Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present[1]

"It's deja vu all over again."
Yogi Berra

I. INTRODUCTION

The Federal Trade Commission (FTC) has a long history of protecting children from unfair and deceptive marketing practices. In doing so, the Commission has recognized the special nature of the child audience. For example, children may be deceived by an image or a message that likely would not deceive an adult. Some of the agency's efforts have been successful, while other have not. This article explores the history of these efforts. It does so in light of current attention to childhood obesity and suggestions for a ban on ads directed to children for foods with high sugar or fat content. As described below, the FTC has been down this road before. The lessons learned 25 years ago are instructive in considering whether the regulation of advertising can meaningfully address this serious health problem.

II. THE FTC'S STATUTORY AUTHORITY

The Commission's basic authority to regulate advertising and marketing practices derives from Section 5 of the FTC Act, which broadly prohibits unfair or deceptive acts or practices in commerce.[2] The Commission "will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[3] There are three elements to this analysis: (1) the representation, omission, or practice must be likely to mislead the consumer; (2) the act or practice must be considered from the perspective of the reasonable consumer; and (3) the representation, omission, or practice must be material, that is, likely to affect a consumer's choice or conduct, thereby leading to injury.[4] When a representation or sales practice is targeted to a specific

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[2]15 U.S.C. § 45.

[3]Deception Policy Statement, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 176 (1984).

[4]*Id.* at 176-83.

audience, such as children, the Commission will determine the effect on a reasonable member of that group.[5] Thus, advertisements directed to children are considered from the standpoint of an ordinary child.

An act or practice is unfair if it causes or is likely to cause substantial consumer injury; the injury is not reasonably avoidable by consumers; and the injury is not offset by countervailing benefits to consumers or competition.[6] This standard, first articulated in a 1980 letter to Congress and adopted in a 1984 Commission decision, was subsequently codified as a statutory definition of the Commission's authority to find an act or practice unlawful on the grounds of unfairness.[7]

III. DECEPTIVE ADS & UNFAIR PRACTICES DIRECTED TO KIDS

A. Ballerina Dolls Don't Dance, Toy Horses Can't Stand Up, and Bread Doesn't Help with Homework

The Commission's enforcement activities targeting deceptive advertising directed to children have been highly successful. During the past three decades, the Comifeco0.000inj17 Tc secengd to

[5] *Id.* at 179.

[6] Unfairness Policy Statement, appended to *International Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984).

[7] 15 U.S.C. § 45(n) ("The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.")

[8] *Lewis Galoob Toys, Inc.*, 114 F.T.C. 187 (1991) (consent order).

[9] *Hasbro, Inc.*, 116 F.T.C. 657 (1993) (consent order). *See also Mattel, Inc.*, 79 F.T.C. 667 (1971) (consent order).

own; in fact, "Nugget" fell over without human assistance.[10] In each of these cases, the ad was examined from the viewpoint of a child in the age group to which the toy was targeted. While an adult viewer might understand that special techniques were employed in such commercials, the child would expect the toy to perform as shown.

In addition, the Commission has brought cases challenging nutritional claims for foods that are likely to be appealing to children. For example, the FTC challenged television ads claiming that Wonder Bread, as a good source of calcium, helps children's minds work better

[10]*General Mills Fun Group, Inc.*, 93 F.T.C. 749 (1979) (consent order).

[11]*Interstate Bakeries Corp.*, 2002 F.T.C. LEXIS 20 (2002) (consent order).

[12]*The Isaly Klondike Co.*, 116 F.T.C. 74 (1993) (consent order). Although this ad was not particularly directed to children, the product is one likely to appeal to consumers of all ages. Under FDA regulations that went into effect subsequent to the Klondike advertising in question, a product like the Klondike Lite bar may not be labeled as low fat if it contains more than 3 grams of fat per serving. 21 C.F.R. § 101.62(b).

[13]*Nestle Food Co.*, 115 F.T.C. 67 (1992) (consent order).

[14]*KFC Corp.*, FTC File No. 042-3033; consent agreement placed on the public record for comment, June 3, 2004.

B. It's Unfair to Entice Kids to Cook Alone, Dry the Doll's Hair, Phone Popeye, or Divulge Personal Information Online

Some of the children's advertising cases the Commission has brought under Section 5 of the FTC Act have been based on a theory of unfairness. As explained in section II, above, an act or practice is "unfair" if it causes or is likely to cause substantial consumer injury, the injury is not reasonably avoidable by consumers, and the injury is not offset by countervailing benefits to consumers or competition.[15]

Some of these unfairness cases involved safety issues. For example, a television advertisement for Uncle Ben's Rice, which emphasized the ease of preparation, depicted a young child engaged in cooking over a stove without adult supervision.[16] The Commission challenged

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[15]*See supra* notes 6 and 7.

[16]*Uncle Ben's, Inc.*, 89 F.T.C. 131 (1977) (consent order).

[17]*Mego International, Inc.*, 92 F.T.C. 186 (1978) (consent order).

[18]*Phone Programs, Inc.*, 115 F.T.C. 977 (1992) (consent order); *Audio Communications Inc.*, 114 F.T.C. 414 (1991) (consent order); *Teleline, Inc.*, 114 F.T.C. 399 (1991) (consent order).

[19]The Commission also used its unfairness authority to challenge R.J. Reynolds' Joe Camel advertising campaign. Although widely misperceived as an action based solely on the use of a cartoon character in cigarette advertising, the Commission's allegations followed an extensive investigation, including empirical studies of the effect of the advertising in the under-age market. The case was never resolved on the merits, however. Before Reynolds presented its defense, the FTC dismissed the case as moot in light of the 1998 State Attorneys General Master Settlement Agreement prohibiting the use of Joe Camel and all other cartoon characters in tobacco advertising. Federal Trade Commission News Release (Jan. 27, 1999), *available at* www.ftc.gov/opa/1999/01/joeorder.htm. The limitations on the Commission's ability to pursue cases like R.J. Reynolds based on an unfairness theory were discussed in a November 20, 2000,

In addition to bringing cases, the Commission has promulgated and enforces two rules directly affecting children. In 1992, pursuant to the Telephone Disclosure and Dispute Resolution Act,[20] the FTC issued its 900 Number Rule.[21] The Rule bans the advertising of 900 number services to children under the age of 12 and requires ads directed to older children, ages 12 to 17, to disclose clearly that they must have a parent's permission to call.[22]

In addition, in 1999, pursuant to the Children's Online Privacy Protection Act,[23] the FTC issued its COPPA Rule governing the online collection of personal information from children under the age of 13. The Rule requires commercial Web sites and online services to obtain verifiable parental consent before collecting personal information from children, if the sites or services are directed to those under 13 or the providers have actual knowledge that visitors to the site are under 13.[24]

What these FTC efforts in protecting children against unfair or deceptive practices have in common is that they have involved practices that parents themselves generally cannot prevent or control – *e.g.*, misrepresenting the performance of toys, urging children to incur toll charges on parents' phone bills, and collecting information from children online without parental consent. Parents may not even be aware that there is a problem until the damage is done. Focusing on such problems has proved successful – in both enforcement actions and rulemaking proceedings.

IV. THE KIDVID RULEMAKING: Down the Yellow Brick Road to the Land of Lollipops and Tooth Decay

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letter to Senator John McCain, Chairman of the Committee on Commerce, Science, and Transportation, from (then) FTC Chairman Robert Pitofsky, *available at* www.ftc.gov/os/2000/11/violstudymccain.htm.

[20]Public Law No. 102-556, codified in part at 15 U.S.C. §§ 5711-14 and 5721-24.

[21]Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. Part 308.

[22]16 C.F.R. §§ 308.3(e) and (f). There is an exception to the ban on advertisements directed to children under 12 for pay-per-call services that are "bona fide educational services." Such a service is defined as one "dedicated to providing information or instruction relating to education, subjects of academic study, or other related areas of school study." 16 C.F.R. § 308.2(a).

[23]15 U.S.C. § 6501, *et seq.*

[24]Children's Online Privacy Protection Rule, 16 C.F.R. Part 312. The Commission has brought 11 cases enforcing this rule.

[25]FTC, Notice of Proposed Rulemaking, 43 Fed. Reg. 17,967, 17,968 (Apr. 27, 1978).

[26]FTC Staff Report on Television Advertising to Children, February 1978 ("1978 Staff Report"), Appendix A.

[27]43 Fed. Reg. at 17,969; 1978 Staff Report at 10-11. Children too young to understand the purpose of advertising were considered initially to be those under the age of eight. (In its Final Report, staff revised this definition to include children six and younger. *See* text accompanying note 39, *infra*.) Older children were considered to be those between the ages of 8 and 11. 1978 Staff Report at nn.16-17. In addition, the Commission sought comment on the feasibility of alternative remedial approaches, including: (1) affirmative disclosures placed in the body of advertisements directed to children for highly cariogenic foods (*i.e.*, those most likely to cause tooth decay and cavities); (2) affirmative disclosures and nutritional information contained in separate advertisements directed to children (to be funded by the advertisers of highly cariogenic foods); (3) limitations placed on particular advertising messages and/or

young children and upon advertisements for highly cariogenic foods directed to all children. 43 Fed. Reg. at 17,969; 1978 Staff Report at 305-28.

[28]1978 Staff Report at 51-156.

[29]FTC Final Staff Report and Recommendation

[32]*See* A.O. Sulzberger Jr., *After Brief Shutdown, F.T.C. Gets More Funds*, N.Y. Times,

[38]In 1980, only 1% of U.S. households had VCRs, and only 20% had cable TV. Last year, 91.5% had VCRs, and 70% had cable TV. *See* Media Info Center, *available at* www.mediainfocenter.org/compare/penetration. In 1980, of course, DVDs and video rental stores such as Blockbuster did not exist.

[39]Final Staff Report at 20-35.

[40]*Id.* at 36.

[41]The FTC staff also considered alternative ways to structure a ban on advertising

children's advertising rulemaking makes plain.

Equally unsuccessful was the effort to address the second major issue in the rulemaking proceeding – television advertising of sugared food products to children under the age of 12. The evidence on the record was inconclusive as to the effect of ads for sugared products on children's attitudes about nutrition, and there was little evidence to show that television advertising increases consumption of such foods.[47]

The nutritional issues addressed in the rulemaking proceeding were also complex and not conducive to the development of remedies through advertising regulation. A multiplicity of factors contribute to tooth decay, and the cariogenic potential of a particular food cannot be measured solely by its sugar content. The frequency of consumption and the nature of the food – *i.e.*, its viscosity and adhesive qualities – are also critical to assessing the role of a particular food in causing tooth decay.[48] These factors could produce some results that are anomalous, to say the least. For example, carbonated soft drinks might be less cariogenic than sticky solid foods, such as dried fruits. Thus, a ban based on cariogenicity might have prohibited advertising for raisins, while allowing it for soda pop. Moreover, the record showed a clear lack of agreement among dental researchers as to how to measure the ability of particular foods to contribute to tooth decay.[49] The FTC staff concluded that "there currently exists no scientific methodology for determining the cariogenicity of individual food products which is sufficiently scientifically accepted to justify formulation of a government-mandated rule."[50]

V. ADVERTISING AND THE FIRST AMENDMENT
An Evolving Doctrine

The application of the First Amendment to commercial advertising was just beginning to evolve at the time of the 1978 Staff Report on Television Advertising to Children. In 1976, the Supreme Court held that commercial speech was not wholly outside the protection of the First Amendment, overturning a Virginia State Board of Pharmacy ban on the advertising of prescription drug prices.[51] The *Virginia Pharmacy* opinion emphasized the right of [adult]

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often have a relatively low percentage of youth in the audience because they are also very popular with adults.

[47]Final Staff Report at 48-55.

[48]*Id.* at 58-77.

[49]*Id.* at 85.

[50]*Id.* at 82.

[51]*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

consumers to receive factual information about prescription drug prices.[52] The 1978 Staff Report recognized that the parameters of First Amendment protection of commercial speech were not yet fully defined, but concluded that the *Virginia Pharmacy* case did not impose a constitutional impediment to restricting advertising to children.[53]

Those parameters were further defined by the Supreme Court in 1980 when it struck down a New York Public Service Commission regulation banning promotional advertising by electrical utilities.[54] The Court continued to recognize "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[55] It stated: "The government may ban forms of communication more likely to deceive the public than to inform it or commercial speech related to illegal activity."[56] For commercial speech that is "neither misleading nor related to unlawful activity," however, the Court established a three-part test: (1) "[t]he state must assert a substantial interest to be achieved by restrictions on commercial speech"; (2) "the restriction must directly advance the state interest involved"; and (3) "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[57]

In subsequent cases, the Court has emphasized that a restriction on speech must directly advance the state interest – in more than a speculative or purely theoretical way. In addition, restrictions must be narrowly drawn, and alternative remedies are always preferable to restrictions on speech. In *44 Liquormart, Inc. v. Rhode Island*,[58] for example, the Court found

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[52]The Court described the role of advertising in a free enterprise economy as follows:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of information is indispensable.

425 U.S. at 765.

[53]1978 Staff Report at 237.

[54]*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

[55]*Id.* at 562, citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

[56]*Id.* at 563-64 (citations omitted).

[57]*Id.* at 566.

[58]517 U.S. 484 (1996).

unconstitutional Rhode Island's prohibition against advertising of retail prices of alcoholic beverages. The Court noted that the state had "presented no evidence to suggest that its speech prohibition will *significantly* reduce marketwide consumption."[59] In addition, the Court stated: "It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance."[60] In other contexts, such as regulations banning certain kinds of attorney advertising, the Court has emphasized that remedies of additional information or disclaimers are generally preferable to restrictions on speech.[61]

In *Thompson v. Western States Medical Center*,[62] the Court further elucidated these principles in finding unconstitutional a provision of the FDA Modernization Act of 1997[63] that prohibited the advertising of compounded drugs. The speech restriction was part of the statutory framework that exempts certain compounded drugs – *i.e.*, those prepared according to prescription for the specialized needs of individual patients – from the FDA's standard new drug approval process under the Federal Food, Drug, and Cosmetic Act (FDCA).[64] The exemption was conditioned upon several restrictions on the pharmacies that compound such drugs, including that they not advertise the compounding of any particular drug. The purpose behind this and other restrictions was to enable small-scale drug compounding to serve the needs of individuals, while at the same time preventing the large-scale manufacturing and marketing of compounded drugs in circumvention of the FDCA's new drug approval process. The government argued that the advertising restriction provided a bright line between the permissible and impermissible sale of compounded drugs because advertising is, in effect, "a fair proxy for actual or intended large-scale manufacturing, ..."[65] The Court was willing to assume that the advertising restriction might directly advance the government's interest. Nonetheless, it found the government had not met its burden of demonstrating it could not achieve its interest without restricting speech. The Court noted that "[s]everal non-speech related means of drawing a line

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[59]*Id.* at 506 (plurality opinion).

[60]*Id.* at 507 (plurality opinion).

[61]*Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 110 (1990) (plurality opinion); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 477 (1988); *In re R.M.J.*, 455 U.S. 191, 203 & 206 n.20 (1982); *Bates v. State of Arizona*, 433 U.S. 350, 375 (1977). *But see Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

[62]535 U.S. 357 (2002).

[63]21 U.S.C. § 353a.

[64]21 U.S.C. § 301 *et seq.*

[65]535 U.S. at 371.

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addressed to adults.'"[72]

The Court concluded:

> A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products.[73]

With respect to the indoor advertising height regulation, the Court found that it failed both the second and third steps of the *Central Hudson* test. The five foot requirement neither advanced the state's goal, nor did it "constitute a reasonable fit with that goal."[74]

The *Lorillard* Court made only passing reference to the Federal Cigarette Labeling and Advertising Act, as amended in 1969,[75] which prohibits the advertising of cigarettes on radio and television.[76] The Court noted the ban several times in the portion of its opinion analyzing the federal pre-emption of law issues.[77] However, its only reference to the broadcast ban in its First Amendment analysis was to note that the ban reflected Congress's recognition of the "power of images in advertising."[78] In the Internet case cited above, the Court recognized "special justifications for regulation of the broadcast media that are not applicable to other speakers,"[79]

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[72]*Id.* at 564 (citing *Reno v. American Civil Liberties Union,* 521 U.S. 844, 875 (1997) (striking down portions of the Communications Decency Act prohibiting transmission of obscene or indecent telecommunications to persons under 18)).

[73]*Lorillard,* 533 U.S. at 565.

[74]*Id.* at 566-67.

[75]15 U.S.C. § 1331 *et seq.* In 1973, Congress extended the electronic media advertising ban to little cigars. Little Cigar Act, § 3, 15 U.S.C. § 1335.

[76]A petition by six radio broadcasting corporations to enjoin enforcement of the ban and to have that section of the statute declared unconstitutional was denied. *Capital Broadcasting Co. v. Mitchell,* 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General,* 405 U.S. 1000 (1972).

[77]*Lorillard,* 533 U.S. at 544, 546, 548, and 551.

[78]*Id.* at 560.

[79]*Reno v. American Civil Liberties Union,* 521 U.S. at 868. (These factors included: "the history of extensive government regulation of the broadcast medium; the scarcity of available frequencies at its inception; and its 'invasive' nature.") [Citations omitted.]

noting that those factors did not apply to cyberspace. Nevertheless, one wonders how the wholesale ban on broadcast advertising would fare under the standards set forth in *Central Hudson* and *Lorillard.* It seems very likely that there will be further evolution of commercial speech/First Amendment principles as they pertain to the broadcast media; moreover, the direction of doctrinal change thus far suggests more protection, rather than less, for commercial speech on radio and television.[80]

VI. INDUSTRY SELF REGULATION
Alcohol, Sex, and Violence: Codes May Help Curb Ad Abuses

In the area of children's advertising, industry self-regulation has often complemented FTC activities. In some instances, industry efforts may be even more efficacious than government regulation in addressing a problem. Precisely because industry self-regulatory approaches do not have to satisfy First Amendment standards, they may be more flexible and adept at addressing concerns about children's advertising. For example, the Children's Advertising Review Unit of the Better Business Bureaus, known as CARU, has voluntary guidelines for advertising to children under 12.[81] The guidelines emphasize that advertisers should not exploit children's credulity; should not advertise inappropriate products or content; should recognize that children may learn practices affecting health or well-being from advertising; and should "contribute to the parent-child relationship in a constructive manner" and "support positive and beneficial social behavior."[82] CARU has an active enforcement program, handling over 100 formal and informal cases or inquiries each year, with about 8% of those involving food ads.[83]

The Commission has conducted studies and issued reports showing that self-regulation can be effective. For example, in response to Congressional requests, in 1999 and 2003 the FTC issued reports regarding alcohol marketing.[84] The alcoholic beverage industry has voluntary codes of conduct restricting the placement of ads for alcoholic beverages. In its 1999 Report, the Commission found that only one-half of the alcohol companies were in compliance with the

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[80]In the context of fully protected speech, the Court has said repeatedly that, regardless of the strength of the government's interest in protecting children from harmful material, the government cannot reduce adults to seeing only what is fit for children. *Id.* at 875.

[81]Children's Advertising Review Unit of the Better Business Bureaus, Self-Regulatory Guidelines for Children's Advertising, *available at* http://www.caru.org/guidelines/index.asp.

[82]*Id*.

[83]National Advertising Review Council, *Guidance for Food Advertising Self-Regulation* 40 (2004).

[84]2003 FTC Alcohol Report and 1999 FTC Alcohol Report.

code standard that alcohol ads should not be placed in media with a 50% or more under-21 audience.[85] To address this finding, the Commission recommended enhanced self-regulatory efforts and highlighted industry best practices that other industry members should follow. When the Commission conducted a second study in 2003, it found compliance with the 50% standard had jumped to 99%.[86] More recently, the industry has lowered its under-age threshold for restricting ads to 30% of the media audience, a significant shift.

The Commission has also studied the marketing to children of violent R-rated movies, explicit-content labeled music, and Mature-rated video games. The FTC issued an initial report in 2000, finding that the entertainment industry marketed directly to children products they had rated or labeled with a parental advisory due to violent content.[87] The Commission also found that children aged 13 to 16 could easily buy these products at retail.[88]

Recognizing the important First Amendment issues surrounding the rating, advertising, and marketing of such entertainment products, the FTC recommended strengthened self-regulatory codes, coupled with industry-imposed sanctions for non-compliance.[89] Under continued Congressional and FTC scrutiny, including four follow-up reports, the entertainment industry has limited its marketing to kids, added rating information to advertising, and made some improvement in limiting children's access to these products at the retail level.[90]

VII. BANNING ADS FOR HIGH CALORIE FOODS
Not an Answer to the Problem of Childhood Obesity

When the Commission initiated the kidvid rulemaking in 1978, only 26% of children ages 6 to 17 had no cavities in their permanent teeth.[91] Two decades later, the number of

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[85]*See generally* 1999 FTC Alcohol Report.

[86]*See generally* 2003 FTC Alcohol Report.

[87]*See generally* 2000 FTC Violent Entertainment Report.

[88]*Id*. at Appendix F.

[89]*Id*. at 52-56.

[90]*See, e.g.*, 2004 FTC Violent Entertainment Report. The music industry has changed less than movies or video games, maintaining that even recordings with parental advisories can be marketed to children.

[91]KidSource OnLine, *Children Without Cavities: A Growing Trend* (July 3, 1996), *available at* www.kidsource.com/kidsource/content/news/cavities7_3_96.html (citing study published in the March 1996 issue of the Journal of the American Dental Association).

[92]*Id*.

[93]*Id*.

[94]Centers for Disease Control and Prevention (CDC), National Center for Health Statistics, National Health and Nutrition Examination Survey (NHANES): NHANES 1999-2000, *Prevalence of overweight among U.S. children and adolescents*.

[95]*See* Kaiser Family Foundation, *Kaiser Family Foundation Releases New Report on Role of Media in Childhood Obesity*, News Release (Feb. 24, 2004).

[96]*See Childhood Obesity: What the Research Tells Us*, The Center for Health and Health Care in Schools, The George Washington University, *available at* http://www.healthinschools.org/sh/obesityfs.asp.

[97]*See* Kaiser Family Foundation, *Kaiser Family Foundation Releases New Report on Role of Media in Childhood Obesity*, News Release (Feb. 24, 2004), citing Styne, D., *Childhood and Adolescent Obesity: prevalence and significance*

The problems that surfaced in the 1970s rulemaking proceeding would also manifest themselves in any proposed rule with respect to food advertising. If the Commission were to attempt to restrict the advertising of "junk food" to children, it would first have to define "junk food." There are no clear standards for doing this. Calorie count alone would not be supportable and would produce some anomalous results, for example, permitting advertisements for diet soft drinks while prohibiting those for fruit juice. A standard referencing some combination of caloric density and low nutritional value is superficially appealing as a place to start, but there would be difficult problems in setting scientifically supportable standards for both of these elements. It is noteworthy that the FDA's food labeling rule, which requires foods to have a minimum amount of certain nutrients before health claims can be made (the so-called "jelly bean rule"), actually has the effect of preventing health claims for many fruits and vegetables.[98] Good nutrition is about good diets, not simply about "good" versus "bad" foods. That principle should be particularly apparent in the case of obesity, because eating too much of an otherwise healthy diet will still lead to weight gain. Any effort to define "junk food," for purposes of crafting and implementing advertising restrictions, likely would be fraught with even more difficulties than be Eqly hasthe effectiRrau(h.5can .165330.00086fiastrucng resg age standards for both of goodlo8.6p5 -1.1D[(

[98]*See* 21 C.F.R. § 101.14(e)(6). *But see* 60 Fed. Reg. 66206 (Dec. 21, 1995) (discussing proposals to change the 10% nutrient contribution requirement for health claims and stating that although FDA has not been persuaded to amend the requirement, it agrees that the rule had the unintended consequence of precluding health claims for certain fruits and vegetables, and that therefore health claims should be allowed for such foods).

[99]In contrast, the alcohol industry self-regulatory effort has successfully limited under-age exposure to its advertising, based on audience composition criteria. That is because the target audience is much broader, given the legal drinking age of 21, and therefore an audience composition standard (first 50%, then 30%) could be employed effectively.

consumption, which in turn leads to obesity. The evidence suggests that children today actually spend less time watching television shows than they did 20 years ago, but increasingly they spend more time in front of computer screens or playing video games on television consoles.[100] Thus, it is far from clear that restricting television advertising would directly advance the health of children. Indeed, the pervasiveness of the obesity problem in America suggests that more fundamental causes are at work.[101]

Furthermore, although it may seem obvious that the advertising to children of "junk foods" will cause children to eat more of these foods and therefore to gain weight, this seemingly apparent connection is surprisingly difficult to demonstrate. Advertising does increase the demand for individual brands of food; otherwise, companies would not pay substantial sums of money for advertising. However, if ads for one brand of candy merely steal market share from other brands of candy, the advertising does not increase children's consumption of candy in general, and does not contribute to obesity. Certainly in most markets, the major effect of advertising is to shift demand across brands, rather than to expand the demand for the entire product category.[102] Whether any market expansion occurs remains highly controversial. In the

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[100]The average amount of time children spend watching television actually declined from more than 4 hours per day in the late 1970s to about 2 3/4 hours per day in 1999. *See* Federal Communications Commission, *Television Programming for Children: A Report of the Children's Television Task Force* (Oct. 1979) (the average preschooler watched television 33 ½ hours per week (more than 4 ½ hours per day); the average school-aged child watched more than 29 hours per week (more than 4 hours per day), citing 1978 A.C. Nielsen Co. data); Kaiser Family Foundation, *Kids and Media @ the New Millenium* (Nov. 1999) (average child aged 2-18 spends 2 hours 46 minutes per day watching television). A 2000 survey found that children aged 2-17 spend an average of about 33 minutes per day playing video games. Kaiser Family Foundation, *Children and Video Games* (Fall 2002).

[101]As FTC Chairman Timothy J. Muris has said: "Even our dogs and cats are fat, and it is not because they are watching too much advertising." *Don't Blame TV*, Wall St. J., June 25, 2004, at A10.

[102]*See generally* the line of research starting with J.J. Lambin, *Advertising, Competition & Market Conduct in Oligopoly Over Time* (1976) (finding that the bulk of advertising efforts serve to influence brand shares, but not overall demand for the industry); K. Bagwell, *The Economic Analysis of Advertising*, Handbook of Industrial Economics (2003), *available at* www.columbia.edu/~kwb8/ (provides a survey of Lambin and more recent research on the sales-advertising relationship; Bagwell's summary conclusions from these studies were three-fold:

> First, a firm's current advertising is associated with an increase in its sales, but this effect is usually short lived. Second, advertising is often combative in nature. An increase in advertising by one firm may reduce the sales of rival firms, and rivals may then react with a reciprocal increase in their own advertising efforts. Third, the overall effect of advertising on primary demand is difficult to determine and appears to vary across

industries.

Id. at 31.)

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commercial speech in order to pursue a nonspeech-related policy."

[105]*See, e.g.*, Prepared Statement of the Federal Trade Commission Before the Subcommittee on Competition, Foreign Commerce, and Infrastructure of the Committee on

[108]For example, reducing calorie intake by 100 calories a day, along with moderately increasing physical activity (*e.g.*, walking about 20 minutes a day), can cause weight loss of approximately 10 pounds in six months or 20 pounds in one year. U.S. Surgeon General,