

COMMENT

CONFLICTS OF INTEREST IN NUTRITION POLICY: WHY AMERICANS ARE SO CONFUSED WHEN IT COMES TO NUTRITION AND HOW THE LAW CAN HELP CREATE A HEALTHIER AMERICA

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## I. ABSTRACT

Conflicts of interest within the government greatly affect the public at large. This Comment addresses the conflicts of interest within the United States Department of Agriculture (USDA), and, more specifically, the conflicts of interest that inhibit proper application of the law with regard to the USDA's issuance of the *Dietary Guidelines for Americans (Dietary Guidelines)*. These *Dietary Guidelines* are widely used and applied in many significant areas. This Comment also addresses the confusion within the American public regarding nutrition. Most of this confusion is due to food industry ties with government officials, food industry-sponsored research promoted to the general public and used to accomplish government objectives, and sponsorships by the food industry to non-profits who promote specific dietary recommendations.

This Comment does not address the biases inherent in non-profits such as the American Heart Association, the American Cancer Society, and the American Diabetes Associations that all have substantial food and drug industry sponsorships which are reflected in these non-profits' dietary recommendations that many Americans follow. This Comment specifically addresses the conflicts of interest within the USDA and the effects on the federal *Dietary Guidelines*. The *Dietary Guidelines* is of substantial importance. Federal dietary policies within government programs are required by law to be consistent with the published USDA *Dietary Guidelines*. Not only do the *Dietary Guidelines* affect millions of Americans per day through federal programs such as school-children lunch and breakfast programs and military food programs, but also the general public can use these recommendations.

As discussed in this Comment, conflicts of interests within the USDA are clearly seen through its dual goals, the funding and personal biases of USDA Advisory Committee members, checkoff programs, and subsidies. The primary goals of the USDA center around promoting economic benefits for the food industry instead of promoting health. With the goals of the *Dietary Guidelines* (discussed below) in conflict with the goals of the USDA at large, the USDA is not well suited to be responsible for the *Dietary Guidelines*.

The financial conflicts of interest within the USDA Advisory Committee members themselves is also cause for concern. The Advisory Committee members are those responsible for reviewing the scientific literature and proposing a new set of *Dietary Guidelines* every five years. Those responsible for the 2020–2025 *Dietary Guidelines* have substantial ties to food industries such as PepsiCo, Hershey, Nestlé, Kraft Foods, and McDonalds. The *Dietary Guidelines* has not been effective in preventing chronic disease such as heart disease, cancer, diabetes, and obesity. Other diets have been shown to prevent and even reverse these diseases. This Comment is not designed to promote one particular diet although nutrition science has remained largely consistent over the years. The reason Americans are so confused about nutrition largely comes down to conflicts of interest—not inconsistent science. Those responsible for making nutrition recommendations with biases toward a particular diet or food industry do not go against that particular diet or food industry regardless of the scientific evidence. The Advisory Committee members are responsible for the national dietary recommendations and many have conflicts of interest. How can those affected by the *Dietary Guidelines* expect proper recommendations and policies? This Comment proposes that those affected by the *Dietary Guidelines* cannot expect proper recommendations and policies; that current laws and governmental regulations are inadequate to achieve proper, trustworthy, and science-based dietary recommendations and results; and that reform is needed in the law and in the policies of the USDA.

Current solutions to these conflicts of interest, such as more transparency and disclosure, are inadequate. Although the disclosure of Advisory Committee members’ conflicts of interest may warn the general public about potential biases, such disclosure does not change the outcome. Outcomes can still be biased. This Comment proposes solutions to the conflicts of interest herein discussed that include the reallocation of the Dietary Guidelines and food recommendations to a different or new governmental agency; the implementation of a firewall between industry and researchers; and new adequate laws and policies for the USDA, modeled after conflict of interest policies in corporate law and in the ethical rules for lawyers.

## II. INTRODUCTION

Confusion is the name of the game. America is in a state of confusion when it comes to nutrition science. Is weight loss more important than health? Does attaining a “healthy weight” mean good health? Is fat good or bad? Is animal protein necessary for good health? Are carbohydrates good or bad? Why is there so much confusion? People find it difficult to actually put into practice nutritional recommendations because of nutrition science’s seemingly ephemeral nature. The cause of its ostensibly ephemeral nature is not inherent in nutrition science itself; rather, the cause is the financial agenda of the food industry and governmental interests. In fact, dietary recommendations based upon nutrition science on the prevention of chronic disease have not changed much over the years.<sup>1</sup> Unfortunately, the major sources of public education on nutrition come from the media and public relations efforts of the food industry.<sup>2</sup> These recommendations and advice can be heavily biased and not fundamentally based upon science.

Surprisingly, since 1980, when the USDA issued its first set of *Dietary Guidelines*, the health of the American public has not improved has not actually improved. In fact, it has worsened. Consider obesity. Over one-third of American adults are now classified as obese, a figure which has more than doubled since the issuance of the first set of *Dietary Guidelines*.<sup>3</sup> 18.4% of children aged 6–11 years are obese.<sup>4</sup> Similarly, 20.6% of adolescents aged 12–19 years are obese.<sup>5</sup> In school-age children, those most effected by the *Dietary Guidelines* because of federal school breakfast and lunch programs, obesity rates have more than tripled since the issuance of the *Guidelines*.<sup>6</sup> One would think that the *Dietary Guidelines* (considered by many to be the gold standard of nutrition advice) would at least do something to enhance health. This has not been

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<sup>1</sup> Nestle, Marion, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 29 (2013).

<sup>2</sup> *Id.*

<sup>3</sup> *Obesity Trends: Tracking the Global epidemic*, HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH, <https://www.hsph.harvard.edu/obesity-prevention-source/obesity-trends/>

<sup>4</sup> *Obesity and Overweight*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nchs/fastats/obesity-overweight.htm>.

<sup>5</sup> *Id.*

<sup>6</sup> *Childhood Obesity: Too Many Kids Are Too Heavy Too Young*, HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH <https://www.hsph.harvard.edu/obesity-prevention-source/obesity-trends/global-obesity-trends-in-children/>; Table 53. *Selected health conditions and risk factors, by age: United States, selected years 1988–1994 through 2015–2016*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2017), <https://www.cdc.gov/nchs/data/hus/2017/053.pdf>.

the case. In fact, the *Dietary Guidelines* have done little to help prevent chronic disease, unlike other diets.<sup>7</sup> Why not? Is it because the science is bad? Or is it because other interests are more important? As argued and justified in this Comment, the conflicts of interest herein discussed have essentially rendered the *Dietary Guidelines* ineffective.<sup>8</sup>

Conflicts of interest are defined as “circumstances that create a risk that professional judgments or actions regarding a primary interest will be unduly influenced by a secondary interest.”<sup>9</sup> For attorneys, “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person or from the lawyer’s own interests.”<sup>10</sup> This comment to the American Bar Association Model Rules of Professional Conduct Rule 1.7 provides a template for determining the essential components of a USDA *Dietary Guidelines* Advisory Committee member’s relationship to those affected by the *Dietary Guidelines*. Although no professional relationship is created between an Advisory Committee member and a member of the general public, the principles of “[l]oyalty and independent judgment” are “essential elements” to providing unbiased, trustworthy dietary recommendations.<sup>11</sup> Conflicts of interest can arise from an Advisory Committee member’s “responsibilities to another,” a “former” employer or benefactor, a “third person,” or from the member’s “own interests.”<sup>12</sup>

The integrity of governmental action and research (e.g., *Dietary Guidelines* Advisory Committee recommendations) becomes questionable upon the existence of an actual or apparent conflict of interest.<sup>13</sup> The USDA’s *Dietary Guidelines* are used heavily in the United States (and other countries) through national programs and by the general public. Unfortunately, these recommendations are ineffective and partial.<sup>14</sup>

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<sup>7</sup> Jeff Herman, *Saving U.S. Dietary Advice from Conflicts of Interest*, 65 Food & Drug L.J. 285, 289–93 (2010).

<sup>8</sup> Herman, *supra* note 7.

<sup>9</sup> Joanna K. Sax, *Financial Conflicts of Interest in Science*, 21 Annals Health L., 297 (2012) (citing Inst. of Med. of the Nat’l Academies, *Conflict of Interest in Med. Research, Education, and Practice* 1, 6 (Bernard Lo & Marilyn J. Field eds., 2009)).

<sup>10</sup> MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS’N 2019) (emphases added).

<sup>11</sup> *See id.*

<sup>12</sup> *Id.*

<sup>13</sup> *See Sax, supra* note 9.

<sup>14</sup> Herman, *supra* note 7.

Using research that contains conflicts of interest and appointing government officials with biases creates substantial problems in the efficacy of the *Dietary Guidelines*. Within the USDA *Dietary Guidelines* Advisory Committee, the conflicts of interest are so significant that they cannot be ignored. Although conflicts of interest are unlikely to become completely eradicated, legal steps can be taken to minimize their effects.

### III. BACKGROUND

The USDA's *Dietary Guidelines for Americans* report "shall contain nutritional and dietary information and guidelines for the general public . . . based on the *preponderance* of the scientific and medical knowledge."<sup>15</sup> This Comment will show how and why the government has not been abiding by its own law. The USDA is responsible for creating and executing federal laws relating to agriculture and food. The USDA aims to promote agricultural trade and production, assure food safety, and develop nutritional guidance. Based upon these aims, conflicts of interest within the USDA as a whole become clear. The focus of the USDA is economic prosperity—not public health.<sup>16</sup> The USDA's *Dietary Guidelines* seem to compromise what science tells us about nutrition and health and the economic interests of the food industry.<sup>17</sup> The goal consolidation within the USDA of economic prosperity in the food industry and public health promotion creates substantial concerns.<sup>18</sup> These two important aims largely conflict with one another.

The food industry does everything it can to acquire a governmental stamp of approval on its products. The goal of the food industry is to maximize profits—not to create healthier individuals. "The production of agricultural commodities plays a significant role in the economy of the United States."<sup>19</sup> Whatever drives profits and economic goals drives nutritional advice. Unfortunately, when it comes to

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<sup>15</sup> 7 U.S.C.A. § 5341 (emphasis added).

<sup>16</sup> USDA Strategic Goals, USDA, <https://www.usda.gov/sites/default/files/documents/usda-strategic-goals-2018-updated-1.pdf>.

<sup>17</sup> Nestle, *supra* note 1, at 30.

<sup>18</sup> See generally USDA Strategic Goals, USDA, <https://www.usda.gov/sites/default/files/documents/usda-strategic-goals-2018-updated-1.pdf>.

<sup>19</sup> 7 U.S.C.S. § 7411.

nutrition education, such as through the issuance of the *Dietary Guidelines*, no governmental agency has the resources to compete with the recommendations of the food industry.<sup>20</sup> Although the government does have a hand in nutritional recommendations, the credibility of the advice has been largely weakened. Nutrition science in dietary recommendations has taken a backburner to the economic and political goals of the food industry.

Specifically, individual government officials have become proponents of whatever agenda fits the interests of their constituents. This Comment will explain how the government makes laws and gives guidance regarding nutrition based upon economic goals rather than public health goals.<sup>21</sup> For example, “It . . . is declared to be the policy of Congress . . . to authorize . . . carrying out a coordinated program of promotion designed to strengthen the

dairy industry’s position in the marketplace and to maintain and expand domestic and foreign markets . . . for fluid milk and dairy products.”<sup>22</sup>

beef industry’s position in the marketplace and to maintain and expand domestic and foreign markets . . . for beef and beef products.”<sup>23</sup>

Regardless of whether these products are healthful, any argument against these products will never be realized within the *Dietary Guidelines* because such statutes and governmental policies exist. Government public health goals, such as reducing chronic disease or the incidence of obesity, are virtually never realized because of conflicts of interest within government policies, laws, and officials. Ethical concerns arise when

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<sup>20</sup> Nestle, *supra* note 1.

<sup>21</sup> See 7 U.S.C. § 7411; 7 U.S. Code § 4501; 7 U.S. Code § 2901; 7 U.S. Code § 2701; 7 U.S. Code § 4801.

<sup>22</sup> 7 U.S.C.S. § 4501.

<sup>23</sup> 7 U.S.C.S. § 2901. Further examples include:

“It is therefore declared to be the policy of the Congress and the purpose of this Act that it is essential and in the public interest, through the exercise of the powers provided herein, to authorize and enable the establishment of an orderly procedure for the development and the financing through an adequate assessment, an effective and continuous coordinated program of research, consumer and producer education, and **promotion** designed to **strengthen the egg industry’s position in the marketplace**, and **maintain** and **expand** domestic and foreign **markets** and uses for eggs, egg products, spent fowl, and products of spent fowl of the United States.” 7 U.S.C.S. § 2701 (emphases added); “It is the purpose of this subtitle to authorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of **promotion**, research, and consumer information designed to—

(A) **strengthen the position of the pork industry** in the marketplace; and

(B) **maintain, develop, and expand markets** for pork and pork products.” 7 U.S.C.S. § 4801 (emphases added).

the government engages in activities that benefit one group—agricultural industry—but harm another—the public.

#### IV. PRIMARY CONFLICTS OF INTEREST IN GOVERNMENT NUTRITION POLICIES

##### A. Advisory Committee

In 1862, the USDA was created primarily to protect the food supply as millions of Americans were dying every year from malnutrition.<sup>24</sup> As time passed, the threat of American deaths from starvation and malnutrition due to food shortages drastically decreased. Chronic diseases, such as heart disease and cancer became the leading causes of death in the world and the United States, but these deaths can largely be prevented through diet and lifestyle.<sup>25</sup> The *Dietary Guidelines* Advisory Committee has not used the “preponderance of the scientific and medical knowledge”<sup>26</sup> available in creating and modifying the *Guidelines*. This is partly because the goals of the USDA in health promotion are completely in conflict with its goals in agricultural economic advancement, and partly because the *Dietary Guidelines* Advisory Committee itself also has conflicts of interest.<sup>27</sup>

Relationships between Advisory Committee members and food and drug industries are very common and concerning. For example, on the 1995 Advisory Committee, three out of eleven members had past or present industry ties.<sup>28</sup> On the 2000 Advisory Committee, seven out of eleven members had past or present industry ties.<sup>29</sup> On the 2005 Advisory Committee, eleven out of thirteen members had past or

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<sup>24</sup> Emily J. Schaffer, *Is the Fox Guarding the Henhouse? Who makes the Rules in American Nutrition Policy?*, 57 FOOD & DRUG L.J. 371, 380 (2002).

<sup>25</sup> Herman, *supra* note 7, at 287 n.14 (stating “[f]or further reading on the relationship between diet, nutrition, and the prevention of chronic diseases, see generally WORLD HEALTH ORG., DIET, NUTRITION AND THE PREVENTION OF CHRONIC DISEASES (2003), available at [http://whqlibdoc.who.int/trs/WHO\\_TRS\\_916.pdf](http://whqlibdoc.who.int/trs/WHO_TRS_916.pdf) [hereinafter DIET, NUTRITION AND THE PREVENTION OF CHRONIC DISEASES]. See also WORLD HEALTH ORG., 1 COMPARATIVE QUANTIFICATION OF HEALTH RISKS (2003), available at [http://www.who.int/healthinfo/global\\_burden\\_disease/cra/en/](http://www.who.int/healthinfo/global_burden_disease/cra/en/) (quantifying the prevalence and magnitude of health risks from various dietary and lifestyle factors). For further reading specifically on heart disease, see Frank B. Hu & Walter C. Willett, *Optimal Diets for Prevention of Coronary Heart Disease*, 288 JAMA 2569 (2002). For further reading specifically on cancer, see generally AM. INST. FOR CANCER RES., WORLD CANCER RES. FUND, FOOD, NUTRITION, PHYSICAL ACTIVITY, AND THE PREVENTION OF CANCER (2007) (citing and reviewing over 7,000 studies).”)

<sup>26</sup> 7 U.S.C.A. § 5341 (emphasis added).

<sup>27</sup> Derrick Z. Jackson, *Food Companies at the Table in Trump Administration’s Dietary Guidelines Committee* (April 1, 2019), <https://blog.ucusa.org/derrick-jackson/trump-administrations-dietary-guidelines-committee>.

<sup>28</sup> Herman, *supra* note 7, at 295.

<sup>29</sup> *Id.*

present industry ties.<sup>30</sup> On the 2010 Advisory Committee, nine out of thirteen members had past or present industry ties.<sup>31</sup>

[O]n just the 2000 Committee . . . , members had past or present ties to: two meat associations; four dairy associations and five dairy companies; one egg association; one sugar association; one grain association; five other food companies; six other industry-sponsored associations; two pharmaceutical associations; and 28 pharmaceutical companies.<sup>32</sup>

Such relationships may cause the experts on the Advisory Committee to favor the industries that support, employ, or honor them. Recent conflicts are addressed in Part III.A.2.

The court in *Physicians Comm. for Responsible Med. v. Glickman* acknowledged such concerns. It stated that “a Committee member . . . financially beholden to a person or entity that ha[s] an interest in how the Dietary Guidelines might be amended,” is in the public interest.<sup>33</sup> It might be difficult for the experts on the Committee to have the best interests of the public in mind while bearing the risk of hurting their industry relationships. “There’s a great deal of money at stake in what these guidelines say,” says Dr. Marion Nestle, author of *Food Politics* and former chair of the Department of Nutrition, Food Studies, and Public Health at New York University.<sup>34</sup>

In 1986, Dr. Nestle also worked for the Public Health Service in Washington, D.C.<sup>35</sup> Her job was to manage the editorial production of the *Surgeon General’s Report on Nutrition and Health* in 1988.<sup>36</sup> Her first day on the job, she was instructed that “no matter what the research indicated, the report could not recommend ‘eat less meat’ as a way to reduce intake of saturated fat, nor could it suggest restrictions on intake of any other category of food.”<sup>37</sup> She states that the reasons for these rules was because “the producers of food that might be affected by such advice would complain to their beneficiaries in Congress, and the

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Herman, *supra* note 7, at 295–296.

<sup>33</sup> *Physicians Comm. for Responsible Med. v. Glickman*, 117 F. Supp. 2d 1, 6 (D.D.C. 2000).

<sup>34</sup> Markham Heid, *Experts Say Lobbying Skewed the U.S. Dietary Guidelines*, TIME (January 8, 2016), <https://time.com/4130043/lobbying-politics-dietary-guidelines/>.

<sup>35</sup> Nestle, *supra* note 1, at 3.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

[*Surgeon General's Report on Nutrition and Health*] would complain to their beneficiaries in Congress, and the report would never be published.”<sup>38</sup> This illustrates some influence of the food industry on government nutrition policy and on the opinions of nutrition consultants.

Additionally, the new 2020–2025 expert committee tasked with reviewing the latest research for the *Dietary Guidelines*, is fraught with conflicts.<sup>39</sup> “More than half of the committee members come with either clear strings to industry-funded research or questionable memberships in industry-funded advocacy groups and foundations.”<sup>40</sup> When he was announcing the *Dietary Guidelines* Advisory Committee, “Agriculture Secretary Sonny Perdue (who must sign off on the final guidelines, along with Health and Human Services Secretary Alex Azar) reportedly said, ‘You ought to have professionals on either end of the spectrum—both from the plant-based and meat-based side of the equation—making recommendations.’”<sup>41</sup> However, that statement is grossly unacceptable. The purpose of the committee is to review the current science so that they can present unbiased, science-based recommendations to the Secretaries. “A balanced committee should imply a diversity of expertise in nutrition and health sciences—not equal representation of the financial interests of the food industry and the science itself.”<sup>42</sup> The experts on the 2020 committee include those whose industry-funded research are about the short-term benefits of meat and low-carbohydrate diets when the abundance of science shows the long-term health impacts of such diets.<sup>43</sup>

The *Dietary Guidelines* Advisory Committee members work to promote ideas such as “anything is good in moderation,” “all foods can be a part of a healthy diet,” and “variety is important to diet.” However, these ideas are contrary to science. Moderation and variety have not shown to prevent chronic diseases such as heart disease, cancer, diabetes, and obesity. Six out of ten adults in the United States have a chronic

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<sup>38</sup> *Id.*

<sup>39</sup> Derrick Z. Jackson, *Food Companies at the Table in Trump Administration's Dietary Guidelines Committee* (April 1, 2019), <https://blog.ucsusa.org/derrick-jackson/trump-administrations-dietary-guidelines-committee>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* See also *supra* note 25, see *infra* 147.

disease such as heart disease, cancer, diabetes, or obesity.<sup>44</sup> In part because of the conflicts of interest within the Advisory Committee, Americans are confused about health, and it shows. Food industries have minimal interest in a healthier America. 3.6 trillion dollars are spent on annual health care costs.<sup>45</sup> The food industry (and the health care industry) not only assist poor American health, but also create incredible economic burdens. The poor choices and sicknesses of Americans line the pockets of these industries. In general, the choices of Americans should be protected. However, when the government corrals American choices, as in the case of nutrition guidance, the government should not introduce biases to the detriment of the American public.

### 1. *Funding Bias*

Understanding funding bias is important to understanding why financial conflicts of interest inhibit the efficacy of the USDA *Dietary Guidelines* Advisory Committee. Funding bias, also known as industry sponsorship bias, funding outcome bias, and funding publication bias refers to the tendency of a scientific study to support the interests of the funding sponsor.<sup>46</sup> In the food and drug industries, these situations often occur.<sup>47</sup> In general, to an informed individual with an awareness of these potential biases, industry-funded research is not inherently persuasive. However, when the USDA *Dietary Guidelines* Advisory Committee uses these studies and employs individuals who have conducted these industry sponsored studies to develop a plan as influential and widely used as the *Dietary Guidelines*, a much greater harm to the public develops.

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<sup>44</sup> *Chronic Diseases in America*, National Center for Chronic Disease Prevention and Health Promotion. <https://www.cdc.gov/chronicdisease/pdf/infographics/chronic-disease-H.pdf>.

<sup>45</sup> *National Health Expenditure Data: Historical*, CMS, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical>.

<sup>46</sup> B. Holman, L. Bero, & B. Mintzes, *Industry Sponsorship Bias: A tendency for the methods and results of a study to support the interests of the funding organisation*, CATALOG OF BIAS, <https://catalogofbias.org/biases/industry-sponsorship-bias/> (last visited Jan. 8, 2019).

<sup>47</sup> Julia Belluz, *Nutrition Research is deeply biased by food companies. A new book explains why*, VOX (Nov. 11, 2018, 9:32 AM), <https://www.vox.com/2018/10/31/18037756/superfoods-food-science-marion-nestle-book>; Joel Lexchin, *Sponsorship bias in clinical research*, *Int J Risk Saf Med.* 2012; 24(4):233-42, <https://www.ncbi.nlm.nih.gov/pubmed/23135338>; Holman, *supra* note 47; A. Lundh, J. Lexchin, B. Mintzes, JB Schroll, L Bero, *Industry sponsorship and research outcome.*, *Cochrane Database of Systematic Reviews* 2017, Issue 2. Art. No.: MR000033. DOI: 10.1002/14651858.MR000033.pub3, <https://www.ncbi.nlm.nih.gov/pubmed/28207928>.

As previously stated, when the Advisory Committee members have industry relationships with those who have substantial interest in the outcome of the *Dietary Guidelines*, the efficacy of the recommendations can be compromised. If members have current relationships with these industries, the members may not want to jeopardize or impair their sources of income or funding.<sup>48</sup> A member may not be able to simultaneously act in the best interests of the Committee and the industry.<sup>49</sup> The member may have a sense of duty to protect the interests of those who have funded their studies in the past or present and are employers, may have developed biased views of the science based on their affiliations, or may use the opportunity on the Advisory Committee to secure future relationships by protecting certain industry interests.

Industry ties have been shown to pressure scientists into favoring a specific industry. In a 1998 study, for example, 63 percent of the scientists conducting studies who received gifts from industry felt that the donor expected acknowledgment in the publication, 32 percent said that the donor expected to have pre-publication review of the articles or reports to be published, and 29 percent felt the donor expected that the gift would not be used for commercial applications that would be used in competition with the company's products.<sup>50</sup> Another study found that researchers who received industry money reported conclusions of drugs as being safer than the alternatives when the conclusion was not supported by the findings more than half the time.<sup>51</sup>

## 2. *Advisory Committee Potential Conflicts of Interest*

The USDA *Dietary Guidelines* Advisory Committee has had substantial conflicts of interest over the years that may impair objectivity in reviewing scientific data for the *Dietary Guidelines*. Jeff Herman in his article *Saving U.S. Dietary Advice from Conflicts of Interest*, outlined some conflicts of interest from

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<sup>48</sup> Herman, *supra* note 7, at 296.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 297 (citing Eric G. Campbell et al., Looking a Gift Horse in the Mouth: Corporate Gifts Supporting Life Sciences Research, 279 JAMA 995, 997 (1998)).

<sup>51</sup> *Id.* (citing Paul A. Rochon, A Study of Manufacturer-Supported Trials of Nonsteroidal Anti-Inflammatory Drugs in the Treatment of Arthritis, 154 ARCH. INTERN. MED. 157 (1994).)

earlier Advisory Committees.<sup>52</sup> This Comment only addresses the potential conflicts of interest in the 2020 *Dietary Guidelines* Advisory Committees. The 2020 USDA *Dietary Guidelines* Advisory Committee member potential conflicts of interest are included in the following paragraphs.<sup>53</sup>

In 1989, 2020 USDA *Dietary Guidelines* Advisory Committee Chair Dr. Barbara Schneeman, PhD was an International Life Sciences Institute-North America (ILSI) (an industry-sponsored research organization<sup>54</sup>) public member, and on the Board of Trustees.<sup>55</sup> She authored or coauthored papers funded in part by grants from the National Dairy Board (1989), the California Prune Board (1990, [1993],<sup>56</sup> and 1994), the National Dairy Promotion Board (1992), Kraft-General Foods (1993), and Ross Laboratories (1994).<sup>57</sup> In 1998, she was listed as President and member of Board of Directors of Dannon Institute.<sup>58</sup> In 1999, she was listed as member of the ACSH-Advisory Board.<sup>59</sup> She was also the president of the Dannon Institute, a non-profit foundation funded by Dannon, Inc.<sup>60</sup> Additionally, she was nominated by the American Beverage Association to the 2020 *Dietary Guidelines* Advisory Committee.<sup>61</sup>

2020 USDA *Dietary Guidelines* Advisory Committee Vice-chair Dr. Ronald Kleinman, MD was a consultant for Grain Food Foundation, Sesame Street Foundation, Beech Nut, the Burger King External Advisory Board, and General Mills.<sup>62</sup> He has deep financial ties with Mead Johnson, the parent company

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<sup>52</sup> *Id.* at 309–15.

<sup>53</sup> 2020 *Advisory Committee Members*, USDA, <https://www.dietaryguidelines.gov/work-under-way/review-science/about-advisory-committee/2020-committee-members>.

<sup>54</sup> See generally *2015 Member and Supporting Companies*, ILSI, <https://ilsina.org/wp-content/uploads/2016/01/Members.pdf>; *Membership: Industry Members*, ILSI NORTH AMERICA, <https://ilsina.org/about-us/membership/#Members>; ILSI NORTH AMERICA 2017 ANNUAL REPORT, <http://ilsina.org/wp-content/uploads/sites/6/2018/01/AR2017/index.html#8>.

<sup>55</sup> Herman, *supra* note 7, at 309.

<sup>56</sup> Lesley Fels Tinker, Barbara Old Schneeman et al., *Number of weeks of 24-hour food records needed to estimate nutrient intake during a community-based clinical nutrition trial*, *J. of the Acad. of Nutrition and Dietetics*, Vol. 93, Issue 3, March 1993, 332–333, <https://www.sciencedirect.com/science/article/pii/S00282239915647?via%3Dihub#bibliography.0010>.

<sup>57</sup> Herman, *supra* note 7, at 309.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Institute of Medicine (US) and National Research Council (US) Committee on the Framework for Evaluating the Safety of Dietary Supplements. *Proposed Framework for Evaluating the Safety of Dietary Supplements: For Comment. Appendix F, Biographical Sketches of Committee Members*, Washington (DC): National Academies Press (US); 2002., <https://www.ncbi.nlm.nih.gov/books/NBK220858/>.

<sup>61</sup> *Trump's ag, trade chiefs take the Hill*, POLITICO, <https://www.politico.com/newsletters/morning-agriculture/2019/02/25/trumps-ag-trade-chiefs-take-the-hill-522434>.

<sup>62</sup> Institute of Medicine (US) Committee on Nutrition Standards for National School Lunch and Breakfast Programs; Stallings VA, West Suitor C, Taylor CL, editors. *School Meals: Building Blocks for Healthy Children., Appendix B, Biographical Sketches of*

for Enfamil infant formula.<sup>63</sup> Dr. Kleinman received an honorarium from Mead for chairing the Mead Johnson Iron Infant Nutrition Panel, (which he described as a “fruitful partnership”) and was the author of two Mead-funded studies.<sup>64</sup> He was the co-chair of two Nestle Nutrition Symposia.<sup>65</sup> He has further financial ties to General Mills, Ocean Spray and the Alliance for Potato Research and Education.<sup>66</sup> He also served on the board of trustees of the International Life Sciences Research Foundation, the grant-making arm of a food industry group whose member companies include Coca-Cola, Dow Agrosiences/Dow Chemical, General Mills, Hershey Foods, Kellogg, Kraft, McDonald’s, Merck & Co., Monsanto, Nestlé, PepsiCo, Pfizer and Procter & Gamble.<sup>67</sup> Authored 2008 study funded, in part, by the Juice Products Association.<sup>68</sup>

2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Jamy Ard, MD<sup>69</sup> has served, since 2009, as the Medical Director for Nestlé’s Optifast, a food-replacement supplement.<sup>70</sup> Dr. Ard serves on Nestlé’s advisory board and received \$431,883 from Nestlé to study Optifast.<sup>71</sup> Dr. Ard has also served on advisory boards of pharmaceutical companies such as Arena Pharmaceuticals, Novo Nordisk, Japanese global giant Eisai, and Vivus, which makes the weight-loss drug Qsymia.<sup>72</sup>

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*Committee Members*, Washington (DC): National Academies Press (US); 2010.  
<https://www.ncbi.nlm.nih.gov/books/NBK219992/>.

<sup>63</sup> Rebecca Gale, *Exclusive Investigative Report: Harvard’s Pediatric Nutrition Star Comes Under Scrutiny for Conflicts of Interest*, December 18, 2018, <https://womensenews.org/2018/12/exclusive-investigative-report-harvards-pediatric-nutrition-star-comes-under-scrutiny-for-conflicts-of-interest/>.

<sup>64</sup> Ronald E. Kleinman, MD, *Introduction: Recommended Iron Levels for Nutritional Formulas for Infants*, *The Journal of Pediatrics* Volume 167, Issue 4, Supplement, Oct. 2015, S1–S2, <https://www.sciencedirect.com/science/article/pii/S0022347615007349?via%3Dihub>; Ronald E. Kleinman, et al, *Timing of the Introduction of Complementary Foods in Infancy: A Randomized Controlled Trial*, [https://pediatrics.aappublications.org/content/130/6/1038?sso=1&sso\\_redirect\\_count=1&nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3a+No+local+token](https://pediatrics.aappublications.org/content/130/6/1038?sso=1&sso_redirect_count=1&nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3a+No+local+token).

<sup>65</sup> Gale, *supra* note 63.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> TA Nicklas, CE O’Neil, R Kleinman, *Association Between 100% Juice Consumption and Nutrient Intake and Weight of Children Aged 2 to 11 Years*, *Arch Pediatr Adolesc Med.* 2008;162(6):557–565. doi:10.1001/archpedi.162.6.557, <https://jamanetwork.com/journals/jamapediatrics/fullarticle/379612>.

<sup>69</sup> *The 2020 Dietary Guidelines Committee: Who Will Stand Up for Rigorous Science Over Industry Interests and—really?—Religion?* NUTRITION COALITION, Mar. 6, 2019, <https://www.nutritioncoalition.us/news/2020-dietary-guidelines-committee>.

<sup>70</sup> *Nestlé HealthCare Nutrition Names New OPTIFAST Medical Director*, Apr. 16, 2009, <http://www.prweb.com/releases/2009/04/prweb2324764.htm>; NUTRITION COALITION, *supra* note 70.

<sup>71</sup> Jamy Ard, et al, *Effectiveness of a Total Meal Replacement Program (OPTIFAST Program) on Weight Loss: Results from the OPTIWIN Study*, Nov. 13, 2018, <https://onlinelibrary.wiley.com/doi/abs/10.1002/oby.22303>.

<sup>72</sup> NUTRITION COALITION, *supra* note 69.

2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Regan Bailey, PhD, MPH, RD was an advisor to the International Life Sciences Institute-North America (ILSI) (an industry-sponsored research organization<sup>73</sup>) both on the Fortification Committee and the Food, Nutrition & Safety Program.<sup>74</sup> Dr. Bailey was also Treasurer for Dannon Nutrition Alumni Association (2012–2015).<sup>75</sup>

In addition, 2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Lydia Bazzano, MD PhD was nominated to the USDA Advisory Committee by Atkins Nutritional.<sup>76</sup> 2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Carol Boushey, PhD, MPH, RD was nominated by National Cattlemen’s Beef Association.<sup>77</sup> 2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Teresa Davis, PhD was a scientific advisor at Riddet Institute<sup>78</sup> (Riddet Institute has long-standing strategic relationship with New Zealand’s largest company, the global dairy nutrition co-operative, Fonterra<sup>79</sup>). Dr. Davis was also Scientific Advisor on ILSI Food, Nutrition & Safety Program.<sup>80</sup> 2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Kathryn Dewey, PhD was the author of Mead-Johnson funded study.<sup>81</sup> 2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Steven Heymsfield, MD was the Global Director of Scientific Affairs for the obesity group at Merck & Co.<sup>82</sup> He was also nominated to the *Dietary Guidelines* Advisory Committee by the American Beverage Association.<sup>83</sup>

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<sup>73</sup> See generally ILSI, *supra* note 54.

<sup>74</sup> Regan Bailey, Ph.D., M.P.H., R.D., *Scientific Consultant (Contractor)*, NATIONAL INSTITUTES OF HEALTH OFFICE OF DIETARY SUPPLEMENTS, [https://ods.od.nih.gov/About/Regan\\_Bailey.aspx](https://ods.od.nih.gov/About/Regan_Bailey.aspx).

<sup>75</sup> Regan Lucas Bailey, Ph.D., M.P.H., R.D., C.P.H., PURDUE UNIVERSITY, DEPARTMENT OF NUTRITION SCIENCE, 12, [https://www.purdue.edu/aging/documents/vita/ReganBailey\\_Academic\\_CV\\_2018.pdf](https://www.purdue.edu/aging/documents/vita/ReganBailey_Academic_CV_2018.pdf).

<sup>76</sup> POLITICO, *supra* note 61.

<sup>77</sup> Colin Woodall, *National Cattlemen’s Beef Association: Support for Nominations to the 2020 Dietary Guidelines Advisory Committee letter*, <https://ancw.wildapricot.org/resources/Documents/NCBA-DGAC-%20Letter%20of%20supportFINAL%5B38654%5D.pdf>; POLITICO, *supra* note 62.

<sup>78</sup> Teresa Davis, LINKEDIN, <https://www.linkedin.com/in/teresa-davis-739a4834/>.

<sup>79</sup> See generally *Industry Programmes*, RIDDET INSTITUTE, <http://www.riddet.ac.nz/industry-programmes/>; *Fonterra and Riddet Institute Announce New Fonterra Chair in Food Material Science*, FOODINGREDIENTSFIRST, <https://www.foodingredientsfirst.com/news/fonterra-and-riddet-institute-announce-new-fonterra-chair-in-food-material-science.html>.

<sup>80</sup> *ILSI North America 2017 Annual Report*, ILSI, <http://ilsina.org/wp-content/uploads/sites/6/2018/01/AR2017/index.html#8>.

<sup>81</sup> Kathryn, G. Dewey, PhD, M. Jane Heinig, PhD, Laurie A. Nommsen-Rivers, MS, RD, *Differences in morbidity between breast-fed and formula-fed infants*, [https://www.jpeds.com/article/S0022-3476\(95\)70395-0/abstract](https://www.jpeds.com/article/S0022-3476(95)70395-0/abstract).

<sup>82</sup> Steven B. Heymsfield, M.D. *New Technologies: Role in Diagnosing and Managing Obesity*, <https://embc.embs.org/2017/keynote-speakers/steven-b-heymsfield/>.

<sup>83</sup> POLITICO, *supra* note 61.

2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Sharon Donovan, PhD, RD was a consultant for Abbott Nutrition, Arla Foods, Mead Johnson (Member of Protein Advisory Board), Pfizer Nutrition (now part of Nestlé<sup>84</sup>).<sup>85</sup> She received the Future Leader Award from ILSI with a \$30,000 grant.<sup>86</sup> She authored a monograph for Mead Johnson Nutritionals.<sup>87</sup> She was a dairy expert for The Dairy Coalition.<sup>88</sup> Dr. Donovan was also a Pillsbury Editorial Review Board Member.<sup>89</sup> As principal investigator, Dr. Donovan received the following: combined \$513,758 grants from Mead Johnson Nutritionals;<sup>90</sup> combined \$499,269 grants from Wyeth-Ayerst Nutritionals (now owned by Nestlé);<sup>91</sup> \$12,000 grant from Illinois Pork Producers;<sup>92</sup> \$84,355 grant from The Solae Company;<sup>93</sup> \$54,500 grant from the Illinois Soybean Association;<sup>94</sup> combined \$391,723 grants from Arla Foods;<sup>95</sup> combined \$1,021,025 in grants from Abbott Nutrition;<sup>96</sup> and \$465,547 grant from Pfizer Nutrition.<sup>97</sup> As co-principal investigator, Dr. Donovan received the following: combined \$145,650 grants from Nestlé Nutrition;<sup>98</sup> combined \$134,038 grants from Mead Johnson;<sup>99</sup> and a \$10,000 grant from the Illinois Soybean Association.<sup>100</sup> She also made presentations for the following: Mead Johnson, Mansanto Corporation, Wyeth-Ayerst Global Pharmaceuticals, Kraft Foods, The Solae Company, Soy Nutrition Institute, Arla Foods, Nestlé.<sup>101</sup>

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<sup>84</sup> See generally Nestlé completes acquisition of Pfizer Nutrition, enhancing its position in global infant nutrition, Dec. 12, 2012, <https://www.nestle.com/media/pressreleases/allpressreleases/pfizer-nutrition-closing>.

<sup>85</sup> CURRICULUM VITAE - Sharon M. Donovan, Ph.D. R.D., 3,

[http://donovan.fshn.illinois.edu/CVs%20and%20Documents/Donovan\\_CV\\_full.pdf](http://donovan.fshn.illinois.edu/CVs%20and%20Documents/Donovan_CV_full.pdf).

<sup>86</sup> *Id.* at 4, 25.

<sup>87</sup> *Id.* at 6.

<sup>88</sup> *Id.* at 39.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 26, 27.

<sup>91</sup> Donovan, *supra* note 85, at 25–26.

<sup>92</sup> *Id.* at 26.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 26, 27.

<sup>96</sup> *Id.*

<sup>97</sup> Donovan, *supra* note 85, at 27.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 28.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 30, 31, 32.

2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Heather Leidy, PhD was nominated to the *Dietary Guidelines* Advisory Committee by the National Cattlemen’s Beef Association.<sup>102</sup> Dr. Leidy obtained research grants from the following: Egg Nutrition Center; Sabra; Roquette; Beef Checkoff; Missouri Soybean Merchandising Council; Kellogg; Solae; Hillshire Brands (subsidiary of Tyson Foods<sup>103</sup>); Pork Checkoff; and General Mills.<sup>104</sup> Dr. Leidy was a member of industry review panels for the following: Egg Nutrition Center; Biofortis-Provident; Hillshire Brands; National Cattlemen’s Beef Association; National Pork Board; Dairy Farmers of Canada; and Alliance for Potato Research & Education.<sup>105</sup> Dr. Leidy was also a Scientific/Medical Advisor for the following: Beachbody, LLC; Milk Pep; Whey Protein Advisory Panel; Sabra; Egg Nutrition Center; and Hillshire Brand Foods.<sup>106</sup> Dr. Leidy was a Nutrition Consultant for: Beachbody, LLC; Kellogg; PepsiCo; Hillshire Brands; General Mills & Yoplait Corporations; and National Cattlemen’s Beef Association.<sup>107</sup> Dr. Leidy was a member of the Speaker Bureau for National Cattlemen’s Beef Association and the National Dairy Council.<sup>108</sup>

2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Elizabeth Mayer-Davis, PhD, RD, was a Consultant for GlaxoSmithKline Inc.<sup>109</sup> She was on the American Diabetes Association<sup>110</sup> Board of Directors and Officer Emeritus.<sup>111</sup> Dr. Mayer-Davis authored a chapter for an ILSI (International Life Sciences Institute) publication.<sup>112</sup> She received a \$24,385 grant from Abbott,<sup>113</sup> a \$20,000 grant from General

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<sup>102</sup> *National Cattlemen’s Beef Association Support for Nominations to the 2020 Dietary Guidelines Advisory Committee*, NATIONAL CATTLEMEN’S BEEF ASSOCIATION, <https://ancw.wildapricot.org/resources/Documents/NCBA-DGAC-%20Letter%20of%20supportFINAL%5B38654%5D.pdf>.

<sup>103</sup> *See generally For Former Shareholder Information*, <https://www.tysonfoods.com/hillshire-brands>.

<sup>104</sup> NATIONAL CATTLEMEN’S BEEF ASSOCIATION, *supra* note 102.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *CURRICULUM VITAE Elizabeth J. Mayer-Davis, MSPH, Ph.D., R.D.*, 3, <https://sph.unc.edu/files/2019/01/1-2-2019-Mayer-Davis-CV.pdf>.

<sup>110</sup> *See generally Corporate Sponsors*, AMERICAN DIABETES ASSOCIATION, <https://www.diabetes.org/pathway/supporters/corporate-sponsors>.

<sup>111</sup> Mayer-Davis, *supra* note 109.

<sup>112</sup> *Id.* at 5.

<sup>113</sup> *Id.* at 69.

Mills, Inc.,<sup>114</sup> and a \$196,365 grant from the American Diabetes Association.<sup>115</sup> She was also a consultant for Sanofi<sup>116</sup> and participated in the Sanofi ThinkTank<sup>117</sup> and the General Mills Speakers' Bureau.<sup>118</sup>

2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Joan Sabaté, DrPH, MD<sup>119</sup> was a member of the Scientific Advisory Board for Paramount Farms.<sup>120</sup> He was also a member of the Scientific Advisory Board for the California Walnut Commission.<sup>121</sup> 2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Linda Van Horn, PhD, RDN, LD received the Dannon Institute Award<sup>122</sup> and an award from the American Diabetes Association<sup>123</sup>.<sup>124</sup> 2020 USDA *Dietary Guidelines* Advisory Committee member Dr. Richard Mattes, PhD, MPH, RD received active research funding from the Almond Board of California, California Walnut Commission, and Ajinomoto Co.<sup>125</sup> He was also a scientific Board Member for ConAgra and the Grain Food Foundation<sup>126</sup> and a Presenter for ConAgra Science Institute's Nutri-Bites®.<sup>127</sup>

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<sup>114</sup> *Id.* at 72.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 75.

<sup>117</sup> Mayer-Davis, *supra* note 109, at 76.

<sup>118</sup> *Id.* at 77.

<sup>119</sup> Although this Comment does not address religious biases, in the interest of full disclosure, Joan Sabaté may have a religious bias. See *The 2020 Dietary Guidelines Committee: Who Will Stand Up for Rigorous Science Over Industry Interests and—really?—Religion?*, NUTRITION COALITION, <https://static1.squarespace.com/static/5a4d5666bff20053c65b7ff2/t/5ca63c73e5e5f0deecd19ee5/1554398324494/nutritioncoalition.us-The+2020+Dietary+Guidelines+Committee+Who+Will+Stand+Up+for+Rigorous+Science+Over+Industry+Interests+%281%29.pdf>.

<sup>120</sup> *Joan Sabaté, MD, DrPH Biography*, PROCON.ORG: PROS AND CONS OF CURRENT ISSUES. RELIABLE. NONPARTISAN. EMPOWERING, <https://vegetarian.procon.org/source-biographies/joan-sabate/>.

<sup>121</sup> *Id.*

<sup>122</sup> *Faculty Profile: Linda V Van Horn, PhD, RD*, NORTHWESTERN MEDICINE FEINBERG SCHOOL OF MEDICINE: DEPARTMENT OF PREVENTATIVE MEDICINE, <https://www.preventivemedicine.northwestern.edu/faculty/profile.html?xid=13194>.

<sup>123</sup> See generally *Corporate Sponsors*, AMERICAN DIABETES ASSOCIATION, <https://www.diabetes.org/pathway/supporters/corporate-sponsors>.

<sup>124</sup> *Final Program 79th Scientific Sessions Abstract Award Recipients*, AMERICAN DIABETES ASSOCIATIONS, 33, [https://professional.diabetes.org/sites/professional.diabetes.org/files/media/79th\\_scientific\\_sessions\\_final\\_program.pdf](https://professional.diabetes.org/sites/professional.diabetes.org/files/media/79th_scientific_sessions_final_program.pdf).

<sup>125</sup> Kelly A Higgins, Robert V Considine, Richard D Mattes, *Aspartame Consumption for 12 Weeks Does Not Affect Glycemia, Appetite, or Body Weight of Healthy, Lean Adults in a Randomized Controlled Trial*, Author notes, <https://academic.oup.com/jn/article/148/4/650/4965932>.

<sup>126</sup> *Id.*

<sup>127</sup> *November 28, 2016 WIC Update: Eating Frequency and Weight Management*, MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES, <https://health.mo.gov/living/families/wic/localagency/updates/2016/november28/>.

Additional 2020 USDA *Dietary Guidelines* Advisory Committee members Timothy Naimi, MD, MPH; Rachel Novotny, PhD, RDN, LD; Linda Snetselaar, PhD, RD; Jamie Stang, PhD, MPH, RD; and Elsie Taveras, MD, MPH have no readily identifiable conflicts of interest.

## **B. Checkoff Programs<sup>128</sup>**

Not only do certain governmental goals and Advisory Committee member biases have the potential to adversely affect public health goals, but federal checkoff programs contribute to the problem as well. Mandatory checkoff programs contribute to governmental bias in creating federal nutrition guidelines. Some people may have never heard of checkoff programs and their effect on American agricultural businesses. In essence, checkoff programs are governmental advertising schemes for specific industries. These advertising schemes are incredibly effective and create considerable business for these industries.

“Checkoff programs, also referred to as research and promotion programs, promote and provide research and information for a particular agricultural commodity without reference to specific producers or brands.”<sup>129</sup> Generally, these are mandatory programs.<sup>130</sup> Each producer in a specific industry must pay an assessment per unit into these governmental checkoff programs.<sup>131</sup> These governmental programs are used to conduct research on the commodity and for marketing and advertising campaigns.<sup>132</sup> “Checkoff programs attempt to improve the market position of the covered commodity by expanding markets, increasing demand, and developing new uses and markets.”<sup>133</sup> These checkoff programs are basically giant governmental marketing campaigns. For example, in 2010 the USDA dairy checkoff program spent \$35 million in a partnership with Domino’s Pizza to boost pizza sales.<sup>134</sup> The dairy checkoff program also worked with McDonalds to launch new McCafé coffees and three new burgers with double the cheese on

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<sup>128</sup> The author does not discuss federal checkoff programs in explicit detail. The next few paragraphs give a brief overview.

<sup>129</sup> *Checkoff Programs*, THE NATIONAL AGRICULTURAL LAW CENTER, <https://nationalaglawcenter.org/research-by-topic/checkoff-programs/>.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Brad Plumer, *USDA program looks to add more slices to your life*, NEW HAVEN REGISTER (February 11, 2014) <https://www.nhregister.com/lifestyle/article/USDA-program-looks-to-add-more-slices-to-your-life-11385589.php>.

them.<sup>135</sup> These checkoff programs have worked remarkably well. Checkoff programs drastically increase the amount of food consumed.<sup>136</sup> Overconsumption of food leads to obesity. And overconsumption of the wrong foods leads to disease. Public health goals, such as reducing the incidence of chronic disease and obesity, are difficult to meet when the government has a substantial interest in increasing the demand for food as seen through its checkoff programs.

### C. Subsidies<sup>137</sup>

Common sense tells us that it is imprudent to sell a product for less than it costs to produce. Even more imprudent is to substantially increase production of that product. Yet, this is exactly what the meat and dairy industries do. Food prices for products derived from animals in the United States have been remarkably resistant to the forces of inflation over the past century, while other consumer goods continue to rise in price.<sup>138</sup> How can these industries produce goods that cost a substantial amount of money at selling prices less than cost and still survive? Government subsidies. For example, hog farmers spend about eight dollars more in cost for the animal than the pig yields when sold.<sup>139</sup> Additionally, corporate beef producers spend about \$20 to \$90 more per animal than the animal yields when sold.<sup>140</sup> Annually, American taxpayers pay about \$38 billion to subsidize the meat, dairy, eggs, and fish industries.<sup>141</sup> This number is astounding. The government actually encourages the meat and dairy industries to use this reverse economic model. This economic model does not benefit consumers. While the low prices of meat and dairy may seem to benefit consumers, the consumers pay these extra costs through their tax dollars. If a person doesn't eat fish, then they still have to pay for costs associated with the fish industry because this industry is so heavily subsidized. This economic model primarily benefits corporations and politicians who are looking to get elected (or stay elected) and need money and big business constituents to do so.

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<sup>135</sup> *Id.*

<sup>136</sup> Uncle Sam Says: Eat More Meat!, MEATONOMICS. <https://meatonomics.com/tag/dairy/>.

<sup>137</sup> The author does not discuss federal subsidies in explicit detail. The next few paragraphs give a brief overview.

<sup>138</sup> Simon, David Robinson, MEATONOMICS 73 (2013).

<sup>139</sup> *Id.* at xv.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at xv.

Further, while the *Dietary Guidelines* attempt to increase the amount of fruits and vegetables and limit meat and dairy consumption for the prevention of chronic disease, the government heavily subsidizes the meat and dairy industry while “[f]armers who grow fruits, vegetables and tree nuts, on the other hand, receive no regular direct subsidies.”<sup>142</sup> Originally, the subsidies grew out of economic hardships experienced by farmers in the 1930s and were enacted to protect the food supply and encourage farmers to continue to produce food. However, these subsidies are no longer relevant. The increase in food production because of the subsidies supplies the demand created by the federal checkoff programs and other advertising schemes. Food industry corporations have fiercely protected these subsidies. The increase in not only food consumption as a whole but also disease-causing foods because of subsidies to meat and dairy industries directly flies in the face of public health goals.<sup>143</sup>

#### **D. Lobbying, Public Relations, Lawsuits, and Campaign Contributions**

Furthermore, to protect food industry subsidies, checkoff programs and governmental interests in particular food industries, lobbying, public relations, lawsuits, and campaign contributions<sup>144</sup> play significant roles. Effects of lobbying, public relations, and campaign contributions blur the bright lines between sound nutritional advice and the interests of constituents and other financial or social relationships. For food lobbyists in particular, their primary goals<sup>145</sup> are to make sure that the government does not do anything to impede a particular food industry’s business and to ensure a positive sales environment for the particular food. This Comment does not go into further detail discussing these protection mechanisms.

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<sup>142</sup> Arthur Allen, *U.S. Touts Fruit and Vegetables While Subsidizing Animals That Become Meat*, THE WASHINGTON POST (October 3, 2011), [https://www.washingtonpost.com/national/health-science/us-touts-fruit-and-vegetables-while-subsidizing-animals-that-become-meat/2011/08/22/gIQAATFG5IL\\_story.html](https://www.washingtonpost.com/national/health-science/us-touts-fruit-and-vegetables-while-subsidizing-animals-that-become-meat/2011/08/22/gIQAATFG5IL_story.html).

<sup>143</sup> Nestle, *supra* note 1, at 142–45.

<sup>144</sup> *How Big Food and Agricultural Special Interests Wield Influence in Congress and Undermine Public Health*, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, <https://cspinet.org/sites/default/files/attachment/riders-dga-campaign-analysis-report.pdf>.

<sup>145</sup> Dan Flynn, *Slicing Into Food Industry’s \$40 Million Lobbying Efforts*, FOOD SAFETY NEWS (March 3, 2012), [https://www.foodsafetynews.com/2012/03/slicing-into-the-food-industrys-40-million-worth-of-lobbying/#.WIuj1\\_JkvfY](https://www.foodsafetynews.com/2012/03/slicing-into-the-food-industrys-40-million-worth-of-lobbying/#.WIuj1_JkvfY).

## V. EFFECTS IN ADDITION TO THE NATIONAL HEALTH CRISIS CAUSED BY CONFLICTS OF INTEREST

### A. Abuses and Cruelty to Animals

The government has contributed to the public health crisis by enacting legislation that protects the meat and dairy industries that engage in cruelty to animals or hazardous conditions from being exposed to the public by individual means. States have enacted legislation that criminalize any videotaping of abuses and unsafe production practices.<sup>146</sup> These regulations cause substantial impact on undercover work exposing health violations and animal cruelty. Regardless of one's stance on what constitutes sound nutritional advice<sup>147</sup> or how humans should treat animals, health violations are a concern. The photos and videos that surface about abuses and health violations in the food industry can bring these abuses to light and have a positive effect in educating the public, causing industries to modify their practices, or positive legislation to be introduced. However, by prohibiting undercover work in these laws, the industries generally do not have accountability to the public other than inspectors.<sup>148</sup>

### B. National School Lunch Program and School Breakfast Programs

Additionally, children are drastically impacted by the *Dietary Guidelines* and food industry propaganda. Most public schools across the country offer students access to breakfast and lunch through

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<sup>146</sup> See N.D. Cent. Code § 12.1-21.1-02(6); Kan. Stat. Ann. § 47-1827(c)(4); Mont. Code Ann. § 81-30-103(2)(e); Mo. Ann. Stat. § 578.407(3); IA ST § 717A.3A(1)(a).

<sup>147</sup> General perceptions about sound nutritional advice are inevitably reduced to bias. Many people base what they constitute as “healthful foods” around their personal preferences, convenience, and/or what they find online on a non-scientific, biased website. A person may even take a step further and request information from her doctor. However, medical schools provide minimal nutrition education (see Kelly M. Adams, W. Scott Butsch, and Martin Kohlmeier, *The State of Nutrition Education at US Medical Schools*, Journal of Biomedical Education, vol. 2015, Article ID 357627, 7 pages, 2015.). See also Caldwell B. Esselstyn, *A plant-based diet and coronary artery disease: a mandate for effective therapy*, JOURNAL OF GERIATRIC CARDIOLOGY (2017), [http://www.jgc301.com/ch/reader/create\\_pdf.aspx?file\\_no=S\\_20170301008&flag=1](http://www.jgc301.com/ch/reader/create_pdf.aspx?file_no=S_20170301008&flag=1).

Science rarely has a fundamental basis in the average person's knowledge of what constitutes a healthful food. The following resources may be helpful to learn more about the basics of nutrition science from an objective, scientific perspective: See generally T. Colin Campbell, Ph.D., *THE CHINA STUDY* (2d ed. 2006); <https://nutritionfacts.org/>; FORKS OVER KNIVES (Monica Beach Media 2011); *WHAT THE HEALTH* (A.U.M. Films & Media 2017). Nutrition science is not ephemeral as many people think. It has been largely consistent.

<sup>148</sup> However, meat inspectors may be ineffective. See generally Martha Rosenberg, *Meat Inspectors Speak Out—But The Government Doesn't Want to Hear Them* (July 1, 2015), <https://foodrevolution.org/blog/meat-inspectors-speak-out-but-government-doesnt-want-to-hear-them/>; *This is why the meat YOU eat could contain tumours or cysts: TWO experienced butchers have admitted to selling meat that has been riddled with tumours*, (Updated February 26, 2018), <https://www.dailystar.co.uk/health/cancer-meat-what-causes-bowel-17051599>.

federal school meal programs<sup>149</sup> such as the National School Lunch Program<sup>150</sup> and the School Breakfast Program.<sup>151</sup> The USDA and state agencies administer these programs by reimbursing schools that provide meals to students. The requirements of these meals are based upon the USDA *Dietary Guidelines*.<sup>152</sup> In 2016, 31.8 million children were served meals through these programs. In the fiscal year 2018, under the federal school meal programs, schools served over 4.8 billion lunches to children nationwide.<sup>153</sup> Food industry marketers have long known that children are easily influenced, and that habits and preferences form young. If a company can get a child hooked on its product, the child will likely maintain that preference throughout adulthood. Because federal school meal programs are required to meet the recommendations of the USDA *Dietary Guidelines*, the food industry has a substantial interest in the USDA *Dietary Guidelines*. Unfortunately, the interest in promoting industry economic success has drastically impacted the *Dietary Guidelines*' effectiveness and impartiality. Consequently, the stated goal of the USDA to promote economic success of the agriculture industry and the conflicts of interest within the *Dietary Guidelines* Advisory Committee are to the detriment of the health of American children.

## VI. JUDICIAL ACTION

The past, present, and future implications of conflicts of interest specifically within the USDA *Dietary Guidelines* Advisory Committee cannot be ignored. The implications on American health are vast. Adequate accountability is necessary. Agency law as a whole is devoid of adequate remedies to hold influential decision-makers accountable. This Comment does not address the inadequacies of agency law as a whole. Rather, the narrow focus is on the inadequacies of the USDA in regard to conflicts of interest. Unfortunately, no adequate judicial remedy is currently available to ameliorate the actual and apparent

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<sup>149</sup> 42 U.S.C.A. § 1758.

<sup>150</sup> 7 C.F.R. § 210.1–33.

<sup>151</sup> 7 C.F.R. § 220.1–23.

<sup>152</sup> *Nutrition Standards in the National School Lunch and School Breakfast*, USDA, <https://www.govinfo.gov/content/pkg/FR-2012-01-26/pdf/2012-1010.pdf>.

<sup>153</sup> *The National School Lunch Program*, USDA, <https://fns-prod.azureedge.net/sites/default/files/resource-files/NSLPPFactSheet.pdf>.

conflicts of interest seen within the USDA as no “meaningful standard” has been articulated. Consider *Physicians Committee for Responsible Medicine v. Vilsack*.<sup>154</sup>

Physicians Committee for Responsible Medicine (PCRM) is a national non-profit public health organization that advocates for preventative medicine through proper nutrition.<sup>155</sup> PCRM is a leading advocate for accountability in nutrition education and policy. In a 2016 case, PCRM sued the USDA and the U.S. Department of Health & Human Services (HHS) alleging that the USDA and the HHS failed to “maintain” provisions to guard against “special interests” from “inappropriately influencing” the 2015 USDA Dietary Guidelines Advisory Committee (DGAC).<sup>156</sup> More specifically, the presence on the DGAC of scientists who had received American Egg Board or Egg Nutrition Center funding compromised the advisory body’s analysis and recommendations to the USDA and HHS.<sup>157</sup> PCRM’s concern was that the 2015 *Dietary Guidelines* changed the government’s long-standing nutritional advice concerning dietary cholesterol.<sup>158</sup>

The court found that because the relevant law provided “no meaningful standard” by which the court could judge the agencies’ exercise of discretion, the question was non-justiciable.<sup>159</sup> The court did not determine whether there were any conflicts of interest because there was no standard available by which to judge appropriate versus inappropriate influences on Advisory Committee members’ decisions. The governing law includes the Federal Advisory Committee Act (FACA) and the Administrative Procedure Act (APA).

#### **A. Federal Advisory Committee Act**

Among other things, the Federal Advisory Committee Act (FACA) requires that, in “establishing, or authorizing the establishment of any advisory committee,” Congress must create “appropriate provisions

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<sup>154</sup> *Physicians Comm. for Responsible Med. v. Vilsack*, No. 16-cv-00069-LB, 2016 U.S. Dist. LEXIS 141489, 2016 WL 5930585 (N.D. Cal. Oct. 12, 2016).

<sup>155</sup> *Id.* at 5.

<sup>156</sup> *Id.* at 1.

<sup>157</sup> *Id.* at 5.

<sup>158</sup> *Id.* at 4.

<sup>159</sup> *Id.* at 2.

to assure [sic] that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment . . . ."<sup>160</sup> This mandate binds executive departments as well.<sup>161</sup> However, "FACA does not define what constitutes *inappropriate influence* or explain how courts are to discern such influence."<sup>162</sup> In the case of the USDA Advisory Committee, one could argue that a member was "inappropriately influenced" by their loyalty or affiliations to outside interests. The argument itself is not unreasonable.

## **B. Administrative Procedure Act**

The Administrative Procedure Act (APA) "embodies a 'basic presumption of judicial review.'"<sup>163</sup> Basically, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."<sup>164</sup> Thus, "agency actions are generally reviewable under federal question jurisdiction, pursuant to 28 U.S.C. § 1331."<sup>165</sup>

However, there are limitations. The APA "withdraws jurisdiction to review agency decisions that are 'committed to agency discretion by law.'"<sup>166</sup> "The Supreme Court has held that this provision [withdrawing jurisdiction] applies . . . where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion . . . ."<sup>167</sup> In essence, there is "no law [for

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<sup>160</sup> 5 U.S.C. app. 2 § 5(b)(3). *Physicians Comm. for Responsible Med. v. Vilsack*, No. 16-cv-00069-LB, 2016 U.S. Dist. LEXIS 141489, 2016 WL 5930585 at 6–7 (N.D. Cal. Oct. 12, 2016).

<sup>161</sup> *Id.* at 7.

<sup>162</sup> *Id.* (emphasis added). See *Ctr. for Policy Analysis on Trade & Health v. Office of the United States Trade Representative*, 540 F.3d 940, 944 (9th Cir. 2008).

<sup>163</sup> *Physicians Comm. for Responsible Med. v. Vilsack*, No. 16-cv-00069-LB, 2016 U.S. Dist. LEXIS 141489, at \*7 (N.D. Cal. Oct. 12, 2016) (quoting *Ctr. for Policy Analysis on Trade & Health v. Office of the United States Trade Representative*, 540 F.3d 940, 944 (9th Cir. 2008), quoting *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000) (quoting in turn *Lincoln v. Vigil*, 508 U.S. 182, 190, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993))).

<sup>164</sup> 5 U.S.C.S. § 702.

<sup>165</sup> 28 U.S.C. 1331. *Physicians Comm. for Responsible Med. v. Vilsack*, No. 16-cv-00069-LB, 2016 U.S. Dist. LEXIS 141489, at \*7 (N.D. Cal. Oct. 12, 2016) (quoting *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 687 (9th Cir. 2003) (citing *Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977))).

<sup>166</sup> *Id.* at \*7 (quoting *Spencer Enterprises*, 345 F.3d at 688 (quoting 5 U.S.C. § 701(a)(2))).

<sup>167</sup> *Id.* at \*7–8 (quoting *Spencer Enterprises*, 345 F.3d at 688 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985))).

the court] to apply” in such cases, so that the challenged action “is absolutely ‘committed’ to the agency’s judgment.”<sup>168</sup> “This “very narrow exception” to judicial review should “rare[ly]” apply.”<sup>169</sup> Thus, in order for a court to review agency decisions (such to ensure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest) a “meaningful standard” must exist.

### C. Physicians Committee for Responsible Medicine Court’s Analysis

#### 1. Federal Advisory Committee Act

Since Congress failed to give any guidance under FACA § 5(b)(3) as to what constitutes an inappropriate influence,<sup>170</sup> and the legislative history likewise gives no indication as to where to draw the line between inappropriate and appropriate influence,<sup>171</sup> the issue of whether there is an inappropriate influence is not justiciable despite legislative history that recognizes the problem of special interests influencing advisory committees.<sup>172</sup> Inappropriate influences may abound and do abound in many different federal agencies. However, with a hole in the analysis—the lack of a standard to determine appropriate versus inappropriate influence—the issue cannot even make it to the courts. Thus, lack of accountability continues to be pervasive.

#### 2. National Nutrition Monitoring and Related Research Act

The Nutrition Act also does not contain a decisional standard.<sup>173</sup> The section that does address the *Dietary Guidelines* does not mention a standard for measuring inappropriate influence or even the existence of an Advisory Committee.<sup>174</sup> The Nutrition Act directed the U.S. President to establish an entirely different

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<sup>168</sup> *Id.* at \*8 (citing *CPATH*, 540 F.3d at 944 (citing *Heckler*, 470 U.S. at 830)).

<sup>169</sup> *Id.* See, e.g., *CPATH*, 540 F.3d at 944 (“narrow”); *Heckler*, 470 U.S. at 830 (“rare”).

<sup>170</sup> 5 U.S.C.A. § APP. 2 § 5; *Physicians Comm. for Responsible Med. v. Vilsack*, No. 16-cv-00069-LB, 2016 U.S. Dist. LEXIS 141489, at \*10 (N.D. Cal. Oct. 12, 2016) (citing *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1231 (10th Cir. 2004)).

<sup>171</sup> *Physicians Comm. for Responsible Med. v. Vilsack*, No. 16-cv-00069-LB, 2016 U.S. Dist. LEXIS 141489, at \*10 (citing *CPATH*, 540 F.3d at 942–43 (discussing legislative history); *Wenker*, 353 F.3d at 1228 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984))).

<sup>172</sup> *Id.* (citing H.R. Rep. No. 92-1017 (1972), as reprinted in 1972 U.S.C.C.A.N. 3491, 3496 (1972) (recognizing “danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees”); H.R. Conf. Rep. No. 92-1403 (1972), as reprinted in 1972 U.S.C.C.A.N. 3508.)

<sup>173</sup> *Id.* See generally 7 U.S.C. §§ 5301-42.

<sup>174</sup> 7 U.S.C. § 5341.

advisory committee for the act's other purposes, and even that did not establish a standard for measuring inappropriate influence.<sup>175</sup>

### 3. *General Advisory-Council Statute*

The *Dietary Guidelines Advisory Committee* was not formed under the Nutrition Act, it was formed under 42 U.S.C. § 217a which is a general statute that authorizes the HHS to “appoint such advisory councils or committees” as it “deems desirable.”<sup>176</sup> Nothing in the statute indicates how to compose the Advisory Committee, nor does the statute address the issue of inappropriate influence.<sup>177</sup> The only bump in the road in determining who will be on the Advisory Committee is that Congress must “create appropriate provisions to assure [sic] that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee’s independent judgment . . . .”<sup>178</sup> But how is one to make sure this provision is adequately considered? Unfortunately, without the “meaningful standard,” the court steps back with its hands up and refuses to adjudicate.

Without addressing other agency law concerns, each *Dietary Guidelines Advisory Committee* member should be accountable for conflicts of interest. As addressed in this Comment, many members of the past and present Advisory Committee members have had substantial conflicts of interest. The only way to remedy the situation is to enact new legislation that establishes a guideline for assessing whether a Committee member has such substantial conflicts of interest in his decision making such that she cannot be objective. In the words of the court, a “meaningful standard” is needed for the court to assess whether influence on an advisory committee member is “inappropriate.”<sup>179</sup>

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<sup>175</sup> 7 U.S.C. § 5331-2.

<sup>176</sup> 42 U.S.C. § 217a. *Physicians Comm. for Responsible Med. v. Vilsack*, No. 16-cv-00069-LB, 2016 U.S. Dist. LEXIS 141489, at \*11.

<sup>177</sup> *Id.*

<sup>178</sup> 5 U.S.C. app. 2 § 5(b)(3). *Physicians Comm. for Responsible Med. v. Vilsack*, No. 16-cv-00069-LB, 2016 U.S. Dist. LEXIS 141489, 2016 WL 5930585 at 6–7 (N.D. Cal. Oct. 12, 2016).

<sup>179</sup> See generally *id.*

## VII. SOLUTIONS TO MINIMIZE THE ADVERSE EFFECTS OF THE CONFLICTS OF INTEREST

### A. USDA Should Get Out of the Nutritional Recommendation Business

The USDA should get out of the nutritional recommendation business. The goals of the USDA of promoting and growing agricultural commodities and the meat and dairy industries are antithetical to the goals of promoting public health and reversion and prevention of chronic disease. A new agency should be created to solely focus on nutritional recommendations to the public and policies for food programs throughout the United States. Or, in the alternative, a different existing governmental agency should take over the responsibility of the *Dietary Guidelines* such as the Centers for Disease Control and Prevention (CDC). As the nation's health protection agency,<sup>180</sup> the CDC is much better equipped to be in charge of the *Dietary Guidelines* than an economy-focused agency. The CDC already has the experts and resources that are utilized for disease prevention. The USDA is less equipped. However, although shifting responsibility for the *Dietary Guidelines* to another agency is necessary and will hopefully alleviate the inherent goal conflicts, conflicts of interest could still develop within the Advisory Committee members themselves. Thus, steps must be taken to protect against those conflicts.

### B. Advisory Committee Members Should Not Only Be Required To Disclose All Actual Or Apparent Conflicts Of Interest Regardless Of Materiality, But Should Be Prevented From Serving On The Advisory Committee Having Conflicts That May Constitute Actual Or Apparent Inappropriate Influence.

There are many situations outside the USDA *Dietary Guidelines* Advisory Committee that face conflict of interest concerns analogous to those discussed in this Comment. Consider corporate governance and attorney conflicts of interest. In contrast to agency law, a "meaningful standard" has been enunciated for these areas. A "meaningful standard" can be extracted from corporate law. In corporate law, it is important for a director or officer to act in the best interests of the corporation. Thus, laws have been enacted to protect against breaches of the duty of loyalty that directors and officers owe the corporation.

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<sup>180</sup> *Mission, Role and Pledge*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/about/organization/mission.htm>.

One type of breach of the duty of loyalty comes in the form of a conflict of interest transaction. As defined by the Model Business Corporation Act (MBCA) 8.60, a

“Director’s conflicting interest transaction” means a transaction effected or proposed to be effected by the corporation (or by an entity controlled by the corporation)

- (i) to which, at the relevant time, the director is a party;
- (ii) respecting which, at the relevant time, the director had knowledge and a material financial interest known to the director; or
- (iii) respecting which, at the relevant time, the director knew that a related person was a party or had a material financial interest.<sup>181</sup>

Similarly, to protect against conflicts of interest within the legal practice, ethical rules have been developed to help protect clients and the public. For example, according to the American Bar Association Model Rules of Professional Conduct 1.7,

[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.<sup>182</sup>

These safeguards were put in place to protect against actual or apparent conflicts of interest. Current laws and policies relating to conflicts of interest in the Advisory Committee are inadequate to protect the public from possible biased decisions that have substantial effects on public health. Analogous policies can be reasonably applied to the Advisory Committee to protect the public. Steps must be taken to minimize the detrimental effects of possible biased decisions.

Primarily, the “meaningful standard” that the court in *Physicians Committee for Responsible Medicine v. Vilsack*<sup>183</sup> found to be non-existent, should be articulated as to allow judicial relief. The USDA

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<sup>181</sup> MBCA § 8.60.

<sup>182</sup> MODEL RULES OF PROF’L CONDUCT r. 1.7 (AM. BAR ASS’N 2010).

<sup>183</sup> See generally 5 U.S.C.A. § APP. 2 § 5 *Physicians Comm. for Responsible Med. v. Vilsack*, No. 16-cv-00069-LB, 2016 U.S. Dist. LEXIS 141489, at \*10 (N.D. Cal. Oct. 12, 2016) (citing *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1231 (10th Cir. 2004)).

has done an inadequate job in preventing the conflicts based on current law. A possible “meaningful standard” could be something like this: “inappropriate influence is defined as any relationship that may actually or apparently impair the objectivity of an Advisory Committee member’s judgment.” This simple definition would allow for not only public confidence in objective decision making by the Advisory Committee members, but also actual objective decision making and review of the latest scientific evidence. It would also create that “meaningful standard” that the court needed to adjudicate.

Regarding potential concerns about the availability of conflict-free experts who are equally or more qualified than the chosen Advisory Committee members, reasonably thorough searches have been found in other agencies to identify equally qualified individuals that had fewer or zero conflicts.<sup>184</sup> Additionally, of course, all possible conflicts of interest cannot possibly be uncovered and appropriately weighed in decision-making. Complete eradication of all conflicts of interest is both impractical and impossible. However, a judicial standard can and must be enacted to ensure more accountability in agency law—and, more specifically, the *Dietary Guidelines* Advisory Committee—in regard to actual and apparent conflicts of interest.

### **C. Impact On Adults Of Changes To Guidelines**

Many may think that the *Dietary Guidelines* are not that important and don’t really affect Americans—after all, food choices are just that: choices. However, the *Guidelines* can be very effective if the government changed its approach from substantial economic promotion to substantial public health promotion. People do have choices, but the government is largely influencing American choices—such as advertising through checkoff programs. If the government is going to influence American decisions, it makes sense to advise in the best interests of the American people.

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<sup>184</sup> Herman, *supra* note 7, at 308 (referencing *Measuring Conflicts Of Interest And Expertise On FDA Advisory Committees*, FOOD AND DRUG ADMINISTRATION, 7-1 (2007), [<https://www.fda.gov/media/76883/download>]).

Finland is an excellent example of positive government influence in the food industry and regulations.<sup>185</sup> For example, in the 1970s, Finland had the highest rates of heart disease in men in the world and very low life expectancy because of non-communicable diseases.<sup>186</sup> To address this problem, the country radically changed its approach and policies to diet and lifestyle in recognition these problems.<sup>187</sup> Overall, the country significantly reduced its meat and dairy consumption and increased its fruit and vegetable intake.<sup>188</sup> As expected, dairy farmers and other industries suffered. In response, the government used programs to help these businesses. For example, the government was largely successful in implementing programs to help dairy farmers transition to berry farming.<sup>189</sup> As a result of government and non-profit efforts in encouraging and educating the citizens,

[f]rom 1969 and 1995, for Finnish men, the mortality rate from CVDs [cardiovascular disease] fell 59.7 percent, the mortality rate from heart disease fell 62.4 percent, and the mortality rate from cancer fell 39.9 percent.<sup>190</sup> For women, the mortality rate from CVDs fell 68.3 percent, the mortality rate from heart disease fell 65.9 percent, and the mortality rate from cancer fell 15.6 percent.<sup>191</sup> As a result, life expectancy for men rose 6.4 years, from 66.4 to 72.8, and life expectancy for women rose 5.6 years, from 74.6 to 80.2.<sup>192</sup>

These results are astounding. Through diet and lifestyle changes, a community was able to increase their life expectancy and reduce their mortality rates from non-communicable diseases.<sup>193</sup> Similarly, communities throughout the United States can be affected by positive governmental changes.

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<sup>185</sup> Puska Pekka et al., *Influencing Public Nutrition for Non-Communicable Disease Prevention: From Community Intervention to National Programme—Experiences from Finland*, 5 PUB. HEALTH NUTR. 245, 246 (2002), [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/79E1D5E9F5CFFBABC9A9EBFEC9A1EBD98/S1368980002000344a.pdf/part\\_iii\\_can\\_we\\_turn\\_back\\_the\\_clock\\_or\\_modify\\_the\\_adverse\\_dynamics\\_programme\\_and\\_policy\\_issues.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/79E1D5E9F5CFFBABC9A9EBFEC9A1EBD98/S1368980002000344a.pdf/part_iii_can_we_turn_back_the_clock_or_modify_the_adverse_dynamics_programme_and_policy_issues.pdf); Puska P, et al., *Changes in premature deaths in Finland: successful longterm prevention of cardiovascular diseases*, Bull. World Health Org. 1998; 76: 419–25, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2305767/pdf/bullwho00004-0101.pdf>.

<sup>186</sup> Puska P, et al., *Changes in premature deaths in Finland: successful longterm prevention of cardiovascular diseases*, Bull. World Health Org. 1998; 76: 419–25, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2305767/pdf/bullwho00004-0101.pdf>.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* Puska Pekka et al., *Influencing Public Nutrition for Non-Communicable Disease Prevention: From Community Intervention to National Programme—Experiences from Finland*, 5 PUB. HEALTH NUTR. 245, 246 (2002).

<sup>190</sup> Herman, *supra* note 7, at 293 (citing Puska et al., *Changes in Premature Deaths in Finland: Successful Long-Term Prevention of Cardiovascular Diseases*, 76 BULL. WORLD HEALTH ORG. 419, 422 (1998)).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

## VIII. CONCLUSION

The health of Americans is at stake, and the USDA *Dietary Guidelines* has largely been ineffective. To actually make the *Dietary Guidelines* effective, steps must be taken to ensure proper interpretation, application, and implementation of the latest scientific evidence. A “meaningful standard” must be created to make sure the law is properly applied and to allow for accountability. The impact on American lives is vast. Changes must be made in the foundational, important group of individuals known as the USDA *Dietary Guidelines* Advisory Committee.