstep with government’s objective of reducing childhood obesity
- II. The proposed Policy rests on thin ice as a matter of statutory authority
- III. Ad Standards is well-placed to enforce food advertising policies
- IV. The proposed Policy will capture advertising directed to adults, as well as some brand advertising, possible impinge on IP rights, and more...
- V. Preclearance, compliance, and enforcement
- VI. Correcting the record
- VII. Constitutional Issues
- VIII. Feedback and proposed corrections to Health Canada’s “Questions and Answers” document
- IX. Summary

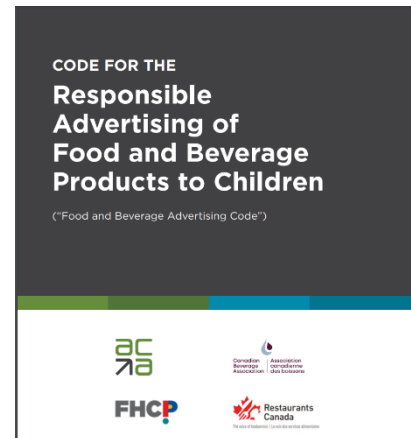
## **I. INDUSTRY IS IN LOCKSTEP WITH GOVERNMENT’S OBJECTIVE OF REDUCING CHILDHOOD OBESITY**

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Industry has long been in lockstep with government’s objective of reducing childhood obesity. We have had ongoing discussions with Health Canada officials on the Code and Guide to meet the government’s long-standing policy objective as set out in the mandate letters of successive Ministers of Health in supporting restrictions on the commercial marketing of food and beverages to children, “...similar to those now in place in Quebec...”<sup>1</sup>

As such, we are surprised to learn about Health Canada’s proposed Policy to introduce restrictions on broadcasting and digital media, which we regard as duplicating the well-developed approach of the Code and Guide. However, Health Canada is not prepared to give the Code and Guide, which was four years in the making, an opportunity to be implemented, with time to be monitored and reviewed within the Canadian context, namely due to selected research which alleges that “self-regulatory approaches have often been found ineffective in meaningfully reducing children’s exposure to food advertisements.”<sup>2</sup>

The Code and Guide are far from an entry level self-regulatory approach. It is easily one of the strongest, most comprehensive such programs in the world, and stands poised to dramatically reduce the exposure of children to child-directed food and beverage advertising. It is supported by many other stakeholders who share our goals, including the Canadian Association of Broadcasters (“CAB”), thinkTV, Canadian Media Directors Council (“CMDC”), Institute of Canadian Agencies (“ICA”), Canadian Out of Home Marketing and Measurement Bureau



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<sup>1</sup> Prime Minister Trudeau’s mandate letter to Minister Philpott. February 2017.

<sup>2</sup> Health Canada’s Policy update on restricting the advertising of food and beverages to children. Policy Background/Self-regulation

("COMMB"), Interactive Advertising Bureau of Canada ("IAB Canada"), Vividata, RadioConnects and the Movie Theatre Association of Canada ("MTAC") ensuring that it will be comprehensive in application.

The Code and Guide applies to all advertising primarily directed to children, in any media, featuring a food or beverage product. It sets specific requirements, similar to rules already in effect in Quebec's Consumer Protection Act, to create a national standard of advertising restrictions. In addition, the Code and Guide comply with Health Canada's own proposed criteria for products with over 6% Daily Value ("DV") sodium, 5% DV for sugars and 10% DV for saturated fats for prepackaged food and beverage products.

There is provision for unique nutrition criteria for restaurant and food service meals and select food and/ or beverages (e.g. cereals, dairy). "Any unique nutrition criteria for select food and/ or beverages products will be determined separately, with input from Health Canada and other relevant stakeholders as appropriate. Nutrition criteria should be science and evidence-based and may include rationale such as:

- a staple food in the diets of Canadian children
- recognized by Health Canada as an important food vehicle in delivering essential vitamins and minerals in children's diets
- required by Canada's Food and Drug Regulations to be enriched/fortified with prescribed levels of vitamins and minerals"<sup>3</sup>

The industry intent and cooperation that led to the development of the Code and Guide is designed to significantly reduce child-directed food and beverage advertising and is broader in scope to what this Policy outlines. Importantly it does so without any drain on governmental resources. It begs questions about any justification for Health Canada's intervention or its scope, including the products the Policy intends to capture.

*Except as otherwise provided, the Code and Guide applies to all advertising featuring a food or beverage product, directed to residents of Canada... in any media. Code Page 3.*

The overall effectiveness of the Code and Guide will be reviewed in five years, specifically June 28, 2028. Health Canada should also undertake its own surveillance monitoring activities to measure change. These two parallel processes can and should co-exist and compliment each other over time.

Consultation with industry regarding the scope of the Code and Guide and how it restricts food and beverage advertising to children would benefit Health Canada to better determine future policy direction or requirements and avoid creating needless duplication. It would also enable Health Canada to better characterize the validity and efficacy of self-regulatory programs as incorrectly represented in the Q&A package. (See III. below)

<sup>3</sup> Code for the Responsible Advertising of Food and Beverage Products to Children. IV. Advertising subject to the Food and Beverage Advertising Code. May 2023. Appendix A. pgs. 7-9.

## **II. THE PROPOSED POLICY RESTS ON THIN ICE AS A MATTER OF STATUTORY AUTHORITY**

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We are astonished to learn that Health Canada believes it has the statutory authority under the *Food and Drugs Act* (FDA) to impose restrictions on advertising of food and beverage products to children under 13 years of age that exceed the thresholds of nutrients of concern.

The Policy and the subsequent Q&As fail to identify the sections of the FDA that enable Health Canada to adopt this new approach other than to say that the FDA broadly defines the term “advertisement”, and that “drink” is captured under the definition of “food”. This is an unusual approach to statutory interpretation. Our own reading of the FDA would suggest that the restriction being proposed here falls well beyond the scope of the regulation-making power in s. 30(1)(b)(i) of the FDA, which is limited to advertising restrictions that prevent misleading statements about food safety, or injury to the consumer’s health.

We respectfully request that you share the grounds on which you determine you have the statutory grounds to proceed under the FDA.

The Q&As are also confusing in this regard. In Q&A #42, it states “Health Canada’s Policy update is separate from Bill C-252, in that the policy could be implemented under existing regulatory authorities under the Food and Drugs Act, or new authorities if Bill C-252 receives Royal Assent.”

If Health Canada is presenting this Policy as separate from Bill C-252, why was there no meaningful dialogue with industry given the FDA’s statutory authority to implement change as the Code and Guide were being developed and discussed with Health Canada? Would this not be the first step of a public consultation process rather than unveiling it through Health Canada’s Policy update?

The fact that this Policy anticipates enabling Regulations on a Bill that has not yet passed is also problematic. Health Canada needs to justify the reasonableness of this approach to stakeholders and should certainly do so in the event that Bill C-252 fails to receive Royal Assent.

## **III. AD STANDARDS IS WELL-PLACED TO ENFORCE FOOD ADVERTISING POLICIES**

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There is a misconception, such as the one that Health Canada is espousing, without any evidence, that mandatory regulatory restrictions will be more effective than the Code and Guide. Health Canada’s assertion that “We consider the industry self-regulatory code to be a voluntary measure as it does not carry the force of law”<sup>4</sup> is simply misleading.

Instead we offer the World Health Organization’s 2010 [“Set of recommendations on the marketing of foods and non-alcoholic beverages to children”](#) and the policy objective of reducing

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<sup>4</sup> Questions and Answers. Follow-up on Health Canada’s May 11, 2023 webinar: Policy update on restricting food advertising primarily directed at children. June 5, 2023. p 14.

any impact on children of High Fats, Sugars and Salts (HFSS) food marketing. The 2010 recommendations put emphasis on the policy *outcomes* and acknowledged that the policy objective can be achieved through a variety of approaches, **including self-regulatory initiatives**.<sup>5</sup>

We believe self-regulation works best when it is well-designed to work across all forms of media and is supported with proper enforcement mechanisms, such as by an independent self-regulatory organization (SRO), like Ad Standards. Self-regulation has continued to evolve in Canada through the more than 60 years during which Ad Standards has held the advertising industry to the principles of truthful, fair and accurate advertising. **We support public policy that incentivizes self-regulatory systems to set ambitious rules and strengthen their compliance mechanisms, rather than dismisses these programs as ineffective.**

SROs<sup>6</sup> are independent bodies responsible for ensuring that advertising on all media is responsible, truthful, fair and accurate. In Canada, Ad Standards accomplishes this through both proactive (preclearance) and responsive (complaints) mechanisms. Both are discussed more specifically in Section V below. SROs in the advertising industry involve a wide range of stakeholders, not only the advertisers, but also advertising agencies and the media making this self-regulatory system an effective and ‘collective’ regulatory system for advertising, which is unparalleled when compared to other forms of industry self-regulation. Sitting at the intersection between the public, government agencies and regulation, and the advertising industry, they bring a unique and specialized perspective to their skills of advertising analysis. There are multiple checks and balances in place to ensure the system is transparent and accountable, which is why the benefits of the self-regulatory system for advertising have been recognized by public authorities and international organizations.

There is a misconception, such as the one Health Canada is espousing, that statutory restrictions are mandatory, while self-regulatory frameworks are voluntary. While it may be true that SROs do not have the power to impose fines, Ad Standards is well recognized and respected in Canada. Through its administration of the Canadian Code of Advertising Standards, it has demonstrably moved the needle for the better in areas including standards of sexism in advertising, of safety in automotive advertising, and disclosures in influencer advertising. It is often misunderstood that Ad Standards acts on behalf of the entire industry, and not only its members. **In fact, all advertisers are captured in its mandate.**

We stress that regulation through mandatory laws and self-regulatory codes are not mutually exclusive. In the case of advertising that violates the Canadian Code of Advertising Standards, in those very rare instances where the advertiser does not act upon the guidance of Ad Standards voluntarily, Ad Standards may refer (and has referred) cases of non-compliance to the Competition Bureau. Ad Standards could refer cases of non-compliance to Health Canada in the

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<sup>5</sup> Paragraph 22, [Set of recommendations on the marketing of foods and non-alcoholic beverages to children](#), World Health Organization, 2010.

<sup>6</sup> Self-regulatory organizations, or advertising standards bodies, administer and enforce advertising codes and standards independently from the government, specific interest groups, and the advertising industry. See list of SROs here: <https://icas.global/about/members/>.

event that it is determined that Health Canada has authority to restrict advertising under the FDA.

Furthermore, there are different types of self-regulation. Food marketing pledges, such as the EU Pledge and the US Children’s Food and Beverage Advertising Initiative (CFBAI) are voluntary initiatives that companies sign up to. In the process, they agree to undergo external, independent audits which report publicly on compliance. This was the case under the prior pledge system in Canada, the Canadian Children’s Food and Beverage Advertising Initiative (CCFBAI or CAI). Administered by Ad Standards until 2019, it resulted in compliance by signatories representing the major food advertisers in Canada and in product reformulations by many participants to meet uniform nutrition criteria.

Industry-wide ad standards or codes, enforced by SROs and as exemplified in the Code and Guide, are comprehensive and collective regulatory systems with enforcement carried out independently from industry. Unlike pledges, **they are de facto mandatory**. All industry members are responsible for compliance or face reporting, compliance and/or enforcement by the SRO. Over the past years, in a number of countries, voluntary initiatives, or pledges, have been integrated into local ad standards and thereby become mandatory to all advertisers<sup>7</sup>.

While voluntary pledges have delivered concrete results in terms of reducing children’s exposure, industry-wide, self-regulatory codes have many advantages. They are often more impactful in that they apply across industry; both consumers and competitors have access to a complaint handling procedure; and businesses benefit from a level playing field. Governments and taxpayers benefit from an enforcement system that is independently administered by SROs.

### **Industry-Wide Codes Are Effective**

#### **IV. THE PROPOSED POLICY WILL CAPTURE ADVERTISING DIRECTED TO ADULTS, AS WELL AS SOME BRAND ADVERTISING, POSSIBLY IMPINGE ON IP RIGHTS, AND MORE...**

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##### **1. Capturing Advertising to Adults...**

Despite the declaration that “...focusing restrictions on advertisements that are primarily directed at children ensures that policy is tailored to reduce children’s exposure to food advertising while limiting the impact on advertising to adults, which is outside of the scope of this policy...”<sup>8</sup>, this is belied by several statements within the Policy, which demonstrate that Health Canada’s Policy will, in fact, capture advertising directed primarily at adults.

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<sup>7</sup> Belgium, Canada (July 2023), Australia, The Netherlands.

<sup>8</sup> Questions and Answers. Follow-up on Health Canada’s May 11, 2023 webinar: Policy update on restricting food advertising primarily directed at children. June 5, 2023. #6. p 3.

It is important to note that justification for the Policy is explicitly rooted in statistics regarding *overall* child exposure to food advertisements.<sup>9</sup> But none of those statistics focus specifically on child exposure to food ads that “are primarily directed to children” - instead, they are all focused on *total child exposure to food ads, including their exposure to adult-directed advertising* which is supposed to be outside of the Policy’s scope. If adult advertising is truly out of scope, then why are these statistics, rather than statistics about child exposure to *primarily child-directed* ads (i.e., the ads the Policy supposedly will affect), being used to justify the Policy?

At best, the Policy may be overstating its benefits by suggesting that it is capable of reducing a much larger number of child ad exposures than it actually can. (This is, by the way, undoubtedly the case anyway. First, the ad exposure statistics are substantially overstated due to a combination of methodological errors and by simply being outdated.<sup>10</sup> Additionally, the ad exposure data necessarily predates the implementation of the Code later this month, which will reduce child-directed food exposure to negligible levels.) At worst, contrary to its assertions, the Policy may actually intend to affect adult-directed advertising, i.e., advertising that is *not* “primarily directed to children.”

And there are concerning signals in the Policy that this latter intent may be the case. For example, the Policy document says that “[s]ome examples of media intended for children could include ... social media pages.” Because the Policy defines “children” as individuals under 13, and because “social media” platforms are universally age-gated at age 13, it is disingenuous to suggest that “social media pages” are “intended for children” under 13 such that ads on these platforms would be in scope of the Policy’s coverage<sup>11</sup> - unless, of course, the Policy is actually intended to apply to ads that are *not* primarily directed to children.

## **Factor 2: Particularly Problematic...**

In this same regard, the Policy deploys some verbal sleight of hand in its own definition of “primarily directed to children,” particularly within “Factor 2” of that definition. Factor 2 suggests that an ad will be deemed as “primarily directed to children” if the ad “targets” children (this is fair and is essentially synonymous with “primarily directed to children”), but then Factor 2 goes on to say that an ad is *also* primarily directed to children if it is “reasonably expected to appeal” particularly to children. Said another way, Factor 2 seems to be saying that an ad is primarily directed to children if: (A) it actually *is* primarily directed to children, AND (B) it is primarily directed to someone other than children, but it still “appeals” particularly to children. Part B of this definition is highly concerning, because it holds the potential to broadly

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<sup>9</sup> Health Canada’s Policy update on restricting the advertising of food and beverages to children. Overview/Exposure to food advertising, as notes 31-33 and accompanying text. Aside from their lack of relevance, these statistics also lack validity, as noted in Footnote 10 below.

<sup>10</sup> The television exposure data cited in the Policy is many years old, making it substantially overstated given significant year-over-year declines in child television exposure in recent years. The online/social media data is also overstated, in part because the methodology used to measure “ad” exposure appears to have included exposure to online food content (not paid for or arranged by industry), none of which is “advertising” covered by the Policy.

<sup>11</sup> To be sure, platforms like YouTube and others contain content and advertising that is “primarily directed to children,” but this is because children are allowed to be there. When brands are primarily directing an ad to children under 13, it makes no economic or rational sense to place these ads on social platforms that prohibit that target audience from entry.

include adult-directed advertising based on subjective determinations of who might find it appealing.

This will have a chilling effect on virtually all advertising, regardless of where and when the ad runs, particularly given the Policy's overly broad rundown of subjective factors that may drive a conclusion that an ad "appeals" to children. For example, Michelin famously ran ads featuring a "brand character" (the Michelin Man) and a baby (sitting in a tire), both of which would apparently be considered under the Policy (if this was a food ad) as indications that this may be a child targeted ad (even though it clearly was not targeted at children). The fundamental problem is that many things that appeal to adults (celebrities, athletes, animation, film characters, etc.) also appeal to children.

**We are concerned that this laundry list of factors may be subjectively applied to ads that are not "targeted" to children. Our concern derives from the fact that Factor 2 says so explicitly. We firmly believe it to be inappropriate to implement any policy broadly at adult-directed advertising and, as noted further below, this would further doom the Policy in the context of a Charter challenge.**

## **2. Capturing Brand Advertising...**

We are also concerned that this Policy will capture brand advertising. While brand advertising has been deemed excluded from the Policy, this is NOT the case. If "the name of a unique food (e.g., an image of the name of a unique food, including its trademarked logo, or an audible reference to the name of a unique food, including where the product name has a strong association with the brand name) ..." <sup>12</sup>, it will be captured.

As currently drafted, the Policy **will capture** a wide range of well-known brands where the product of the company, brand or sub-brand has a strong association with the brand name, irrespective of whether the company is advertising to children or advertising to adults.

As a solution to this problem, we draw your attention to the wording in the Code for consideration:

*Brand advertising and sponsorship advertising that do not feature a food and/or beverage product are not subject to the Restriction.* <sup>13</sup>

## **3. Impinge on Intellectual Property Rights...**

In some cases, depending on the final form that these restrictions may take, and the nature of the trademarks in question, these restrictions may effectively act as a prohibition against companies from using their trademark at all, and, with respect to certain other trademarks, may

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<sup>12</sup> Questions and Answers. Follow-up on Health Canada's May 11, 2023 webinar: Policy update on restricting food advertising primarily directed at children. June 5, 2023. #7. p 4.

<sup>13</sup> Code for the Responsible Advertising of Food and Beverage Products to Children. IV. Advertising subject to the Food and Beverage Advertising Code



act to constrain where, and how, they can be used. This would be very problematic for industry, as trademarks are highly valuable intangible property rights which arise through use and registration.

These types of intellectual property concerns were closely considered when developing the Code and Guide and we are confident that it strikes the right balance between enabling continued use of intellectual property rights while also allowing the government to achieve its mandate.

#### 4. And more...

The Policy is either silent on or has overlooked two areas whereby benefit of a program is shared with communities and causes, specifically **education and charitable initiatives**. We urge Health Canada to consider employing how the Code handles such initiatives.

*Specifically: Advertising that features a food and/or beverage product that does not meet the nutrition criteria and promotes an educational or charitable initiative or cause, including those associated with children or families, is not subject to the Restriction unless such advertising puts greater emphasis on the food or beverage product featured than on such initiative or cause.<sup>14</sup>*

As currently drafted, the Policy will capture:

- ✓ Adult-directed advertising
- ✓ Brand advertising
- ✓ Intellectual Property Rights
- ✓ Education and charitable advertising initiatives
- ✓ Food and beverages shown in an incidental manner.

Further, another area that is likely subject to the Policy as written is the capture of a food or beverage product if it appears in advertising **incidentally**. In this case we would again encourage your consideration of language in the Guide.

*Specifically: If a food or beverage product appears in advertising in an incidental manner and not for the purposes of advertising the product per se, it will not be considered as being “featured” in the ad. For example, a restaurant making a recruitment ad and showing employees handling food or beverage products would not be considered as an ad “featuring” a food or beverage.<sup>15</sup>*

## V. PRECLEARANCE, COMPLIANCE, AND ENFORCEMENT

Health Canada still has not clarified and provided a transparent proposal of its compliance and enforcement regime. The Policy provides examples of how the Policy could be implemented, including inspections. You will appreciate, as we do, that the model of food safety inspections, for example, cannot be applied in advertising. The Policy is silent on a preclearance mechanism.

The Code and Guide address this deficit in detail. Beginning June 28, 2023, the Code and Guide will be implemented by Ad Standards, “which is the only national not-for-profit advertising self-

<sup>14</sup> Code for the Responsible Advertising of Food and Beverage Products to Children. IV. Advertising subject to the Food and Beverage Advertising Code. pgs 3-4.

<sup>15</sup> Guide for the Responsible Advertising of Food and Beverage Products to Children. VII. What forms of advertising and media are covered? p 6.

regulatory organization in Canada.”<sup>16</sup> Ad Standard’s mission is to ensure advertising in Canada is **truthful, fair and accurate** - ensuring the integrity and viability of advertising in Canada for over 60 years. Ad Standards has been responsible for the preclearance of broadcast advertising directed to children under the CRTC’s Broadcast Code for Advertising to Children since 1972. They began preclearing broadcast advertising for food and non-alcoholic beverages in 1992 when that responsibility passed to them from Consumer and Corporate Affairs Canada.

Ad Standards continues to evolve with the needs of the public, government and the advertising industry, and now preclears advertising of food and beverage products and other regulated product categories in all media. Ad Standards is recognized as an Advertising Preclearance Agency by Health Canada for a wide variety of consumer health products. Independently, it is also the compliance partner for the federal government’s own non-partisan advertising review process.<sup>17</sup>

Ad Standards will soon, as of June 28, 2023, fully-implement its robust preclearance regime to the Code and Guide. Advertisers are encouraged to submit for preclearance any food or beverage advertising that might reasonably be seen as primarily directed to children, in any media, for review and preclearance by Ad Standards. Preclearance is available for all advertisers, whether the company is a signatory or not to the Code and Guide, and whether or not the advertiser is a member of Ad Standards.

As in other preclearance sectors, two analysts will review each advertisement submitted for compliance with the Code and Guide. They will consider a variety of factors in determining whether the advertising complies: the nature and intended purpose of the product being advertising (the ‘what’), the manner of presenting such advertisement (the ‘how’), and the time and place it is shown (the ‘where/when’). No one factor is determinative. That is to say that an ad with a media buy that has fewer than 15% child-audience may still be considered child-directed if the advertisement otherwise is designed to primarily attract the attention of children.

Ad Standards will also enforce the Code and Guide through a complaints-based mechanism for both precleared and non-precleared advertising. This complaints-based mechanism will mirror the work that the SRO has done since 1967 when ensuring compliance with the broader Canadian Code of Advertising Standards, the industry standard recognized as being effective in ensuring that advertising to Canadians is **truthful, fair and accurate**. Their complaints-based compliance and reporting system results in industry compliance through the amendment or withdrawal of advertising that is deemed to violate the Canadian Code of Advertising Standards. This important complaints-based mechanism, available to ordinary Canadians and to competitor advertisers, saves the Competition Bureau from having to dedicate resources to this task and helps ensure the veracity of Canadian advertisements.

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<sup>16</sup> <https://adstandards.ca/about>

<sup>17</sup> <https://www.canada.ca/en/treasury-board-secretariat/services/government-communications/government-advertising/standards-review-non-partisan.html>

Under both the Canadian Code of Advertising Standards, and the new Code and Guide, reporting, compliance and enforcement applies to all advertisers in all media, **regardless of whether they sign on to the Code and regardless of membership in Ad Standards.**

Given the robust preclearance, compliance and enforcement mechanisms that has been put in place to administer the Code, the remedies that the Policy is looking to impose are grossly disproportionate, and serves no pressing purpose, for the government to criminalize commercial speech, and thereby chill speech to adults, when the “mischief” at which the Policy purports to be aimed has already been eliminated.

We firmly believe the Code and Guide enables the government to achieve its mandate creatively and cost-effectively, thereby allowing it to focus on the many other unprecedented pressures in the daily lives of Canadians.

## VI. CORRECTING THE RECORD

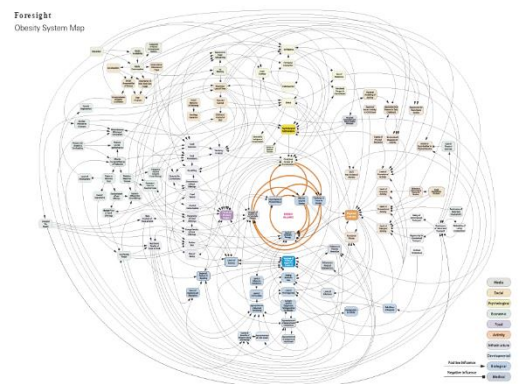
This section addresses some of the incomplete or inaccurate information that is either reported in the proposed Policy or otherwise published as studies or policy papers on childhood obesity and the role advertising may play.

We do not usually weigh in on correcting the record, but feel it is necessary in this case as we (and other industry stakeholders), despite repeated requests, were blocked from testifying at the Standing Committee of Health’s study of Bill C-252. Similarly, there was no attempt by Health Canada to engage in discussion of this proposed Policy update and a possible role for the Code and Guide, even though Health Canada had been briefed on the solution by industry. We must ensure a robust fact base to ensure proportionality to the debate. Importantly, sharing this information in no way changes our commitment **to doing our part in reducing childhood obesity through the implementation of the Code.**

The four areas of discussion challenge the conventional wisdom that advertising is the cause of childhood obesity.

**1. Overweight and obesity is a complex issue. There is no reason to believe that food and beverage advertising restrictions offer a meaningful solution.**

The World Health Organization (WHO) Global Action Plan on the Prevention and Control of Noncommunicable Diseases (NCDs), 2013-2020, now extended to 2030, recognizes that effective NCD prevention and control requires a whole-of-society approach and engagement of all stakeholders, including the private sector. Industry, academia, and regulators alike tend



to agree that action is needed in many areas of society to start to tackle what is perceived as “obesogenic environments”<sup>18</sup>.

Advertising has an impact on behaviours, preferences, and purchases. We therefore fully support the idea that advertisers have a role to play in supporting healthy diets, particularly when it comes to children. **This is the reason we developed the Code and Guide for the Responsible Advertising of Food and Beverage Products to Children.**

However, the size and relative importance of the impact of food marketing, and any demonstrable impact on health outcomes, are important research questions that are far from settled.

In 2007, the UK government funded the Foresight Obesity System Map (Map)<sup>19</sup> to examine this question. The Map, a causal loop model, visualized how marketing communications might fit into the overall equation. The result: it identified a myriad of more than 100 factors which may be connected to overweight and obesity - **marketing communications being just one.** [See high resolution map here.](#)

Moreover, McKinsey’s 2014 discussion paper “Overcoming obesity: An initial economic analysis” compares different measures and their outcomes<sup>20</sup> adds to this discourse. McKinsey’s analysis concluded that the cost-effectiveness of media restrictions in terms of reducing obesity is low, and that there is only limited evidence of behavioural change linked to media restrictions.

Food advertising restrictions should therefore not be seen as a silver bullet to address the childhood obesity problem. Instead, food marketing policies should be designed in a way that is proportionate and protects the most vulnerable.

## **2. The evidence-base for food marketing restrictions is weak.**

Regulatory pressures on the marketing of non-alcoholic food and beverage products have steadily increased since the early 2000s. Year on year, efforts by academics to quantify the impact of food marketing on children’s food preferences, choices and consumption have gained in importance. However, to this day, the evidence base for the effectiveness of food marketing restrictions, in terms of producing positive health outcomes, remains weak.

In the recently published “Draft WHO guideline on policies to protect children from the harmful impact of food marketing”, the WHO admits its “conditional” policy recommendations are based

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<sup>18</sup> [Report of the Commission on Ending Childhood Obesity](#) (2016): “Many children today are growing up in an obesogenic environment that encourages weight gain and obesity. Energy imbalance has resulted from the changes in food type, availability, affordability and marketing, as well as a decline in physical activity, with more time being spent on screenbased and sedentary leisure activities.”

<sup>19</sup> [Reducing obesity: obesity systems map](#), UK Government Office for Science, 2007.

<sup>20</sup> [Overcoming obesity: An initial economic analysis](#), McKinsey & Company, 2014.

on “very low certainty evidence” on the effect of policies on children’s exposure to food marketing and the power of food marketing as well as on children’s dietary intake and product change”<sup>21</sup>. The WHO also acknowledges there are no relevant studies on the impact of exposure of food marketing on diet related NCDs. This admission is underscored in the technical annex of the updated draft Appendix 3 of the WHO Global NCD Action Plan 2013-2030<sup>22</sup> which states that evidence of policies to reduce the power and exposure is “scarce”.

Similarly, the Impact Assessment conducted by the UK government in March 2019 recognizes that research looking at how food advertising impacts child preferences over time, including as they progressed into adulthood, only found limited results. It concluded that *“the primary reasons for this are: television viewing being used as a proxy for advertising exposure, low quality methodology, non-dietary markers as outcomes and not being conducted over a significant time period”*. It recognizes that there is *“limited evidence on the longitudinal impacts of unhealthy food advertising on dietary behaviours”* and that *“the results we can draw from this literature search are limited”*<sup>23</sup>.

Even Dr. Supriya Sharma, Chief Medical Advisor to the Deputy Minister and Senior Medical Advisor, Health Products and Food Branch echoed the findings of the Impact Assessment study in her remarks before the Standing Committee on Health during consideration of clause 4 of Bill C-252, which is the five-year review clause, when she stated,

*“As with everyone else, of course, any time there's new legislation and regulations put in place we want to make sure that we have a review process and measurable outcomes we can look at. In the longer term, absolutely, things like obesity, hypertension and chronic disease are things that we would want to monitor. However, five years, which is when the parliamentary re- view process would kick in, is actually too short a time to look at those sorts of trends. Those trends are things that evolve over a much longer time period.*

*In other jurisdictions where they put restrictions like this in place, they have measured outcomes, such as the numbers or the amount of advertising directed at these groups. Again, to substantially see a change in obesity rates, chronic disease or something like cancer, which is also a risk factor for exposure to these products, those latency periods for something like cancer are much longer. It would be impractical to be able to see those sorts of changes in a five-year period.”*<sup>24</sup>

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<sup>21</sup> [WHO guideline on policies to protect children from the harmful impact of food marketing](#). Draft WHO guidelines for public consultation, June 2022.

<sup>22</sup> WHO Discussion Paper, 8 June 2022. [Draft Updated Appendix 3 of the WHO Global NCD Action Plan 2013-2030](#). Technical Annex, H5: [https://cdn.who.int/media/docs/default-source/ncds/mnd/2022-app3-technical-annex-v26jan2023.pdf?sfvrsn=62581aa3\\_5](https://cdn.who.int/media/docs/default-source/ncds/mnd/2022-app3-technical-annex-v26jan2023.pdf?sfvrsn=62581aa3_5)

<sup>23</sup> UK Government (2019) Impact Assessment, Introducing a 21h00-05h30 watershed on TV advertising of HFSS (food and drink that are High in Fat, Salt and Sugar) products and similar protection for children viewing adverts online, available [here](#).

<sup>24</sup> Parliament. House of Commons. Standing Committee on Health. Evidence, 44th Parl., 1st sess. number 060 (2023), p.10.

This led Dr. Robert Kitchen - a medical doctor and Conservative Member of Parliament for Souris-Moose Mountain, Saskatchewan who sits as a member of the Standing Committee on Health (HESA) - to sum up the critical flaw of Bill C-252 when he stated:

***“The reality, here, is that we’re talking five years and making decisions on advertising. We are assuming that advertising is the only parameter impacting over these five years, when there are so many other variables that could be impacting the person. We’re making an assumption – the legislation is making an assumption – that it’s the advertising causing the changes, when it could be so many things.”<sup>25</sup>***

This remark also applies to Health Canada’s Policy for restricting food advertising primarily directed at children.

There is some consensus among researchers that advertising has an influence on food preferences. However, the *size* of this impact, and hence its importance relative to an individual’s overall diet, is disputed to this day. There only exists evidence for *a modest direct effect*. The Hastings Review commissioned by the UK Food Standards Agency (FSA) in 2003 was one of the first seminal studies on the impact of food advertising on children’s diets. It found a rather modest impact of TV advertising on food choices but could not quantify the effect nor explain how this effect operates alongside the complex conditions of daily life<sup>26</sup>. Livingstone and Helsper concluded in 2004 that “evidence suggests that television advertising has a *modest, direct effect* on children’s food choices”<sup>27</sup>. But this, of course, is quite different from finding an effect on long-term outcomes such as obesity. In 2006, after having been specifically commissioned by the U.S. Congress to identify any such possible causal effect, the Institute of Medicine concluded that “evidence is not sufficient to arrive at any finding about a causal relationship from television advertising to adiposity among children and youth.”<sup>28</sup>

Over the last decade, scientists have continued exploring the impact of food marketing and are shifting their attention to digital marketing specifically. Boyland reviewed the results of 13 studies on the short-term impact of food advertising and found a *moderate* difference in food intake among those who were exposed to “unhealthy” food adverts compared with those who were not<sup>29</sup>. More recent studies have raised concerns with digital advertising, and particularly with

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<sup>25</sup> *Ibid* p. 12.

<sup>26</sup> Hastings G, Stead M, Lobstein T: *Review of Research on the Effects of Food Promotion to Children Final Report*, prepared for the Food Standards Agency.

<sup>27</sup> Livingstone and Helsper (2004) concluded: “evidence suggests that television advertising has a modest, direct effect on children’s food choices”, in *Advertising 'unhealthy' foods to children: understanding promotion in the context of children's daily lives*. A review of the literature for the Research Department of the Office of Communications (Ofcom)

<sup>28</sup> *Food Marketing to Children and Youth: Threat or Opportunity*, IOM, 2006. pgs 379-380.

<sup>29</sup> Boyland E et. al (2016) “Advertising as a cue to consume: a systematic review and meta-analysis of the effects of acute exposure to unhealthy food and non-alcoholic beverage advertising on intake in children and adults”, *The American journal of clinical nutrition*.

social media, when it comes to both children’s ability to recognize advertising and the impact on food preferences. One randomized trial from 2019 concluded that popular social media influencer marketing of unhealthy foods increased children’s immediate food intake, whereas the equivalent marketing of healthy foods had no effect<sup>30</sup>. Nevertheless, such studies don’t reflect real-life situations, and have been counterbalanced by others. A 2017 study in New Zealand notably found that the most popular websites among children and adolescents were non-food related, and the extent of food marketing on those websites was low<sup>31</sup>.

**As such, we acknowledge the potential for a “modest direct effect” of food marketing on short-term food preferences and choices, but there is no evidence that allows anyone to draw conclusions on any significant influence of food advertising on children’s longer-term diet and health.** Academic evidence is still lacking, and several methodological flaws prevent researchers from reaching definitive conclusions, such as those of Dr. Potvin-Kent, on which Health Canada relies. This was again evidenced this week with the publication of Health Canada’s infographic “Food and beverage advertising to teens in Canada”<sup>32</sup> which, despite the plethora of numbers offered, once more fails to mention that there no evidence of advertising and children’s longer-term diet and health. Very often, studies fail to isolate the impact of advertising on food and reflect real life conditions. Studies in this area often consist of showing children unrealistic intake volumes of food advertising in a lab setting and then gauging their food preferences immediately afterward or fail to account for foreign media/advertising from foreign countries, which despite what Health Canada may say, is outside of the scope of the Policy. Studies also fail to consider the numerous other factors influencing food consumption.

Dr. Supriya Sharma, echoed this view in her remarks before the Standing Committee on Health during consideration of clause 4 of Bill C-252, which is the five-year review clause, when she stated:

*“It would still be challenging. Again, all those things that we're looking at in that list are multifactorial. There are lots of different things that can affect them. Those trends will continue and they'll move on.”<sup>33</sup>*

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<sup>30</sup> Coates A, Hardman C, Halford J, Christiansen P, Boyland E (2019) “Social Media Influencer Marketing and Children’s Food Intake: A Randomized Trial”, *Pediatrics*

<sup>31</sup> Vandevijvere S., Sagar K., Kelly B and Swinburn B. (2017) “Unhealthy food marketing to New Zealand children and adolescents through the internet”, *New Zealand Medical Journal*.

<sup>32</sup> <https://www.canada.ca/content/dam/hc-sc/documents/services/publications/food-nutrition/food-beverage-advertising-children-teens-canada/food-beverage-advertising-children-teens-canada.pdf>

<sup>33</sup> *Supra* note 24 p. 10

*“Regarding the dearth of longitudinal studies that would establish a causal connection between food advertising to children and obesity and related chronic diseases, Dr. Sharma explains, “I don't at all want to give the impression that we do not want to be doing all the monitoring in terms of children's health. That's absolutely the case. It's just the ability of this provision to show the effectiveness of this intervention is not possible in this time frame.”<sup>34</sup>*

Going forward, it will be important to gain a better understanding of children's online experiences to effectively set policies that reduce children's exposure to the marketing of HFSS foods in this space.

### **3. Ad bans and warning labels have not produced positive health outcomes.**

When assessing the need for far-reaching restrictions on food advertising, it is worth looking at the effects of regulations adopted in places such as the province of Quebec, the United Kingdom and Chile. In all cases, evidence remains clear that such restrictions have had no success in impacting child obesity rates, presumably because they do not address the core drivers of the problem.

**Quebec** was the first province to ban all advertising to children under 13 back in 1980<sup>35</sup>. The rest of Canada did not. When Quebec first imposed its ad ban, Quebec children had the same overweight and obesity levels as Canadian children overall. But during the long lifespan of the ban, Quebec children have fared worse than other Canadian children: in the first 15 years of the Quebec ad ban, the prevalence of overweight and obesity amongst Quebec children grew by 140%<sup>36</sup>.

The **United Kingdom** instituted one of world's strictest restrictions on food advertising to children back in 2006 — probably the first ambitious set of rules targeting HFSS ads aimed at children under the age of 16. Child exposure to food ads in the UK was cut almost in half between 2008 and 2017<sup>37</sup> and yet obesity rates have remained near constant<sup>38</sup>.

**Chile's** restrictions, adopted in 2016, went further than both the UK and Quebec restrictions in that it adopted stricter nutrition criteria and imposed a 10pm watershed ban for TV. HFSS products cannot be advertised from 6am to 10pm, all packs and visual ads for HFSS products must display warning labels, and the use of cartoons and characters of appeal to children are also

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<sup>34</sup> *Ibid* p. 12.

<sup>35</sup> Quebec Consumer Protection Act, 1980.

<sup>36</sup> Quebec's rate of childhood obesity and overweight rose substantially between 2004 and 2015, measuring at 23.2% amongst children 2-11 by 2015, whereas the rate in the rest of Canada (where no ad ban is in place) declined over that same period to 18.7%. See Statistics Canada, Table 13-10-0797-01: <https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=1310079701>

<sup>37</sup> Advertising Standards Authority, [Children's exposure to age-restricted TV ads](#), February 2019.

<sup>38</sup> Public Health England, [Patterns and trends in child obesity: A presentation of the latest data on child obesity](#), Feb. 2018.



prohibited. Sadly, childhood obesity continued to rise from 51.2% in 2016 to 54% in 2020<sup>39</sup> and 58% in 2022<sup>40</sup>.

**Again, the impact of ad bans and warning labels have not produced positive health outcomes.**

#### **4. Setting nutrition criteria**

Any food and beverage product can be part of a varied and balanced diet, if consumed in moderation and in proper portions. However, the action of classifying foods through nutritional profiles, in a manner that is backed by scientific evidence, has been recognized by the WHO and lawmakers as a useful tool for a variety of applications. The most common applications of nutritional profiles at the global level are food labelling, restrictions on advertising for children, determining which products may carry health claims or determining which products may be sold within schools. Nutritional profiles are a complementary tool to nutrition education, which is vital considering that most of the food intake comes from food with home preparation.

However, as mentioned in a WHO report from 2010<sup>41</sup>: *“Nutrient profiling is not a panacea; it cannot solve all problems in relation to food and health. One reason for this is that the nutrient composition of individual foods is not the only determinant of diets. Diets are also determined by the portion sizes of individual foods that consumers eat, the frequency of their consumption, the variety of different foods that make up the diets and the combinations in which they are eaten.”*

Realistic thresholds, coupled with a category-based approach<sup>42</sup> to profiling, are preferable as they provide an incentive to manufacturers to innovate and reformulate to improve the nutritional composition of the product, thus encouraging the development of healthier options. The concept of nutrient density should be considered to encourage the use of “positive” nutrients (e.g., fibre, protein, vitamins and minerals) that can influence change toward product improvement and better diets.

One could argue the supposed “benefits” of the proposed Policy may in fact be negative, given the dramatic scope of foods that would be restricted from advertising. Indeed, the proposed limits on sugar, sodium, and saturated fats are so restrictive that almost no individual food or beverage products can meet these limits.

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<sup>39</sup> BBC article: *The labels encouraging Chileans to buy healthier food*, <https://www.bbc.com/news/world-latin-america-57553315>, August 2021. Overweight and obesity data from JUNAEB, the National Board of School Aid and Scholarships, under the Ministry of Health in Chile.

<sup>40</sup> In **2022** there are approximately 34% of students with a normal weight, 31% with some degree of obesity, and 27% overweight, that is, **in total, 58% are overweight** (in 2020 they were 54.1%). Since 2009 total obesity has increased 15.1pp, almost doubling in 13 years (from 15.9% to 31%), while severe obesity has increased 6.6pp. Source: The Chilean Society of Obesity (SOCHOB), <https://www.sochob.cl/web1/31-de-ninos-obesos-junaeb-detecta-niveles-sin-precedentes/>.

<sup>41</sup> *Nutrient Profiling Report of a WHO/IASO Technical Meeting*, WHO 2010

<sup>42</sup> The Code has taken such an approach. See Appendix A, Pages 7-9. <https://acaweb.ca/en/wp-content/uploads/sites/2/2023/05/FoodAndBeverageAdvertisingCode-FINAL-20230505-1.pdf>

Indeed, most foods promoted on the government’s own Food Guide website would be deemed to be “unhealthy” and therefore also be subject to advertising restrictions under the Policy’s criteria.

This is especially relevant in the context of whole grain foods which, unlike fruits and vegetables, are not necessarily consumable in a raw, unprocessed state. Instead, they are almost universally “processed” and/or used as ingredients in finished products that are formulated with some amounts of sugar, salt or fat for not just taste, but also for stability and safety/preservation of the food product.

The Food Guide exhorts Canadians to consume whole grain foods—and publishes (on its website<sup>43</sup>) 26 recipes for whole grain-predominant foods that are undeniably “healthy”, and which contain extremely modest levels of sugar, sodium, or saturated fat. These whole grain recipes were specifically designed to be “healthy” and to support the Food Guide, and yet the vast majority - 23 out of 26 - of these undeniably healthy foods would be barred from advertising under the Policy’s criteria. There is no public health “benefit” to suppressing promotion of these foods. If anything, this would present a “negative benefit.”

To ignore the value-add of the Code and Guide, which Health Canada has apparently deprioritized, or has made incorrect assumptions about its efficacy based on misinterpretation and/or failure to understand it, does not justify the overreach of the Policy. If anything, it is a reason for a court to find the legislation unnecessary or too burdensome.

## VII. CONSTITUTIONAL ISSUES

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Not only do the above issues render the Policy unjustifiable as a matter of public policy, but they also leave it exposed to legal challenge. **It is highly unlikely that the Policy could survive a Charter challenge.** The Policy is clearly a *prima facie* infringement of freedom of speech, including the rights of viewers to receive accurate information to make informed decisions about products of interest to them.

Under the *Oakes* test, after all, the government would bear the burden of justifying its restriction on speech by establishing:

- (i) that its proposed Policy is rationally connected to the objective of reducing childhood obesity;
- (ii) that the proposed Policy impairs free speech as little as reasonably possible; and
- (iii) that the proposed Policy’s detrimental impacts are outweighed by its benefits.

The government would need to establish *all three* of these points to survive a Charter challenge. In reality, for all of the reasons noted immediately above, it would be a struggle to establish *any* of these three points. Given the overly strict nutrition criteria—and the clear

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<sup>43</sup> <https://food-guide.canada.ca/en/recipes>

conflict with the government’s own Food Guide education and resources - it would seem impossible to conclude that the Policy does not affect the speech (i.e., the right to advertise) of more food products than necessary. And given the existence of the Code, it is hard to say that *any* governmental restriction of speech here is necessary, has a “pressing and substantial objective” or that it offers incremental “benefits” that outweigh the infringement on speech.

The only way in which this Policy would accomplish *anything* in excess of the Code would be if it is actually intended to affect adult-directed advertising. Despite Health Canada’s protestations that this is not its aim, we fear that this may be the true intent. Indeed, there are troubling clues throughout the Policy that point to its intended impact more broadly on adult-directed advertising. And the very fact that the Policy is being put forward at all, despite the existence of the Code, suggests that **the government may intend to broadly affect adult-directed advertising**. If so, this would put the Policy on an even shakier footing under the Charter.

It is worth emphasizing again that industry is already moving ahead with full implementation of the Code and Guide on June 28, 2023. Like the proposed governmental regulation, the Code implements restrictions on a very similar array of food and beverage advertising and is similarly binding on all food advertisers. A key difference is that the implementation and enforcement of the Code and Guide will not impact government resources or saddle inappropriate agencies with the task of enforcing it. Administration and enforcement are instead being handled by Ad Standards, which has long-standing expertise to do this.

## VIII. FEEDBACK AND PROPOSED CORRECTIONS TO HEALTH CANADA’S QUESTIONS AND ANSWERS DOCUMENT

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The following section provides feedback and proposed corrections to Health Canada’s “Questions and Answers Follow-up on Health Canada’s May 11, 2023 webinar: proposed Policy update on restricting food advertising primarily directed at children” document distributed June 5, 2023.

Feedback and corrections are boxed in green.

### **Q&A #1: Why is Health Canada proposing to introduce restrictions only on television and digital media?**

- The scope of the Code and Guide is significantly more extensive than the Policy. Except as otherwise provided, the Food and Beverage Advertising Code applies to all child-directed advertising featuring a food or beverage product, in any media.
- It is troublesome that input is being sought on a Policy which is evolutionary, clearly contemplating future changes:

*To support restrictions, government will continue to monitor food advertising to children and teens, including in settings and media where regulations would not initially apply, which could help inform potential future regulatory changes.*

- In terms of future decision making, the department is focused on advancing its current policy approach and looks forward to reviewing comments as part of the ongoing consultation.
- Following the introduction of regulations, Health Canada will continue to monitor food advertising to children and teens, including settings and media where regulations would not initially apply.
- This monitoring, in addition to the impact of industry’s new self-regulatory code, will help inform any future changes.
- Any subsequent actions would be subject to future consultations and engagement.

Again, it is troublesome that input is being sought on a Policy which is clearly anticipating regulatory overreach as demonstrated by the answers in Q:4 above and Q5 below.

**Q&A #5: Why is Health Canada targeting restrictions to children under 13? Why are teens not being considered?**

- Children under the age of 13 are particularly vulnerable to advertising.
- Under the age of 5, children are unable to distinguish between advertising and programming. By the age of 12, children understand that advertisements are designed to sell products, but they remain vulnerable, as most are still not able to understand the persuasive intent. This is why the proposed policy is focusing on this particularly vulnerable population.
- Health Canada recognizes that teens are also vulnerable to food advertising. We are assessing the extent and nature of food advertising to teens in Canada through our monitoring work. This will help us to understand if there are any changes to teens’ exposure to food advertising after the proposed regulation comes into force, which could help inform potential future regulatory changes.

**Q&A #6: Why is Health Canada only restricting food advertising that is “primarily directed at children”? Why not restrict all food advertisements that children are exposed to?**

- Focusing restrictions on advertisements that are “primarily directed at children” ensures that policy is tailored to reduce children’s exposure to food advertising while limiting the impact on advertising to adults, which is outside of the scope of this policy.

This simply is not true. Advertising to adults will be captured. (See IV. Page 5)

- We recognize that children are exposed to food advertising in programming intended for a general audience, such as during playoff hockey. In these media, we would be reducing the prevalence of food advertisements that appeal particularly to children.
- Focusing restrictions on food advertisements that are primarily directed at children also aligns with the legislative framework proposed by Bill C-252, an Act to amend the Food and

**Drugs Act** (prohibition of food and beverage marketing directed at children), which is currently being considered in Parliament.

**Question: Is this Policy being brought forward in order to enable legislation that doesn't**

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**Q&A #7: Why has brand advertising been excluded from this M2K proposal?**

This Policy will capture a wide range of well-known brands where the product of the company, brand or sub-brand has a strong association with the brand name whether the company is advertising to children or advertising to adults. (See IV. Page 7)

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**Q&A #10: How will child appeal of a food advertisement be assessed, for example an ad with company mascots and celebrities?**

- Whether a food advertisement on television or in digital media appeals particularly to children would be considered under factor 2 in the assessment to determine whether an advertisement is primarily directed to children. The policy update provides examples of advertising techniques, design elements and characteristics that would be considered.
- For example, the contextual assessment of the advertisement would consider whether:
  - a mascot is a child or has child-like characteristics and behaviours, uses child-like language or has a design that is likely to appeal primarily to children; and
  - celebrities and public figures, including actors, influencers, athletes and musicians are popular primarily with children.
- Recognizing that an advertisement could be directed at adults or a general audience despite featuring design elements, characteristics and/or advertising techniques that may be particularly appealing to children, it is also important to consider the overall context of the ad. For example, if the ad only features adults in an adult context, such as going to work, it is unlikely that the ad would be particularly appealing to children.

Once again, this will capture advertising directed to adults. We are concerned that this laundry list of factors may be subjectively applied to ads that are not “targeted” to children. The fundamental problem is that many things that appeal to adults (celebrities, athletes, animation, film characters, etc.) also appeal to children. (See IV. Page 6)

**Q&A #10: Would sponsorship of sporting events which include product representation be in scope of the restrictions?**

- Sponsorship of children’s sports by food companies would not be impacted by restrictions. However, if an advertisement on television or digital media for a children’s sport organization shows a food that can be identified or references the name of a unique food, that ad could be subject to the restrictions if the ad is primarily directed at children and the advertised food exceeds the nutrient thresholds.

The Code is significantly broader than this Policy in that it both captures and treats the sponsorship of an event and advertising of that event in the same way. *“Brand advertising and sponsorship advertising that do not feature a food and/or beverage product are not subject to the Restriction.”*

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**Q&A #25: Why is Health Canada monitoring aspects of advertising that are not being regulated?**

- Health Canada’s monitoring is broader than the scope of the proposed policy because it is important to understand the extent of food advertising across settings and media, and to all children, including older kids, who are also vulnerable.
- Comprehensive monitoring across a variety of settings and media, including those where regulations would not initially apply, will allow us to see shifts in the advertising landscape and identify gaps for future action.
- Comprehensive monitoring also supports other policies and interventions, such as the development of education and awareness resources and Canada’s food guide.
- By understanding the variety of ways that children and teens are exposed to food advertising, regardless of their inclusion in the proposed policy, we are better able to develop education and awareness activities to support children and their families in navigating food advertising.
- Finally, monitoring data could be used to support the five-year Parliamentary review included in Bill C-252, which would assess the impact of the Bill should it receive Royal Assent.

Indeed, why is Health Canada monitoring aspects of advertising that are not being regulated. Again, it is troublesome that input is being sought which suggests a Policy anticipating regulatory overreach.

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**Q&A #28: How will the monitoring of food advertising be completed, for example in schools?**

- We have partnered with experts across Canada to monitor children and teen’s exposure to advertising in the media and settings where they spend the most time or are most likely to be exposed to advertising, as well as their exposure to advertising techniques.

- For schools, we will be leveraging an INFORMAS survey of school administrators on food environments in their school, including the amount and types of food advertising in their schools, and whether they have policies about food advertising.
- It is important to acknowledge that that schools are unique from other media and settings where food advertising occurs. These settings often have their own policies related to food advertising to children, which are overseen by provinces, territories, school boards and school administrators.

Health Canada answers the question by describing the number of actions it is taking to monitor the exposure of children and teens to advertising and advertising techniques in grade schools and high schools by partnering with experts across Canada, which likely means multiple contracts with researchers and academics for monitoring studies and leveraging the INFORMAS survey.

The solution of industry is more cost-effective and straightforward as the Code bans advertising in schools to grade 8.

Health Canada wishes to complement the regulations with education and awareness activities to support children and their families in navigating food advertising (Q#25), it should be noted that the ideal point of intervention, to ensure that children develop healthy eating habits across a lifetime, is in the public education system through the incorporation of mandatory food and nutrition courses into the curriculum. The Minister of Health should work with the Ministers of Health and the Ministers of Education in the provinces and territories to facilitate the introduction of food literacy in the curriculum.

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**Q&A #32: How will the government identify and act on non-compliance with the regulations? What are the steps?**

- A compliance and enforcement framework for the restrictions is being developed, which would include a continuum of compliance promotion, verification and enforcement activities depending on the risk and level of non-compliance.
- Our approach to identify non-compliance could include a complaint mechanism, monitoring and inspections.
- Our responses to non-compliance could include non-compliance letters and other responses available under the Food and Drugs Act, including in some cases, prosecutions and fines of up to \$250,000 for those convicted of an offence.

Health Canada’s response to this question clearly indicates that the foundation of compliance promotion is the risk-based approach for food and/or drug safety inspections which are not applicable to advertising.

Health Canada plans to rely on a series of bureaucratic steps - verifications, non-compliance letters, and inspections - that will significantly increase the administrative costs of compliance for industry. Stated otherwise, Health Canada is not demonstrating an attempt to “control the administrative burden that the proposed regulations will impose on business.”<sup>44</sup>

Industry eliminated the “red tape” with the introduction of a preclearance regime to mitigate the risk of non-compliance. Industry’s approach is more effective because it is proactive rather than reactive. It is also aligned with the government’s *Red Tape Reduction Act*.

With respect to enforcement, we believe there is a lack of proportionality in the application of prosecutions and fines under the FDA for a regulatory offence. We have already commented on the lack of proportionality between the nature of the offence and the intended penalty in the body of our submission.

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**Q&A #40: How does this initiative compare to the industry code? Will industry be subject to two different regimes?**

- There are a few key differences between Health Canada’s proposed M2K proposed Policy and the new industry code.
- First, the code uses significantly higher nutrient thresholds for restaurant and food service meals as well as for cereal. Restaurants account for a high proportion of food advertising to children. Similarly, sweetened cereals are commonly advertised to children. Nutrient criteria have also not yet been published for other food categories that may be assigned less restrictive nutrient criteria (e.g. dairy foods).

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<sup>44</sup> Red Tape Reduction Act, S.C. 2015, c. 12, s.4.



There is provision in the Code for unique nutrition criteria to be considered for select food and/or beverages. These are to be determined separately, with input from Health Canada and other relevant stakeholders, as appropriate. Nutrition criteria should be science and evidence-based and may include rationale such as:

- a staple food in the diets of Canadian children
- recognized by Health Canada as an important food vehicle in delivering essential vitamins and minerals in children's diets
- required by Canada's Food and Drug Regulations to be enriched/fortified with prescribed levels of vitamins and minerals

This is not dissimilar to what Health Canada did in considering the value/delivery of calcium in diet when developing Front of the Package Labelling. By contrast, the Policy's one-dimensional application of the exact same nutrient limits across all food types, regardless of the underlying nature or intended purpose (i.e. single serve vs. meal-based) of those foods, is exactly why the proposed Policy yields the counterproductive result of barring the promotion of foods formulated exactly as recommended by the Food Guide's own website.

- The Code includes a number of presumptions that would result in an advertisement not being considered primarily directed at children, such as when children make up less than 15% of the audience, or on age gated websites such as social media. The code also considers a limited list of techniques when assessing whether the ad primarily appeals to children. This could result in children's continued exposure to food advertising that appeals particularly to them.

**THIS IS ENTIRELY INCORRECT AND/OR MISLEADING.**

- The statement that the Code includes a number of presumptions that would result in an advertising not being considered primarily directed at children completely mischaracterizes the Guide. The Guide clearly sets out on numerous occasions that the presumptions set out in the Guide are all rebuttable. A three-factor analysis will be applied when reviewing ads to determine if they are primarily child directed and no one factor is determinative. This is true even where there are presumptions for a specific factor.
- As in Quebec, an advertisement is prohibited if the message is designed to arouse the interest of children irrespective of the percentage of children in the audience (e.g. even under 15%)
- "social media" platforms are universally age-gated at age 13 and therefore should not be under the auspices of this Policy.
- The Code does not limit a list of techniques. Rather it defines Criteria to be considered to determine if an advertisement is primarily directed to children.

- Finally, federal regulations would be mandatory. We consider the industry self-regulatory code to be a voluntary measure as it does not carry the force of law.

**Voluntary measures do work, even if they do not carry the force of law. See Section III.**

**Q&A #43: Will the Health Canada proposed Policy supersede the Quebec law on marketing to kids in the province of Quebec? How will this be implemented in Quebec given that there is already a law on this in Quebec, and how does it differ from what is being proposed?**

- M2K restrictions are not intended to interfere with existing restrictions on commercial advertising to children in Québec.
- Health Canada’s M2K proposal differs from the existing Quebec restrictions in several ways. For example, the restrictions in Quebec:
  - Are made under the Quebec’s Consumer Protection Act and apply to advertisements for all goods and services advertised to children under 13
  - Covers a broader range of media and settings
  - Do not use a nutrient profile model to determine which foods will be subject to restriction
- Health Canada’s M2K proposal aligns with existing Quebec restrictions in a number of ways:
  - Under both frameworks, advertising restrictions apply to children under the age of 13.
  - Both Health Canada and Quebec take into consideration similar factors – where the ad is communicated and design/appeal of the ad – to determine whether an ad is primarily directed at children.
  - However, the Quebec model also considers the appeal of the good/service, which is not relevant for Health Canada’s proposed policy given that M2K restrictions focus on the nutrient content of the food.

This proposed Policy will essentially create a two-tier regulatory system in the province of Québec. The Code, on the other hand, establishes a national standard based on and aligned to the Quebec model to meaningfully reduce the exposure of children to the advertising of food and beverages. The criteria of the industry Code are based on the matrix approach of s. 249 of Quebec’s Consumer Protection Act which include the following criteria:

- (a) The nature and intended purpose of the food or beverage product advertised
- (b) The manner of presenting such advertisement
- (c) The time and place it is shown

Advertisements consider the relationship among all three of these criteria as each criteria, when considered separately, is not necessarily determinative by itself.

Health Canada’s model, while seemingly similar, casts a much wider net. It takes into consideration where the ad is communicated and design/appeal of the ad – to determine whether an ad is primarily directed at children”. It proposes a process based on two factors:

**Factor 1:** The nature and intended purpose of the medium where the ad is communicated

**Factor 2:** Whether the advertisement targets, or is reasonably expected to appeal particularly to children. (See page 3 of the Policy document.)

(Continued on next page...)

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This does not work the same way as it does in Quebec. It introduces significantly more judgement into its model. Factor 2 is particularly problematic.

Examples of advertising techniques, design elements and characteristics that would be captured under Factor 2 are very broad in scope and can be often used as techniques in advertising to adults. They include: licensed characters, brand or generic characters, games or activities, celebrities and public figures, cross-promotions, incentives and premiums, visual designs, audio and special effects, subjects, themes and language, calls to action and engagement techniques, digital targeting techniques.

In addition to the spectre of capturing IP rights, one of the main concerns of food and beverage manufacturers that do not advertise to children are the broad application of child-directed advertising in Health Canada's updated Policy on M2K, which goes beyond the scope of the Quebec model. While Health Canada has significantly changed its methodology to determine if an ad is primarily directed at children who are under 13 years of age since releasing its draft 2018 Guidelines<sup>1</sup>, the outcome remains the same. Advertising includes the message, design, characteristics and techniques that could potentially prohibit advertising of foods to adults in media or mixed settings.

## IX. SUMMARY

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The Code and Guide fulfills the objectives of government in restricting advertising of food and beverage products to children. Its restriction is unequivocal...and will be implemented in just under two weeks from the close of this consultation – June 28, 2023.

This implementation will take place at least two years - if not more - before restrictions on the advertising of food to children will likely be implemented.

By adopting the Code and working collaboratively with industry, the government would pave the way for a practical, well-considered, and meaningful set of advertising standards, which would benefit children now.

### **The Code is clear and unequivocal in its purpose...**

*Advertising for a food or beverage product may not be primarily directed to persons under thirteen years of age (the "child" or "children") unless the product satisfies the child advertising nutrition criteria set forth in Appendix A (the "Restriction").<sup>45</sup>*



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<sup>45</sup> Code for the Responsible Advertising of Food and Beverage Products to Children. p 2.

- ✓ The Code and Guide go well beyond the scope of restrictions of the proposed Policy (television and digital media). **All media are included.**

*Except as otherwise provided, the Food and Beverage Advertising Code applies to all adve featuring a food or beverage product, directed to residents of Canada, in any media...<sup>46</sup>*

- ✓ Importantly, the Code and Guide do not capture advertising to adults. **The proposed Policy will capture advertising directed to adults, brand advertising and threatens IP Rights.**
- ✓ The Code and Guide offer **predictable solutions** for brand advertising, sponsorships, and charitable & education initiatives, including fundraising. In contrast, the proposed Policy lacks predictability because Health Canada is considering a targeted approach to the restrictions that could eventually include restrictions to “children” up to 17 years of age” and/or “mandatory restrictions regarding marketing techniques”.
- ✓ A robust preclearance, compliance and enforcement regime will underpin the Code and Guide. It will be administered by Ad Standards, Canada’s self-regulatory body overseeing advertising in Canada for the last 60 years. This is the very same organization that oversees the government’s own advertising.



Under both the Canadian Code of Advertising Standards, and the new Code and Guide, reporting, compliance and enforcement **apply to all advertisers in all media**, regardless of whether they sign on to the Code and regardless of membership in Ad Standards.

*Given the robust preclearance, compliance and enforcement mechanism that has been put in place to administer the Code, the remedies that the proposed Policy is looking to impose are grossly disproportionate, and serves no pressing purpose, for the government to criminalize commercial speech, and thereby chill speech to adults, when the “mischief” at which the proposed Policy purports to be aimed has already been eliminated.<sup>47</sup>*

<sup>46</sup> Code for the Responsible Advertising of Food and Beverage Products to Children. p 3.

<sup>47</sup> ACA proposed Policy Submission, June 16, 2023. Section V. p 8.

✓ **Focussing on implementation...**

Restricting food and beverage advertising was a mandate first given by the government to Minister Philpot in 2017. It has seen three more ministers since then. **It is time to act.** The Code and Guide are ready for implementation.

We invite Health Canada to sit down with industry to better understand how the Code and Guide will deliver on government proposed Policy. Let us know where there may be shortcomings so that we might deliver this proposed Policy together and without unnecessary challenges on statutory authority.

*...introducing new restrictions on the commercial marketing of unhealthy food and beverages to children similar to those now in place in Quebec...*

February 2017  
Prime Minister Trudeau  
Mandate Letter to Health Min

Importantly the Code and Guide mirror Quebec's criteria to be considered to determine if an advertisement is primarily directed to children. The Code and Guide build on an over 40-year history of a made-in-Canada successful solution. They don't try to recreate the wheel.

- ✓ Lastly, we wish to underscore that transparency applies to the submissions that will be filed with Health Canada in response to its call for public comments on this proposed Policy. This public consultation is not part of the official *Canada Gazette* consultation process where submissions are not open to view. Rather than producing a "Summary of Comments" or "What we Heard Report", we encourage Health Canada to release all submissions on the public record to encourage dialogue and consensus-building among stakeholders. Health Canada should use the tools at its disposition and post the submissions on its Public Registry of Meetings and Correspondence re: Healthy Eating Strategy Canada's to meet its commitment to open government and transparency with citizens. Before including the submissions in the registry, Health Canada can easily address privacy concerns by asking respondents to redact identifiable or business confidential information, if any, from their submissions.

We wish you well in your deliberations and look forward to discussing this submission in more detail with you, together with our coalition partners: FHCP, CBA and Restaurants Canada.

Respectfully submitted,



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