
COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

**Department of Health and Human Services and
the United States Department of Agriculture**

Concerning

**THE SCIENTIFIC REPORT OF THE 2015
DIETARY GUIDELINES ADVISORY COMMITTEE**

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**Re: Comments Concerning the Scientific Report of the 2015 Dietary
Guidelines Advisory Committee**

Dear Mr. Olson and Ms. Tagtow,

Washington Legal Foundation (WLF) appreciates the opportunity to submit these comments regarding the Scientific Report of the 2015 Dietary Guidelines Advisory Committee (DGAC).

I. Interests of WLF

Founded in 1977, Washington Legal Foundation is a public-interest law firm and policy center with supporters throughout the United States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. The intense debate over Americans' food and beverage consumption, and what role, if any, government should play in dietary choices, implicates all of those principles

The space for individual responsibility and personal choice on the nation's dinner plate, WLF believes, is rapidly shrinking, driven by a steady increase in the demonization of certain foods and ingredients, regulations and taxes proposed and adopted in the name of reducing obesity, and lawyer-driven class-action litigation purporting to protect consumers. WLF questions whether these actions are indeed pursued in the interest of

public health, and whether they are diverting attention and resources from effective solutions.

In October 2011, WLF initiated the “Eating Away Our Freedoms” project with the establishment of a dedicated website, www.EatingAwayOurFreedoms.org. The project utilizes each of WLF’s advocacy and educational tools to elevate and balance the debate over a vital American freedom: the ability to choose what we feed ourselves and our children.

Under the auspices of the Eating Away Our Freedoms project, WLF has participated in federal agency policy- and rule-making activities. *See, e.g., In re: Proposed Local Wellness Policy Implementation under the Healthy, Hunger-Free Kids Act of 2010* (Apr. 28, 2014); *In re: Proposed Revision of the Nutrition and Supplemental Facts Label* (Aug. 1, 2014).

WLF has also offered legal analysis and critiqued the ongoing focus and process of the DGAC on its *WLF Legal Pulse* blog and in papers published by WLF’s Legal Studies Division. *See, e.g., Frank and Silverglade, Public Should Scrutinize Federal Dietary Guidelines’ Support for New Regulations, WLF COUNSEL’S ADVISORY*, Feb. 13, 2015.

II. Introduction and Summary of Comments

WLF generally supports the goal Congress set for HHS’s and USDA’s publication of the Dietary Guidelines for Americans (DGA or Dietary Guidelines) in the National Nutrition Monitoring and Related Research Act of 1990 (NNMRA): “Each report shall contain nutritional and dietary information for the public and shall be promoted by each Federal Agency in carrying out a Federal food, nutrition, or health program.”¹ WLF expected that the DGAC would adhere to that limited mission, especially considering that prior DGAs had generally done so and given that the agencies’ chartering statement for the committee stated that its duty was to “take into consideration new scientific evidence and current resource documents, and then develop a report to be submitted to the Secretaries that outlines its science-based recommendations and rationale” for use in the 2015 Dietary Guidelines.²

Regretfully, the Scientific Report of the 2015 Dietary Guidelines Advisory Committee (hereinafter Report or Scientific Report) departs significantly from its statutory mandate, the duties described in its charter, and the actions of its predecessors. This departure will complicate the ability of HHS and USDA to provide clear, useful nutrition guidance for Americans and undermines the scientific integrity of the Dietary Guidelines process.

¹ 7 U.S.C. § 5341(a)(1).

² Dept. of Health and Human Services, *Charter, 2015 Dietary Guidelines Advisory Committee*, Jan. 9, 2013, available at <http://www.health.gov/dietaryguidelines/dgac2015-charter-final.pdf>.

The agencies themselves must bear some responsibility for the DGAC's inclination to, as Secretary Vilsack himself stated, "color outside of the lines"³ in the Report. HHS and USDA empanelled the advisory committee fully aware, one would think, of some of the members' preexisting written and spoken support for "bold,"⁴ government-directed solutions to obesity and overweight. The committee is also homogeneously academic. It did not include representatives of any group that would be directly affected by the DGA. Such lack of diversity of viewpoints and professional backgrounds not only short-changes the public, it places the DGAC at odds with the Federal Advisory Committee Act requirement that the committee's membership be "fairly balanced."

Despite the Report's conclusion that "it is not necessary to eliminate food groups or conform to a single dietary pattern to achieve healthy dietary patterns,"⁵ the DGAC singles out specific nutrients and ingredients, as well as particular products, for scorn. While in past Dietary Guidelines, "fat" or "cholesterol" were the dietary bogeymen, today's appear to be "added sugars," a term which the DGAC references over 300 times in the Report. Lean meats are deemed undesirable, as are energy drinks because of their "high caffeine" level, a term the Report declines to define.

The Report's singling out of components of an overall diet is concerning for a number of reasons. First, nutrition science has never established that the elimination of a single nutrient or food product from Americans' diet will curb obesity. Second, the Report lends credence to public health activists' campaign to label certain foods "good" and "bad" and supports those seeking government regulations on "bad" products. Third, such official government value judgments can stigmatize not only those products' producers, but also those who choose to consume these products, leading to consumer frustration and reflexive rejection of the DGA's intended messages.

As a means of limiting consumption of certain disfavored nutrients, the DGAC advances policy recommendations that, if embraced by HHS and USDA, would exceed Congress's limited mandate for the DGA, explicitly ignore the 1990 law's prohibition against "includ[ing] any rule or regulation issued by a Federal Agency,"⁶ and fail the

³ Tracy, *Vilsack: Dietary Guidelines Are About Health, Not Environment*, WALL ST. J., Mar. 11, 2015 ("[Vilsack] said Wednesday that the advisory committee, with a long leash to consider various aspects of a perfect diet, is like one of his granddaughters who colors outside of the lines. He, on the other hand, was like a younger grandson in preschool. 'The little guy, he's in preschool now, he's trying to learn how to color inside the lines,' Mr. Vilsack said. 'I'm more like my grandson.'")

⁴ Report, pt. B, ch. 2, p. 4; *see also* Bjerga and Bloomfield, *Tax on Sugary Foods Proposed by U.S. Panel to Fight Obesity*, WASH. POST, Feb. 19, 2015, quoting DGAC Chairwoman Barbara Millen ("What we're calling for in the report [is] innovation and bold new action in health care, in public health.")

⁵ Report, pt. B, ch. 2, p. 2.

⁶ National Nutrition Monitoring and Related Research Act of 1990, 7 U.S.C. § 5341(b)(3).

law's "preponderance of the scientific and medical knowledge" test.⁷ The suggested government fiscal and regulatory actions represent unprecedented intrusions into the food and beverage marketplaces, some of which could significantly increase the cost of food choices enjoyed by millions of Americans. If HHS and USDA include these recommendations in the 2015 DGA, federal agencies' reliance on them for rulemaking proposals courts administrative law challenges.

Finally, the DGAC ignores the objections of numerous stakeholders and even a Congressional Directive from the U.S. House of Representatives and includes a chapter in the Report on "sustainability." No federal agency has defined "sustainability" in any context, including as it relates to food production and consumption. The DGAC fails to do so in its Report, and yet it makes specific conclusions and recommendations to advance this amorphous concept. Such recommendations are well outside of the DGAC's mandate, are not supported by a preponderance of the evidence, and, because of the ideologically-charged nature of the larger sustainability debate, threaten to undercut the Guidelines' credibility.

WLF urges the Secretaries of HHS and USDA to issue a 2015 DGA that keeps faith with the statutory mission Congress delegated to it and provides consumers with science-based information that empowers their freedom to choose. The Secretaries should thus steer clear of the Report's focus on the elimination or severe limitation of specific ingredients and food products, and adhere to the total diet approach the Report claims to be advancing. They should also decline the Report's recommendations to include specific regulatory and fiscal policies in a document meant to educate and inform dietary choices. Finally, we trust the Secretaries recognize that federal guidelines on diet are not a proper vehicle for environmental policy, and they will thus avoid any formal references to "sustainability."

III. The Secretaries Must Consider the Makeup of the DGAC and its Lack of Fair Balance when Reviewing the Scientific Report

Throughout the year-long process leading up to the Scientific Report's release, the DGAC received comments from stakeholders criticizing its consideration of government policies as a means of steering consumers toward healthier diets. In addition, the U.S. House of Representatives issued a Congressional Directive expressing concern over the DGAC's "interest in incorporating agriculture production practices and environmental factors" into its report and requiring Secretary Vilsack to include in the Dietary Guidelines only "nutrition and dietary information, not extraneous factors."⁸

⁷ *Id.* at § 5341(a)(2).

⁸ DIVISION A - AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2015, at 29, available at <http://rules.house.gov/sites/republicans.rules.house.gov/files/113-1/PDF/113-HR83sa-ES-A.pdf>.

The DGAC's determination for "bold" action and the policy-oriented nature of its Report should come as no surprise when one considers the makeup of the committee and some of its members' support for an active government role in Americans' dietary choices. Dr. Connie Weaver, a 2005 DGAC member, explained in a conference call with reporters, "They [USDA and HHS] selected members who would think more about policy . . . because few of them were card-carrying nutrition or food scientists and they must have had a particular idea in mind . . . otherwise why would they have chosen them?"⁹ Dr. Roger Clemens of the University of Southern California, a 2010 DGAC member, added, "The flavor [of the committee] was quite evident based on the consultants the DGAC brought on board . . . there was not a balance of presentation. We did not have an adequate amount of agriculture input, nobody on the committee was a food scientist or had been trained in food science, nobody had a background in food law."¹⁰

Another former 2010 DGAC member, Dr. Joanne Slavin of the University of Minnesota, St. Paul, emphasized the negative ramifications of an advisory committee that lacks diversity:

When policy recommendations are developed by committees, such as the DGAC, those committees should be comprised of a balanced and well-rounded set of perspectives and expertise. Ideally a scientific nutrition committee would not only include experts in nutrition, biochemistry, physiology, epidemiology and statistics, but also food science, food production, food policy and behavior. This combination of skills would ensure that the ultimate recommendations adequately reflect our entire food system and food environment.¹¹

Dr. Slavin also criticizes the public health community's opinion that professionals who have been involved with or worked for food businesses are inherently suspect. Such professionals, she argues, offer a unique perspective on how we "learn" about nutrition. Government agencies perceive a conflict of interest if an expert has industry ties but "there seems to be little concern about committee members who are closely linked to

⁹*News Bite: 2015 Dietary Guidelines Advisory Committee Report: What Does it Mean for the Actual Guidelines*, International Food Information Council *Food Insight*, available at <http://www.foodinsight.org/newsletters/news-bite-2015-dietary-guidelines-advisory-committee-report-what-means-for-actual-guidelines#sthash.cfjGUiJaf.dpuf>.

¹⁰ *Id.*

¹¹ Slavin, *The Challenge of Nutrition Policymaking*, 15 NUTRITION J. (Feb. 2015), available at www.nutritionj.com/content/14/1/15, at 6.

professional groups, such as the American Heart Association or other advocacy groups.”¹²

Some DGAC members hold personal views that undoubtedly influenced their work on the DGAC and the DGAC’s work as a whole. One member’s participation in a special interest group’s petition to the Food and Drug Administration on a matter involving “added sugars,” creates at least an appearance of a conflict of interest.

Prior to being named DGAC Committee Vice-Chair, Professor Alice Lichtenstein consistently expressed support for changing dietary habits through government policy. Professor Lichtenstein, for instance, authored a July 2013 editorial in *The Annals of Internal Medicine* praising the purported success of New York City Mayor Michael Bloomberg’s ban on trans fat in city restaurants.¹³ She wrote, “Having a default option takes some of the stress of making healthy choices from the consumer . . . The preliminary findings suggest that New York City’s approach is worth pursuing for this and other nutrition interventions.” She spoke approvingly to CNN about Mayor Bloomberg’s ban on soda and other “sugary” drinks in portions larger than 16 ounces, saying that “soda restriction could have a similar impact” as the trans fat ban.¹⁴

Professor Lichtenstein spoke regretfully about the drink portion-size ban being “blocked by the courts” in an illuminating speech at Boston University’s College of Health on December 4, 2013.¹⁵ During the speech, Professor Lichtenstein praised Mexico for its adoption of an 8% tax on sodas and “junk food” and reproved the food industry for “giving consumers what they demanded,” such as products with large amounts of “added sugars.” She also stated more generally, “And can we implement changes based on public policy? I think we are now beginning to learn how to do it, and I think we need to put more emphasis now on figuring out how to change behavior.”

During her presentation at a Tufts University academic conference, “Obesity in America: Turning it Around,” DGAC Committee member Miriam Nelson encouraged attendees to intensify their focus on the role government health policy could play, remarking, “We have to be looking at this [obesity epidemic] from a perspective way beyond the realm of personal responsibility.”¹⁶ Professor Nelson—holding up a glass of sugar for dramatic effect and utilizing a PowerPoint slide featuring stacks of sugar

¹² *Id.*

¹³ Lichtenstein, *New York City Trans Fat Ban: Improving the Default Option When Purchasing Foods Prepared Outside of the Home*, ANN. INTERN. MED. July 17, 2012; 157: 144-145.

¹⁴ MacMillan, *NYC Fat Ban Paying Off*, CNN Health.com, July 16, 2012, available at <http://www.cnn.com/2012/07/16/health/nyc-fat-ban-paying-off>.

¹⁵ Intersection of Nutrition Science and Policy, Current Challenges, available at <https://www.youtube.com/watch?v=7fFNTye7ejo&feature=youtu.be>.

¹⁶ Nelson, “Obesity in America: Turning it Around,” Tufts University Back to the Future Academic Conference, Nov. 27, 2012, available at <https://www.youtube.com/watch?v=hHYTpRUpRVM>.

cubes—stated, “There’s a huge amount of added sugar that has infiltrated our diet.” She also addressed the environmental sustainability issue, adding, “Unhealthy foods that we are producing have a much larger carbon footprint . . . we are actually using a billion more gallons of gas a year because people are heavier.”¹⁷

Committee member Mary Story has written about numerous issues the DGAC considers and addresses in the Report. For instance, she co-authored articles (some of which were released during her tenure on the DGAC) on energy drink consumption¹⁸; the impact of food promotion on children’s diets¹⁹; public school food and beverage policies²⁰; the need for standardized portion sizes in restaurants²¹; and the reduction of childhood obesity through federal policy.²² Dr. Story also serves as Director of the Robert Wood Johnson Foundation national program office of Health Eating Research. Among the program’s research priorities for childhood obesity are “reducing consumption of sugary beverages” and “protecting children from unhealthy food and beverage marketing.”²³

Committee member Frank Hu, in commenting on the results of an observational study²⁴ he co-authored, publicly urged Americans to abandon even moderate consumption of red meat in favor of “a plant-based diet.”²⁵ Dr. Hu served on the DGAC

¹⁷ *Ibid.*

¹⁸ Larson, Laska, Story, and Neumark-Sztainer, *Sports and Energy Drink Consumption among a Population-based Sample of Young Adults*, PUBLIC HEALTH NUTRITION, in press; Larson, DeWolfe, Story, and Neumark-Sztainer, *Adolescent Consumption of Sports and Energy Drinks: Linkages to Higher Physical Activity, Unhealthy Beverage Patterns, Cigarette Smoking, and Screen Media Use*, J. OF NUTRITION EDUCATION AND BEHAVIOR.46:181-187 (2014).

¹⁹ Kraak and Story, *Influence of Food Companies’ Brand Mascots and Entertainment Companies’ Cartoon Media Characters on Children’s Diet and Health: A Systematic Review and Research Needs*, OBESITY REV. doi: 10.1111/obr.12237 (Dec. 2014).

²⁰ Chriqui, Pickel, and Story, *Influence of School Competitive Food and Beverage Policies on Obesity, Consumption, and Availability: A Systematic Review*, JAMA PEDIATRICS, 168(3):279-286 (2014).

²¹ Cohen and Story, *Mitigating the Health Risks of Dining Out: The Need for Standardized Portion Sizes in Restaurants*, AM. J. OF PUBLIC HEALTH, 104(4) 586-590 (2014).

²² Kristensen, Flottemesch, Maciosek, Jenson, Barclay, Ashe, Sanchez, Story, Teutsch, and Brownson, *Reducing Childhood Obesity through U.S. Federal Policy: A Microsimulation Analysis*, AM. J. OF PREVENTIVE MEDICINE, 47(5): 604-612 (2014).

²³ Robert Wood Johnson Foundation, *Health Eating Research: Building Evidence to Prevent Childhood Obesity* (Jan. 2013) at 5, available at <http://anr.rwjf.org/viewCfp.do?cfpId=1139&cfpOverviewId=>.

²⁴ Pan, Sun, Bernstein, Schulze, Manson, Stampfer, Willett, and Hu, *Red Meat Consumption and Mortality*, ARCH. INTERN. MED. 2012; 172(7): 555-563.

²⁵ Moisse, *Red Meat Tied to Increased Mortality Rate*, ABC News, Mar. 12, 2012, available at http://abcnews.go.com/Health/w_DietAndFitness/red-meat-tied-increased-mortality-risk/story?id=15901365.

subcommittee on food sustainability, a position that provided him with opportunities to advance his position on red-meat consumption in the guise of environmental protection.

Dr. Hu also participated in a February 13, 2013 citizen petition spearheaded by public health activist group Center for Science in the Public Interest (CSPI).²⁶ The petition demanded that the Food and Drug Administration (FDA) review the generally recognized as safe (GRAS) status of added sugars in soda and other beverages. It claimed that added sugars were unsafe at the levels consumed in such beverages. The petition also sought a separate line for added sugars on the Nutrition Facts Panel. The DGAC Report focuses extensively on added sugars and the need to remove them from our diet, an approach that could strongly influence FDA and advance the petition's goal—the removal of GRAS status for added sugars in some beverages. The Report also directly advances the other policy CSPI's petition urged FDA to adopt: a specific line for “added sugars” on the Nutrition Facts label. Dr. Hu's involvement in the petition, and then his work on the DGAC that benefitted that effort, at the very least create an appearance of a conflict of interest.

WLF urges the Secretaries to take this potential conflict into consideration when assessing the DGAC report. If they do not, a federal court will throw out the entire effort.

WLF understands that federal agencies have the discretion to appoint individuals with strong opinions to serve on advisory committees. The lack of diversity in professional backgrounds and viewpoints on the 2015 DGAC, however, deprives the public of the wider range of perspectives and unique knowledge-base that someone who works in the food industry or runs a federal nutrition program could add to the process. The failure of HHS and USDA to appoint a panel with diverse viewpoints is also at odds with the Federal Advisory Committee Act (FACA), under which the DGAC was empanelled.²⁷

Section 5 of FACA requires that all federal advisory committees be “fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.”²⁸ FACA obliges federal agencies to refrain from adopting the recommendations of advisory committees that are not fairly balanced. In adopting the “fairly balanced” requirement, Congress emphasized the need “to ensure that persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee.”²⁹ The food and beverage industries, practicing

²⁶ Petition to Ensure the Safe Use of “Added Sugars,” Submitted by Center for Science in the Public Interest, Feb. 13, 2013, available at http://cspinet.org/new/pdf/sugar_petition_2-12-13_final.pdf.

²⁷ See *Charter, 2015 Dietary Guidelines Advisory Committee*, *supra* note 2.

²⁸ 5 U.S.C. § 5(b)(2).

²⁹ *Nat'l Anti-Hunger Coalition v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1074 n. 2 (D.C. Cir. 1983).

nutritionists, and leaders of federal nutrition programs are among those “directly affected” by the DGAC’s recommendations. The utter and complete absence of representatives from those affected groups from the DGAC renders it unfairly unbalanced.

It is unclear whether HHS and USDA anticipated or expected the DGAC to delve as deeply into government regulatory or fiscal policy as it did, or include policy suggestions among its recommendations on its “nutritional and dietary information for the public.”³⁰ Regardless of whether the agencies expected policy suggestions, the Secretaries have a duty under FACA to assess whether the committee they appointed was fairly balanced and if not, it obliges them to reject the DGAC’s recommendations. Given that the lack of fair balance most significantly arises in the context of the committee’s policy recommendations, the Secretaries should refrain from adopting those at a minimum.

IV. The Report’s Focus on Specific Ingredients or Food Products Does Not Advance the Dietary Guidelines’ Mission

The Scientific Report concludes, “[S]trong evidence shows that it is not necessary to eliminate food groups or conform to a single dietary pattern to achieve healthy dietary patterns.”³¹ This holistic or total diet approach appropriately respects consumer choices and reflects the importance of a varied and balanced diet. Unfortunately, many of the Report’s conclusions and recommendations do not embrace or further this common-sense approach. WLF discusses three examples of this below.

A. Added Sugars

“Added sugars” as it formally relates to nutrition is an invented term lacking any scientific basis. Authorities such as the World Health Organization have concluded that all sugars, whether intrinsic or added, are equal in terms of the amount of calories they contain and how the human body metabolizes them.³² FDA itself has acknowledged that “there are currently no analytical methods that are able to distinguish between naturally occurring sugars and those sugars added to a food.”³³

Instead of retaining the Dietary Guidelines’ traditional focus on sugars as a general carbohydrate and the calories sugar contributes to food and beverages, the

³⁰ National Nutrition Monitoring and Related Research Act of 1990, *supra* note 1.

³¹ Report, pt. B, ch. 2, p. 2.

³² See *Joint FAO/WHO Scientific Update on Carbohydrates in Human Nutrition*, EUROPEAN J. OF CLINICAL NUTRITION 61:S1 (Dec. 2007).

³³ U.S. Food and Drug Administration, Proposed Revision of the Nutrition and Supplemental Facts Label, 79 Fed. Reg. 11,989, 11,905 (Mar. 3, 2014).

DGAC's Scientific Report ironically embraces this unscientific term and adds its imprimatur to the factually untrue concept that added sugars are somehow different. Educational materials that focus on carbohydrates or calories, however, are far less compelling or eye-catching than those that spotlight added sugars. Consumers, the majority of whom are unlikely to understand that their bodies metabolize all sugars equally, will reasonably equate "added" with "extraneous" or "unnecessary," and thus conclude that added sugars contribute more calories or worse calories than natural ones. If the 2015 Dietary Guidelines ratify the Scientific Report's nearly obsessive focus on added sugars, such an embrace would place the guidelines at odds with its mission of providing evidence-based nutritional and dietary information.

The concept of added sugars is a driving force behind public health activists' nationwide regulatory and legislative agendas. The Scientific Report borrowed many of the policy solutions it recommends from these activists' campaigns. This Comment will address those recommended policies in a separate section below. Regardless of whether the Secretaries choose to retain those policy suggestions in the 2015 DGA, their inclusion in the Scientific Report add detrimental credence to the notion that control of added sugar should be a central focus of government nutrition policy.

Guidelines that discourage the intake of one entire ingredient or component of the food supply can backfire, and in fact have. As one commentator pointed out, "When people dutifully cut down on fat in the 1980s and 1990s [as suggested by past Nutrition Guidelines], they replaced much of it with high-sugar and high-calorie processed foods."³⁴ F. Edward Scarbrough, a former Director of FDA's Office of Food Labeling, echoed this concern in his comments to FDA on its proposed Nutrition Facts revision:

'Added sugar' is the 'bête noir' of this decade for many in the nutrition community. A decade ago the chemical to avoid was trans fat. [At least with trans fat it could be shown that, although chemically it is not a saturated fat, it acts in the body as a saturated fat and therefore could deserve a separate line in nutrition labeling.] What will be the 'bête noir' in the decades to come? There appears to be an underlying assumption that if we can just eliminate the chemical of the decade from the food supply our public health problems would be solved. This intense focus on a single component of the food supply tends to diminish the appropriate focus on the total diet and moderation in consumption.³⁵

³⁴ Moyer, *Why Almost Everything Dean Ornish Says about Nutrition Is Wrong*, SCIENTIFIC AMERICAN, Apr. 22, 2015, available at <http://www.scientificamerican.com/article/why-almost-everything-dean-ornish-says-about-nutrition-is-wrong/>.

³⁵ Consumer Comment of F.E. Scarbrough on U.S. Food and Drug Administration, Proposed Revision of the Nutrition and Supplemental Facts Label.

WLF agrees that Americans should consume sugar in moderation and supports federal guidelines that encourage that general proposition. A 2015 DGA that not only joins, but intensifies, public health activists' wholesale demonization of sugar, however, will not promote any nutrition goal.

B. Lean Meat

The Scientific Report also concludes that a “healthy dietary pattern” is one that, among other characteristics, is “lower in red and processed meats.”³⁶ That statement by implication eliminates *lean* meats from healthy diet consideration, a reversal from past reports. The DGAC references lean meat in a footnote to its statement on healthy dietary patterns with a tepid statement that such meats *can* be considered healthy. Their justification for removing lean meats from the formal healthy dietary pattern declaration is that “lean meats were not consistently defined or handled similarly between studies.”³⁷ Secretary Vilsack may fairly question why the DGAC does not simply use the definition of “lean meat” set by USDA’s Food Safety and Inspection Service.³⁸

The Report’s treatment of lean meat, if adopted in the 2015 DGA, will firmly entrench it in the “bad” foods category for many consumers. Such a stigma could seriously undermine the DGAC’s broader goal of encouraging the public, and especially the millions of Americans who benefit from federal nutrition assistance programs, to eat nutrient dense foods. Although an examination of the scientific evidence regarding lean meat is beyond the scope of this Comment, WLF does note that other stakeholders have argued that the DGAC’s decision to remove lean meat is not supported by a preponderance of the evidence.³⁹

The manner in which the DGAC reaches its conclusion on the status of lean meat also violates the Federal Advisory Committee Act. Notes from the November 7, 2014 meeting of the DGAC reflect that in the committee’s opinion, lean meats are “associated with positive health outcomes.”⁴⁰ During the committee’s final meeting on December 15, 2014, however, the DGAC engaged in a lengthy discussion over such basic questions as what is “lean?”; does “lean meat” include red meat?; and does “lean meat” include poultry? The committee broke for lunch leaving those questions, and the status

³⁶ Report, pt. B, ch. 2, p. 2.

³⁷ *Id.*

³⁸ USDA-FSIS-OPPED-LCPS. 2007. A guide to federal food labeling requirements for meat, poultry, and egg products, available at http://www.fsis.gov/shared/PDF/Labeling_Requirements_Guide.pdf.

³⁹ *See, e.g.*, North American Meat Institute, Comment to Dietary Guidelines Advisory Committee Regarding the Removal of Lean Meat as a Component of a Dietary Pattern Associated with Positive Health Outcomes (Dec. 30, 2014).

⁴⁰ 2015 Dietary Guidelines Advisory Committee Meeting 6, Meeting Summary at 16, available at <http://www.health.gov/dietaryguidelines/DGAC-Meeting-6-Summary-508.pdf>.

of lean meat, unresolved. The members of Subcommittee 2-Dietary Patterns, Foods and Nutrients, and Health Outcomes indicated they would discuss the issues during the lunch break. That discussion is very briefly memorialized in the December 15 meeting notes, but does not appear on the live web broadcast of the December 15 meeting. The Subcommittee 2 members returned from lunch and announced that lean meat was to be struck from the Scientific Report's healthy dietary pattern statement.⁴¹

Section 10 of FACA dictates, "Each advisory committee meeting shall be open to the public."⁴² The law further requires if "the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public" such a determination "shall be in writing and shall contain the reasons for such determination."⁴³ DGAC Subcommittee 2's lunch discussion, which appears to have been the tipping point for the entire committee's decision on lean meat, was not open to the public. Neither Secretary Burwell nor Secretary Vilsack provided written notice for the side meeting being held in private.

WLF urges the Secretaries to consider the impact of this blatant FACA violation on the DGAC's determination for lean meat. Failure to do so could result in a federal court challenge.

C. Caffeine and Energy Drinks

To the best of WLF's knowledge, the DGA has never included a discussion of caffeine, which is not a nutrient. Caffeine arguably is not even within the Guidelines' legislative mandate. WLF questions whether addressing the issues *du jour* as perceived by the DGAC members serves the primary statutory purpose of the Dietary Guidelines, a document that changes every five years.

If the 2015 DGA does include a discussion of caffeine, WLF trusts that it will take a far more holistic, evidence-based approach than does the Scientific Report. The Report essentially embraces a scientifically unsupported double standard for caffeine depending on its dietary source: one standard for energy drinks and another for every other caffeine-containing beverage.

The Report acknowledges that moderate consumption of coffee is not associated with increased risk of chronic disease and may actually reduce risk of type-2 diabetes, cardiovascular disease, and liver and endometrial cancer. Moderate evidence also exists that caffeine may reduce the risk of Parkinson's disease. However, the Report goes on

⁴¹ 2015 Dietary Guidelines Advisory Committee Meeting 7, Meeting Summary at 27, available at <http://www.health.gov/dietaryguidelines/DGAC-Meeting-7-Summary-508.pdf>.

⁴² 5 U.S.C. § 10(a)(1).

⁴³ *Id.* at § 10(d).

to find increasing evidence that excessive caffeine consumption (more than 400 milligrams (mg) per day for adults) may cause adverse health effects.

During that discussion, the DGAC segues into a discussion of caffeinated energy drinks. The clear implication is that caffeine is only harmful when consumed in the form of energy drinks. This preoccupation with energy drinks is inconsistent with the rest of the assessment of caffeine, and unsupported for several reasons:

- Coffee, tea, and carbonated soft drinks are the main sources of caffeine for the general population and for all age groups. In fact, energy drinks contribute only about two percent of total caffeine intake in the general population and less than six percent of total caffeine intake among children, teens, and young adults.⁴⁴
- The DGAC report refers to “high caffeine energy drinks,” but does not define “high caffeine.” The DGAC acknowledges that energy drinks vary widely in their caffeine content, ranging from 50 to more than 500 mg of caffeine per can or bottle. The DGAC does not mention that the vast majority of energy drinks sold in the United States by volume contain about 80 mg of caffeine per container, and that only a few energy drinks representing a very small portion of the energy drink market contain caffeine in the higher range.⁴⁵
- All caffeine is chemically the same, whether it is found in coffee, tea, cola, chocolate, or energy drinks. The caffeine added to energy drinks and colas has the same effect on the body as the naturally occurring caffeine in coffee and tea.⁴⁶
- The DGAC appears to base its negative conclusions about energy drinks on 17 case reports, but even the DGAC concedes the weakness of this

⁴⁴ Ahluwalia, *Caffeine Intake in Children in the United States and 10 Year Trends: 2001-2010*, AM. J. OF CLIN. NUTR. DOI: 10.3945/ajcn.113.082172 (2014); Branum, Rossen, and Schoendorf, *Trends in Caffeine Intake Among U.S. Children and Adolescents*, PEDIATRICS, 386-393 DOI: 10.1542/peds.2013-2877 (2014); Fulgoni, *Various Aspects of Caffeine Intake in America: An Analysis of NHANES*, Presented at the Institute of Medicine Workshop on Potential Health Hazards Associated with Consumption of Caffeine in Food and Dietary Supplements. Aug. 5, 2013, available at <http://www.iom.edu/~media/Files/Activity%20Files/Nutrition/PotentialEffectsofCaffeine/Victor%20L%20Fulgoni%20III.pdf>.

⁴⁵ Somogyi, *Caffeine Intake by the U.S. Population*, Prepared for the United States Food and Drug Administration and Oakridge National Laboratory. Subcontract Number: 70000073494 (2010).

⁴⁶ See Remarks by Dr. Margaret Hamburg, FDA Commissioner, Caffeine in Food and Dietary Supplements: Examining Safety, Aug. 5, 2013, available at <http://www.fda.gov/newsevents/speeches/ucm363925.htm>.

evidence base. According to the DGAC report, “causality cannot be inferred from this case series.”⁴⁷

- The DGAC report also warns against simultaneous consumption of “high caffeine” drinks and alcohol. The DGAC ignores a recent European Food Safety Authority (EFSA) report which concluded that “there is no harmful toxicological or behavioral interaction between caffeine and alcohol.”⁴⁸ Even if there were a scientifically significant concern about consuming caffeine and alcohol together, that concern would be the same when alcohol is consumed with coffee or cola as it is when it is consumed with energy drinks. The DGAC also overlooks EFSA’s finding that the interaction between caffeine and other ingredients typically found in energy drinks poses no health hazard.

In short, based on extraordinarily little evidence, the DGAC Report conveys the impression that caffeinated energy drinks represent a significant emerging public health problem. This effort to portray energy drinks as a uniquely dangerous source of caffeine is not based on a preponderance of the existing science and should not be reflected in the 2015 DGA.⁴⁹

V. The Secretaries Should Explicitly Reject the Scientific Report’s Legally- and Scientifically-Unsupported Policy Recommendations

A. General Concerns with DGAC Policy Recommendations

The 2015 DGAC Scientific Report includes recommended government policies that can “establish healthy food environments.”⁵⁰ Most of the policy ideas, as noted previously in this Comment, are not new. Most have either been previously proposed or are drawn from public health activists’ legislative or regulatory wish lists. What is new, however, is such policy recommendations’ inclusion in a report that is statutorily limited

⁴⁷ Report, pt. D, ch. 5, p. 34.

⁴⁸ See <http://www.efsa.europa.eu/en/consultations/call/150115.pdf>; see also <http://www.efsa.europa.eu/en/press/news/150115.htm>.

⁴⁹ For further analysis of the DGAC’s approach on caffeine, see Frank, *Federal Dietary Guidelines Lack a Consistent and Scientific Approach to Caffeine*, WLF LEGAL OPINION LETTER, May 8, 2015, available at http://www.wlf.org/publishing/publication_detail.asp?id=2497.

⁵⁰ Report, pt. B, ch. 2, p. 8.

to “nutritional and dietary information for the public”⁵¹ and that should not “include any rule or regulation issued by a Federal Agency.”⁵²

The Secretaries have multiple statutory grounds on which to reject these recommendations. As argued above, the DGAC’s lack of fair balance as defined by FACA taints its policy conclusions, and HHS and USDA must therefore reject them.⁵³ The agencies’ acceptance of these recommendations would also violate the NNMRRRA, which strictly defines the DGA’s scope. The recommended policies further violate the Nutrition Monitoring Act because the Scientific Report fails to prove their effectiveness by a preponderance of scientific evidence. The Report, in fact, propounds *no* evidence whatsoever that supports any of the policy suggestions.

The DGAC’s attempt to transform itself from a group of nutrition science advisors into regulatory and legislative policy counselors is quite audacious. Their suggestions are breathtaking in scope and would dramatically expand government’s ability to manipulate the food market and consumers’ choices. Most, if not all of them, suffer from significant economic, legal, or constitutional flaws.

At the conclusion of the Report’s discussion of added sugars, for example, the committee declares that “Policies and programs at local, state, and national levels in both the private and public sectors are *necessary* to support efforts to lower added sugars.”⁵⁴ The DGAC then lists those policies it deems essential. They include: 1) a mandated front-of-package food label that is constitutionally suspect under the First and Fifth Amendments⁵⁵; 2) “economic and pricing approaches . . . to promote the purchase of healthy foods and beverages,” *i.e.* regressive sin taxes, which studies reveal will do nothing but harm their intended beneficiaries⁵⁶; 3) restrictions on marketing “foods and beverages high in added sugars to young children,” also suspect under the First

⁵¹ National Nutrition Monitoring and Related Research Act of 1990, *supra* note 1.

⁵² *Id.*, § 5431(b)(3).

⁵³ *See supra* pp. 8-9.

⁵⁴ Report, pt. D, ch. 6, p.27 (emphasis added).

⁵⁵ For further analysis on the front-of-package labeling idea, *see* Lammi, “Front-of-Package Rating System Government’s Next Tool in ‘Guiding’ Consumers’ Food Choices?”, *WLF Legal Pulse*, Dec. 12, 2011, available at <http://wlflegalpulse.com/2011/12/12/front-of-package-rating-system-governments-next-tool-in-guiding-consumers-food-choices/>.

⁵⁶ Congressional Research Service, *Excise Tax on Sugar-Sweetened Beverages*, prepared for the Hon. John Barow, Apr. 24, 2009; Klick and Helland, *Empirical Studies Provide Little Evidence that Soda Taxes would shrink Americans’ waistlines*, REGULATION-HEALTH & MEDICINE, Spring 2011: 20-23.

Amendment⁵⁷; and 4) the listing of added sugars on the Nutrition Facts Panel, a legally faulty suggestion that this Comment discusses below in more detail.

Nor does the DGAC limit its bold policy pronouncements to demonizing sugar. It also offers such dramatically ambitious and entirely unrealistic suggestions as “set nutrition standards for foods and beverages offered in public places” and “support changes to the food environment that can help individuals make healthy choices in foods they consume away from home.”⁵⁸

B. Specific Concerns with Including “Added Sugars” on the Nutrition Facts Panel

The Scientific Report’s recommendation to list added sugars on the Nutrition Facts Panel is an especially troubling suggestion, and merits further comment, because of the regulatory environment in which the DGAC offers it. FDA, which is a part of the Department of Health and Human Services, is currently engaged in rulemaking on the Nutrition Facts Panel and has proposed that “added sugars” be included on the label under “total sugars.”⁵⁹ The agency cites as its justification for added sugar labeling the 2010 Dietary Guidelines’ general recommendation that “individuals identify foods that are nutrient-dense within caloric limits and aid in reducing excess discretionary caloric intake from added sugars.”⁶⁰ Though the Scientific Report for the 2015 Dietary Guidelines does not reference the pending rulemaking, it explicitly endorses the policy the proposed FDA rule would mandate.

Michael Taylor, FDA’s Deputy Commissioner for Foods, recently confirmed the interconnection between the finalization of the proposed FDA rule and the DGAC recommendation.⁶¹ As argued below, if the 2015 Dietary Guidelines adopt the DGAC’s added sugar labeling recommendation, and FDA relies retroactively upon the DGA for its pending rulemaking, FDA is vulnerable to a challenge under the Administrative Procedure Act.

⁵⁷ See Comments of Washington Legal Foundation, Food & Nutrition Service Local School Wellness Policy Implementation, Apr. 28, 2014, available at <http://www.wlf.org/upload/litigation/misc/WLFComments--AgDept.pdf>.

⁵⁸ Report, pt. B, ch. 2, pp. 8-9.

⁵⁹ WLF has formally commented on the FDA’s Proposed Revision of the Nutrition and Supplemental Facts Label, arguing that the added sugars labeling mandate violates the First Amendment. Comments of Washington Legal Foundation, Aug. 1, 2014, available at [http://www.wlf.org/upload/litigation/misc/WLFComments--FDA\(Aug1,2014\).pdf](http://www.wlf.org/upload/litigation/misc/WLFComments--FDA(Aug1,2014).pdf).

⁶⁰ Proposed Revision of the Nutrition and Supplemental Facts Label, 78 Fed. Reg. 11,880, 11,905.

⁶¹ Evich, *FDA Still Working on ‘Added Sugars’ Nutrition Facts Research*, POLITICO AG PRO, Mar. 27, 2015 “(Mike Taylor, deputy commissioner for foods and veterinary medicine at FDA, confirmed recently that the timeline for finalizing the nutrition labeling rules is riding somewhat on what happens with the 2015 Dietary Guidelines, the advisory committee report which does support added sugars labeling.”)

1. HHS and USDA Cannot Lawfully Recommend Regulation in the Dietary Guidelines

As discussed previously, the NNMARRA limits the Dietary Guidelines' mandate to reporting on "nutritional and dietary information for the public," and states that "dietary guidance does not include any rule or regulation issued by a Federal Agency."⁶² The DGAC's added sugar labeling recommendation does not constitute "dietary guidance" under the 1990 law. Also, when viewed in the context of FDA's pending rulemaking, the Scientific Report treads on § 5431(b)(3) of the law by recommending that the Dietary Guidelines advance the mandatory declaration of added sugars on the Nutrition Facts Panel as FDA has proposed.

2. The Report's Added Sugars Labeling Recommendation is Not Based on a Preponderance of the Evidence

Section 301(a)(2) of the NNMARRA dictates that the "information and guidelines contained in each report . . . shall be based on the preponderance of the scientific and medical knowledge."

The scientific studies on added sugar the DGAC reviewed did not examine how consumers would comprehend such label disclosures, and hence whether the recommended labeling requirement would "assist consumers in making informed dietary decisions."⁶³ Only one study has been conducted on consumer comprehension of added sugar labeling on the Nutrition Facts. Ironically, FDA itself commissioned the study⁶⁴ after previously acknowledging the complete dearth of scientific literature regarding how consumers might interpret the labeling of added sugars.⁶⁵ The study is reportedly complete,⁶⁶ but FDA has yet to release its findings to the public.

Because the DGAC could not review FDA's completed but unreleased study, and failed to consult any other relevant studies, its added sugars labeling recommendation is not supported by a preponderance of the evidence as required by the 1990 law.

3. Reliance on a 2015 DGA Recommendation of Added Sugars Labeling Would Violate the Administrative Procedure Act

A decision by FDA to *post hoc* rely upon a 2015 Dietary Guidelines recommendation for added sugars labeling in a final Revision of the Nutrition and

⁶² 7 U.S.C. § 5341(a)(1), § 5431(b)(3).

⁶³ Report, pt. D, ch. 6, p. 26.

⁶⁴ *Supra* note 60 at 11,952.

⁶⁵ Food and Drug Administration, Experimental Study on Consumer Responses to Nutrition Facts Labels, 78 Fed. Reg. 32,394, 32,395 (May 30, 2013).

⁶⁶ Evich, *supra* note 61.

Supplemental Facts Label rule would provide one possible argument for stakeholders interested in challenging the new FDA rule in court.

It is well settled that a court may strike down a regulation if the asserted or necessary “factual basis” of the rule is invalid.⁶⁷ Regulations lacking an adequate “factual basis” are considered to be “arbitrary and capricious” in violation of the Administrative Procedure Act.⁶⁸

As explained above, an added sugar labeling recommendation in the Dietary Guidelines would violate the NNMRA. If FDA’s factual basis for its added sugars labeling mandate is information in the 2015 Dietary Guidelines, that factual basis is invalid because the Guidelines’ recommendation is itself invalid.

C. The Secretaries Should Explicitly Reject Reliance on the Scientific Report’s Policy Recommendations

This Comment has argued that the Secretaries have a number of grounds on which they can justify declining the DGAC’s policy-oriented recommendations. WLF urges the Secretaries to avail themselves of one or all of those reasons.

It is not enough, however, for the Secretaries to merely leave the policy recommendations out of the 2015 DGA. They must make an explicit statement that the Dietary Guidelines are not a proper vehicle to propose how government officials should create a healthier food environment. Such a declaration is critical if HHS and USDA wish to maintain the integrity of the Dietary Guidelines as an evidence-based vehicle for imparting nutrition information to the public, and as a tool for the government to utilize through its nutrition assistance programs.

Without such an explicit rejection, federal, state, and local legislators and public health activist groups will be more likely to cite the Scientific Report as support for their “healthier eating by government regulation” agenda. The DGAC is a statutorily-sanctioned advisory board, and its conclusions, even if not adopted in the Dietary Guidelines, can carry enormous weight as a nutrition policy source. The Secretaries could limit the influence of the DGAC’s pronouncements by stating that such recommendations should have never been made.

⁶⁷ *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29 (1983).

⁶⁸ 5 U.S.C. § 706 (2)(A).

VI. The Secretaries Should Explicitly Reject the DGAC's Introduction of "Sustainability" Principles into the Nutrition Guidelines

One of the DGAC's justifications for its last-minute removal of lean meat from the Report's healthy dietary pattern statement is the committee's inability to adequately define "lean meat."⁶⁹ The DGAC's decision to devote an entire subcommittee, hours of deliberation, and an entire section of the Report to "food sustainability," then, is quite confounding. Unlike "lean meat," which USDA has defined,⁷⁰ no federal government entity has defined the term "sustainability."⁷¹ The DGAC's consideration of this amorphous concept offers, at best, speculative nutritional benefits. Moreover, the sustainability discussion falls far outside of the DGAC's defined mission, and the committee did not support its inclusion with a preponderance of the evidence. For these reasons, the Secretaries should explicitly reject the Report's conclusions and recommendations related to food sustainability.

The DGAC, not surprisingly, equates consumption of its recommended healthy diet—"higher in plant-based foods, such as vegetables, fruits, whole grains, legumes, nuts and seeds, and lower in animal-based foods"—with "lesser environmental impact."⁷² That conclusion, however, is based on flawed premises and a body of inconclusive scientific literature that is in its infancy.

The DGAC assumes a diet that curtails animal-based and processed foods will result in fewer greenhouse gas emissions and less environmental degradation. An equally, if not more convincing, case can be made that those types of foods are as sustainable, or more sustainable, than the items in the DGAC's healthy diet recommendation. Companies in those food production businesses have a strong financial incentive to utilize as much of the processed product as is feasible and safe. Items such as canned vegetables and fruits offer consumers an affordable, convenient means to eat nutrient-dense foods. That they are processed does not necessarily make such vegetables and fruits any less "sustainable."

Scientific studies on the environmental impact of substituting vegetables, fruits, and other DGAC-preferred items vary based on the method of comparison. For instance, when the baseline for comparison was calories rather than pounds, one study found that the substitution of fruits and vegetables for animal-based products either had no impact

⁶⁹ See *supra* p. 11.

⁷⁰ See *supra* note 38.

⁷¹ See also Slavin, *supra* note 10, at 4 ("[T]here is no scientific consensus for even a definition of sustainability.")

⁷² Report, pt. D, ch. 5, p. 8.

on greenhouse gas emissions or in fact increased such emissions.⁷³ In order to achieve a calorie-for-calorie substitution, consumers had to eat more fruits and vegetables, which are lower in calories, to compensate for the lack of higher-calorie animal products.

The DGAC acknowledges in the Report that food sustainability is an “emerging area of scientific investigation that is not readily addressed by traditional study designs.”⁷⁴ This statement implies that the committee was willing to reach out and find studies, however non-traditional, that supported its conclusions. The general concept of environmental sustainability is a deeply complex one, and applying it in the context of nutrition is a very complicated task. The Institute of Medicine has convened an *ad hoc* expert committee to develop “a framework for assessing the health, environmental, and social effects associated with the ways in which food is grown, processed, distributed, and marketed within the U.S. food system.”⁷⁵ That committee has drawn no conclusions about food sustainability and likely will not do so for several years. HHS and USDA should allow that and other ongoing research to proceed, rather than incorporating the DGAC’s seemingly-forced sustainability conclusions into the 2015 Dietary Guidelines.

Dietary Guidelines that adopt the DGAC’s ambitious recommendations to inject sustainability considerations and messages into every facet of nutrition decisionmaking will significantly disserve the public. Americans are already bombarded with “healthy eating” advice, and the Scientific Report provides ample reasons for them to pursue a healthy diet. If the Dietary Guidelines embrace food sustainability, who will be responsible for determining what specific food products can be considered sustainable? What criteria will be developed to guide those decisions?

WLF requests that the Secretaries not only decline the DGAC’s recommendations on food sustainability by leaving them out of the 2015 Dietary Guidelines, but that they also expressly state that environmental matters are outside the scope of DGAC’s mission and expertise and should not have been considered.

⁷³ Vieux, Darmon, Touazi, and Soler, *Greenhouse Gas Emissions of Self-selected Individual Diets in France: Changing the Diet Structure or Consuming Less?*, ECOLOGICAL ECONOMICS, 75 issue C, 91-101 (2012).

⁷⁴ Report, pt. D, ch. 5, p. 7.

⁷⁵ Institute of Medicine, “Framework for Assessing Health, Environmental, and Social Effects of the Food System,” <http://www8.nationalacademies.org/cp/projectview.aspx?key=49544>.

VII. Conclusion

The DGAC's Scientific Report paints a bleak picture of Americans' diet-related health: "About half of all Americans—117 million individuals—have one or more preventable, chronic diseases that are related to poor quality dietary patterns and physical activity."⁷⁶ This state of affairs exists despite three decades of official nutrition advice provided in federal Dietary Guidelines.

The correct approach for public health officials is not, however, the issuance of 2015 Dietary Guidelines that introduce unprecedented government policy recommendations, embrace trends in the public health community by targeting added sugar, lean meat, and energy drinks, and add yet another factor to consumers' healthy-eating calculus—sustainability. After government has failed to provide sufficiently compelling and useful information for 30 years to inspire healthier diets, how would Americans benefit from Dietary Guidelines that inject government deeper into our consumption decisions?

The 2015 Dietary Guidelines should reflect the statutory mission Congress delegated and provide consumers with science-based information that empowers their freedom to choose. The Secretaries of HHS and USDA can achieve that goal in part by taking the actions WLF recommends in this Comment:

- Assess the implications of Dr. Frank Hu's possible conflict of interest on the Scientific Report's policy-oriented recommendations with regard to the reduction of added sugars consumption;
- Explicitly reject all policy-oriented recommendations in the Scientific Report and refrain from including them in the 2015 DGA because of the DGAC's lack of fair balance, which violates the Federal Advisory Committee Act;
- Explicitly reject all policy-oriented recommendations in the Scientific Report and refrain from including them in the 2015 DGA on the ground that they would violate the National Nutrition Monitoring and Related Research Act of 1990;
- Decline to accept DGAC's recommendation to remove "lean meat" from the Scientific Report's statement on healthy dietary patterns on the ground that the manner in which DGAC reached that conclusion violated the Federal Advisory Committee Act;

⁷⁶ Report, pt. B, ch. 2, p. 1.

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- Refrain from any discussion of caffeine in the 2015 DGA; if the Secretaries do accept the Scientific Report's recommendations, adopt a holistic approach to caffeine rather than one that needlessly stigmatizes one particular product category;
- Explicitly reject the Scientific Report's recommendations regarding food sustainability and refrain from including food sustainability in the 2015 DGA on the ground that doing so would violate the National Nutrition Monitoring and Related Research Act of 1990.