Federal Trade Commission Regulation of Food Advertising to Children: Possibilities for a Reinvigorated Role

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Abstract Growing awareness of the role that food and beverage advertising plays in the epidemic of childhood obesity has prompted calls for stricter oversight of advertising practices. The food and beverage industries have taken voluntary steps in this direction, but many commentators have called for increased government regulation. The mission of the Federal Trade Commission (FTC) makes it an obvious candidate to lead a new regulatory effort. However, the FTC has a troubled history in the area of children's advertising regulation, and several political and legal factors constrain its ability to act. This article reviews those obstacles as well as the opportunities that exist at present to expand FTC oversight of food advertising to children. The FTC has considerable latitude to regulate individual food advertisements more rigorously, either on the basis that they are deceptive or on the basis that they are unfair. Broader rule making under the unfairness authority would require congressional intervention to expand the FTC's scope of authority, but there exist possibilities for rule making under the deception doctrine. Finally, the FTC could strengthen its efforts to encourage the food industry to regulate its own advertising practices more stringently and could provide mechanisms for making voluntary initiatives more meaningful.

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Food and beverage companies spend more than $1.5 billion per year to promote their products to American children and adolescents (Federal Trade Commission 2008b). These companies employ a variety of marketing techniques, including broadcast, print, and Internet advertisements; product packaging and labeling; point-of-purchase displays; transmissions to personal digital devices; giveaway items; sponsorship of entertainment events, sports teams, and athletes; product placements; character licensing, toy co-branding, and cross-promotions; viral marketing; and in-school marketing (ibid.). Nearly 60 percent of the total expenditure on youth marketing is spent on carbonated beverages, restaurant food, candy, frozen desserts, and baked goods, products that tend to be high in calories, sugar, and saturated fat and are thus sometimes referred to as "obesogenic," or obesity causing. Fifty-three percent of all youth marketing spending is allocated to traditional television, print, and radio advertisements, and foods advertised on television are especially likely to be high in fat, high in sugar, or of low nutritional value (Batada et al. 2008).

The Institute of Medicine, reviewing the scientific literature in 2006, concluded that, while the evidence for adolescents was more equivocal, there was strong evidence that television advertising affects the food and beverage requests and preferences of children ages two to eleven (McGinnis, Gootman, and Kraak 2006). It recommended that the food industry develop and strictly adhere to advertising guidelines aimed at minimizing the risk that advertising would contribute to childhood obesity and that the Federal Trade Commission (FTC) be vested with the authority and resources to monitor and enforce compliance with these guidelines (Koplan, Liverman, and Kraak 2005). However, the Institute of Medicine did not elaborate on the FTC's role or on potential mechanisms of enforcement and did not recommend that the FTC or other agencies determine the substantive restrictions with which companies would have to comply. Rather, it suggested that stronger, direct FTC oversight should be initiated only if a voluntary approach, in which the food and beverage industries were asked to police their own marketing activities more vigorously, had been tried without success.

The Institute of Medicine's recommendations raise the question of what the optimal roles for government and industry in regulating food advertising to children are — and, more specifically, what part the FTC should play in ensuring that advertising practices meet evolving public demands for improvement. This article explores possibilities for wielding administrative regulation more effectively in this area. Historically, legal and political barriers have precluded effective agency regulation of

child-oriented food and beverage advertising to children, but the recent changeover in presidential administrations presents a window of opportunity for change.

I begin with a brief summary of the scientific, ethical, legal, and political arguments for stronger regulation of food advertising to children. Next, following an overview of the regulatory environment for child-oriented advertising, I discuss the scope of the FTC's own regulatory authority, past and present, in this domain. I then outline some potential directions and strategies for future regulation.

I conclude that, notwithstanding the historical contractions in its scope of authority, the FTC has considerable latitude to regulate individual food advertisements more aggressively under either its statutory authority to restrict deceptive advertising or its authority to prohibit unfair practices. Congressional action to restore some of the FTC's original authority to regulate child-oriented advertising would bolster the agency's ability to regulate advertisements as a group, although the FTC currently has latitude to engage in such rule making under its deception authority. Finally, the FTC could play a more vigorous and substantive role in encouraging articulation of and compliance with voluntary standards by the food and beverage industries.

Several boundaries of the analysis that follows should be noted. I focus on advertising to children, which raises some unique issues that do not clearly apply to adults. I address only briefly the legal constraints imposed on food advertising regulation by the U.S. Constitution — particularly the First Amendment — which have been discussed extensively elsewhere (Pomeranz, Mermin, and Le 2009). I do not discuss issues unique to the school environment or to Internet advertising. Internet marketing presently comprises only a small proportion (5 percent) of all youth-oriented food marketing expenses (Federal Trade Commission 2008b), and legal issues in the Internet and school contexts have recently been analyzed in depth. (See, respectively, Schwartz and Solove 2008 and Graff 2008.)

In the discussion that follows, I refer to advertising of both foods and beverages using the unitary term, "food advertising." Drawing on definitions suggested by courts and commentators, I define food "advertising" as any action intended to draw public attention to a food product, other than the labeling of the product.[1]

1. I exclude product labeling not because it sits outside the traditional understanding of the concept of advertising but because a separate regulatory regime exists for food labeling.

Justifications for Stronger Regulation of Food Advertising to Children

The Contributory Role of Food Advertising to Childhood Obesity

There is broad consensus among child health experts that the food environment generally and food marketing in particular are major contributors to childhood obesity. Several recent reports by expert bodies have reviewed the available empirical research about the effects of food advertising on children; expressed concern about the growth in such advertising; and called for greater regulation, with some emphasizing industry self-regulation and others calling for government action.

As noted above, highly distinguished committees convened by the Institute of Medicine produced comprehensive reports on childhood obesity prevention and the role of food marketing in 2005 and 2006 (Koplan, Liverman, and Kraak 2005; McGinnis, Gootman, and Kraak 2006). The 2005 report found that

> dietary and other choices influenced by exposure to these advertisements may likely contribute to energy imbalance and weight gain, resulting in obesity. Based on children's commercial recall and product preferences, it is evident that advertising achieves its intended effects, and an extensive systematic literature review concludes that food advertisements promote food requests by children to parents, have an impact on children's product and brand preferences, and affect consumption behavior. . . . Research suggests that long-term exposure to such advertisements may have adverse impacts due to a cumulate effect on children's eating and exercise habits. (Koplan, Liverman, and Kraak 2005: 173; internal citations omitted)

It concluded as follows: "After reviewing the evidence, the committee has concluded that the effects of advertising aimed at children are unlikely to be limited to brand choice. Wider impacts include the increased consumption of energy-dense foods and beverages and greater engagement in sedentary behaviors, both of which contribute to energy imbalance and obesity" (ibid.: 174). However, the report went on to say that "there is presently insufficient causal evidence that links advertising directly with childhood obesity and that would support a ban on all food advertising directed to children" (ibid.). This conclusion is somewhat curious in light of the report's foregoing findings, since the causal connection between consumption of high-calorie foods, physical inactivity, and obesity is not

in doubt. Nevertheless, it is true that few studies have established a direct dose-response relationship between advertising exposure and body mass index.

This Institute of Medicine report drew on a 2004 synthesis of relevant studies by the Henry J. Kaiser Family Foundation (2004) and a 2004 report by the American Psychological Association (Kunkel et al. 2004). Among the findings of these reports were that advertisements influence children's requests that their parents purchase particular food products, that a large proportion of such requests are successful, that exposure to advertisements is associated with children's caloric intake and specific food choices, and that advertisements contribute to children's misperceptions about the healthfulness of certain foods. The American Psychological Association voiced concern about these phenomena in light of empirical findings that eating habits formed during childhood tend to persist over a person's life cycle and noted that many experts "have linked the dramatic increase in the prevalence of childhood obesity to the emergence of the advertising of unhealthy foods to children" (ibid.: 12). It also reviewed a large literature from the field of psychology showing that children under the age of four or five cannot distinguish advertisements from television programs and that children under age seven or eight lack the ability to understand the persuasive intent and biased content of advertising.

These findings were echoed in a policy statement on children's advertising issued by the American Academy of Pediatrics in 2006. It highlighted several studies linking young children's television advertisement exposure to requests for junk food and to actual caloric intake and characterized young children as "psychologically defenseless against advertising" because of their limited cognitive development (American Academy of Pediatrics, Committee on Communications 2006: 2563).

The most compelling empirical account of the association between advertising and obesity in children is found in the Institute of Medicine's subsequent report on food marketing in 2006. The committee comprehensively and systematically reviewed the evidence on the relationship between exposure to food advertising, children's diet, and adiposity, analyzing 123 studies published over three decades. Among the findings from this review were the following:

- There is strong evidence that television advertising influences the food preferences and purchase requests of children aged two to eleven (McGinnis, Gootman, and Kraak 2006: 257–258) as well as their short-term food consumption (ibid.: 264–267). The evidence regard-

ing longer-term effects on dietary intake is strong for young children (ages two to five) but weaker for children aged six to eleven. There are too few studies to judge the effect on adolescents, although some evidence suggests there is no long-term effect on teens' dietary intake (ibid.).

- Children's purchasing requests are often successful, creating a causal link from food advertising to food intake (ibid.: 260).
- There is moderate evidence that television advertising affects the beliefs of children aged two to eleven about the healthfulness of particular foods. There is insufficient evidence to gauge the effect on adolescents (ibid.: 259).
- There is strong evidence that television viewing is associated with adiposity in children and adolescents. There are several explanations for this effect, but exposure to television advertising is a highly plausible mechanism. The association persists after taking alternative explanations, such as lower physical activity, into account, although these alternatives cannot be entirely ruled out due to the possibility of measurement error in studies of this kind (ibid.: 278–279).
- Generally, children aged eight and younger do not effectively understand the persuasive intent of advertising, and children aged four and younger cannot consistently discriminate television programming from advertisements (ibid.: 296–298).

Collectively, these expert reports provide a strong evidentiary basis that curtailing food marketing to children would address important contributing factors to childhood obesity. Also, in the case of young children, expert consensus is that such restrictions would address a practice that is inherently unfair: taking advantage of children's limited cognitive skills. Furthermore, regulation is justified by the limited ability of parents to counteract advertising messages and control expenditures on food and beverages, as is discussed below.

Parent and Child Roles in Food Purchasing and Consumption Decisions

The Institute of Medicine concluded that children are an important target market for food advertisers for three reasons: they are a "primary market" because they receive, control, and spend money themselves; they are an "influence market" because they influence their parents' purchasing decisions; and they are a "future market" representing future adult cus-

tomers (McGinnis, Gootman, and Kraak 2006: 153). In 2005, children aged three to eleven were estimated to control $18 billion in disposable income, almost half of which was spent on food products (Buying Power of Kids Tops $18 Billion 2006). Adolescents spent an estimated $159 billion in 2005 (TRU Projects Teens Will Spend $159 Billion in 2005 2005). Parents may have limited ability to control their children's purchasing decisions due to competing influences, including food advertisements; parents' physical separation from children during the school and work day; and parents' lack of control over the school food environment. On the other hand, children exert substantial influence over family food purchases (McGinnis, Gootman, and Kraak 2006; Koplan, Liverman, and Kraak 2005). More than three-quarters of children and adolescents report having influenced family food purchases, and similar proportions of parents report that their children exert such influence (American Youth Wielding More Household Buying Power 2003).

The case for a governance structure to ensure that food companies adhere to responsible practices when advertising to children emerges rather clearly from these empirical findings. Advertising exerts a substantial influence over children's food preferences and purchasing decisions, and children and youth engage in a substantial amount of food purchasing, both directly and by influencing their parents' decisions. Young children are cognitively limited in their ability to view advertisements critically and to weigh the pros and cons of different food choices. Although parents have an important role to play in mitigating the effect of food advertising through educating and exhorting their children to make healthful choices, their task is formidable in light of the volume and psychological appeal of countervailing messages children receive from advertisers.

The food and advertising industries themselves have long recognized the need for careful governance to ensure responsible advertising to children. However, their self-governance of food advertising has fallen short of the level of regulation needed to avoid further increases in the prevalence of obesity and overweight among youth.

Limitations of Industry Self-Regulation

To their credit, the food and advertising industries have taken significant steps toward curbing the aggressive marketing of obesogenic foods to children, particularly in the last four years. A number of companies have made better use of food advertisements, packaging, and labels to help consumers control their portion sizes and calorie intake as well as understand

the ingredients of the foods they consume (Federal Trade Commission 2008b). Major media companies such as Disney have limited the licensing of their characters so that they are used to promote fewer unhealthful foods (ibid.). In May 2006, the Alliance for a Healthier Generation (2006a) announced an agreement with three leading beverage companies to curtail marketing of soft drinks in schools. This was soon followed by agreements establishing minimum nutritional requirements for milk products and snack foods sold in schools (Alliance for a Healthier Generation 2006b, 2007).

In November 2006, the Council of Better Business Bureaus (CBBB) and the National Advertising Review Council launched the Children's Food and Beverage Advertising Initiative, with commitments from a number of major food and beverage companies to change their practices concerning advertising to children on television and the radio and in print and Internet advertisements. As of January 2009, four companies—Cadbury Adams, Mars, Hershey, and Coca-Cola—had pledged not to advertise to children under age twelve at all, and another eleven had adopted minimum nutritional standards for the types of foods that they will advertise to children under twelve (Federal Trade Commission 2008b; Council of Better Business Bureaus n.d.). Additionally, all of these companies have pledged to limit products depicted in interactive games directed to children under twelve to healthy dietary choices or to incorporate healthy lifestyle messages, to reduce their use of third-party licensed characters in advertisements that do not promote healthy dietary choices or healthy lifestyles, to refrain from product placement in editorial and entertainment content directed to children under twelve, and to stop advertising in elementary schools (Federal Trade Commission 2008b). Collectively, the pledging companies accounted for more than two-thirds of television food ads targeted at children in 2004 (ibid.). The FTC asserts that it is closely monitoring activities pursuant to these pledges (ibid.: 80).

There has also been activity within the leading professional monitoring body for children's advertising, the Children's Advertising Review Unit (CARU). CARU was created by the advertising industry in 1974 to ensure that advertising aimed at children younger than twelve is not misleading and takes into consideration children's level of cognitive development (Federal Trade Commission and Department of Health and Human Services 2006). CARU's policies and strategic direction are controlled by the National Advertising Review Council, which is in turn controlled by the Council of Better Business Bureaus and three advertising professional associations. The CBBB administers CARU's day-to-day operations,

which focus on investigating compliance with CARU's guidelines for children's advertising. Adherence to the guidelines is monitored through several mechanisms: CARU receives complaints from consumers and companies; the CBBB collects compliance reports from companies that participate in CARU; and the CBBB audits samples of advertisements (Children's Advertising Review Unit 2009: 4). CARU enforces its guidelines by issuing reprimands to offending advertisers. If companies do not comply with CARU's requests, in theory, it may report them to the FTC, although this almost never occurs in practice (Federal Trade Commission and Department of Health and Human Services 2006).

CARU's guidelines for children's advertising do not restrict advertising of particular products but do aim to eliminate potentially unfair or deceptive advertising practices across the board. In 2006 and 2009, the guidelines were revised; the revised guidelines authorized CARU to take action in "unfair" advertising, explicitly addressed the need to maintain distinctions between television program content and advertisements, required that depictions of food consumption in advertisements reflect the labeled serving size, prohibited disparaging messages about healthy foods and lifestyle choices, and required mealtime depictions of foods to be shown in the context of a nutritionally balanced meal (National Advertising Review Council 2007: 44–45; Children's Advertising Review Unit 2009).

Even some skeptics of food industry self-regulation have been impressed with these developments (Wootan 2007). The fact that major food and beverage companies agreed to adopt nutrition standards for child-oriented advertising and in-school marketing is a significant step forward. On the other hand, a number of holes in the self-regulation regime persist.

Several criticisms have been leveled at CARU as an oversight mechanism. Although CARU reports high rates of compliance with its requests to modify advertisements, some have questioned the reliability of these findings, highlighting the lack of external review, and have criticized CARU for failing to implement more aggressive mechanisms, such as fines, for enforcing its guidelines (Fried 2006). Additionally, focusing on advertising methods rather than imposing substantive limits on which kinds of foods may be advertised to children arguably misses the mark in a rather serious way (Federal Trade Commission and Department of Health and Human Services 2006). The Institute of Medicine has noted that CARU's enforcement efforts tend to focus on the accuracy and deceptiveness of ads and that its guidelines ignore the impact of both the sheer volume of food advertisements directed at children and the broader marketing environment (McGinnis, Gootman, and Kraak 2006).

The Children's Food and Beverage Advertising Initiative, which does involve substantive restrictions on the types of products that can be advertised to children, to some extent addresses the last concern. However, not all food companies — or even all major companies — have pledged to adhere to the new standards. Moreover, the initiative permits companies to adopt their own standards for what constitutes advertising directed to children under age twelve, as well as for what they consider "healthier dietary choice" products. It also leaves the door open for companies to meet pledge requirements primarily by including messages promoting "healthy lifestyles" — that is, increased physical activity — rather than reducing advertising of unhealthful foods. Only one of the early pledging companies has taken this route, but companies that join the group later and less enthusiastically may show a greater inclination to do so.

In summary, industry self-regulation initiatives, though laudatory, are significantly narrower in scope than the kind of regulation advocated by medical professional societies and public health experts. The most important gaps are in the focus on advertising practices for the kinds of products that may be advertised, the inconsistent adherence of different companies to the articulated advertising standards, and the paucity of strong enforcement mechanisms. For these reasons, a greater formal regulatory presence in this sphere is desirable.

A Window of Opportunity for Change at the FTC

For the last three decades, the FTC has not appeared interested in pursuing aggressive formal regulation of food advertising to children. With each new presidential administration, however, there are fresh opportunities for an invigorated role. Currently, there are signs that the commission's posture on regulating food advertising to children may be in transition, with its new leadership contemplating a greater regulatory role.

Like all federal agencies, the FTC is dependent on Congress for its funding and scope of authority, and its budget and agenda are heavily driven by the priorities and ideology of the reigning presidential administration (Mello 2002: 470; Moe 1982; Kiewiet and McCubbins 1991; Hammond and Knott 1996: 124; Wildavsky 1964; Waterman 1989: 37 – 39). This dependence, along with uncertainty as to where the political winds may shift, may cultivate a reluctance to act boldly. The FTC tends to assert that it is less politicized than other federal agencies, but the history of its own consumer protection agenda suggests an attentiveness to, if not an outright affinity with, the priorities of the current presidential administration.

Thus, while the FTC has considerable institutional capacity to engage in thoughtful, expeditious, transparent rule making, political considerations often militate against it.

During the last several administrations, the commission's philosophy and strategy of regulation in this area have been characterized by two features. First, an ideology of antipaternalism has pervaded public statements by FTC officials. In a 2003 presentation, former FTC Bureau of Consumer Protection head Howard Beales remarked that "one might argue that fast food or fast cars create significant harms that are not outweighed by countervailing benefits and should be banned. But the concept of reasonable avoidance keeps the Commission from substituting its paternalistic choices for those of informed consumers. . . . Unwise consumer choices are a strong argument for consumer education, but not for law enforcement" (Beales 2003). He went on to comment on the ways in which the current interpretation of the unfairness doctrine reflects "common sense principles about the appropriate role for the Commission in the marketplace":

> First, the Commission's role is to promote consumer choices, not second-guess those choices. That's the point of the reasonable avoidance test. Second, the Commission should not be in the business of trying to second guess market outcomes when the benefits and costs of a policy are very closely balanced or when the existence of consumer injury itself is disputed. That's the point of the substantial injury test. And the Commission should not be in the business of making essentially political choices about which public policies it wants to pursue. That is the point of codifying the limited role of public policy. (ibid.)

In 2007, then FTC chair Deborah Platt Majoras also expressed the view that consumers are best served by the free flow of information in the marketplace and that it is improper for a government agency to "substitute our judgment for that of consumers or to save them from bad choices" (Majoras 2007).

These statements reveal an underlying belief that food advertising — even advertising to very young children — facilitates informed choices in the marketplace. A corollary is that where there is informed choice about food product purchase and consumption, there is the opportunity for consumers to avoid unwanted health effects through such choices. Another underlying view is that the available evidence does not clearly establish that the free flow of advertising harms children or other consumers. The commission's position appears to reflect a belief that in the absence of

proof of harm there is a danger that food advertising restrictions will be perceived as purely political.

The second feature of the FTC's philosophy has been a preference for industry self-regulation. Majoras (2005) has remarked that self-regulation "can address problems more quickly, creatively, and flexibly than government regulation can" and that the government regulation approach had been tried and had "failed for good reasons." One element driving the view that voluntary efforts are more feasible than external regulation is a judgment within the commission that the current scope of constitutional protection for commercial speech leaves little latitude for restricting child-oriented advertising (Hippsley 2008).

The commission has made several specific recommendations for industry self-regulation. In part, these recommendations advise food companies to intensify their efforts to improve the nutritional content of their products through reformulation and new product development, to facilitate consumption of appropriate portion sizes by repackaging foods in smaller portions, to make better use of food labels to assist consumers in identifying relatively healthful products and consuming reasonable portions, to reconsider their in-school marketing practices, to consider limiting the marketing of foods with a very unfavorable nutritional profile to children, to use television and movie characters to promote only healthful foods to children, and to develop public education programs on health and fitness (Federal Trade Commission and Department of Health and Human Services 2006). The FTC has articulated few conditions on its support for voluntary self-regulation, emphasizing only that such initiatives should evolve with developments in the field, should have some private enforcement mechanism, should be visible to the public, and must have no anti-competitive impact (ibid.).

The Obama administration has brought new leadership to the FTC and created the prospect of a shift in both ideological orientation and policy agenda. The appointments of Jonathan Leibowitz as chair of the FTC and David Vladeck as director of the Bureau of Consumer Protection signal that the new administration intends the FTC to regulate more aggressively. During his five years as an FTC commissioner, Leibowitz concurred or dissented fifteen times from FTC orders, reports, and complaints to express his view that, in many cases, the commission had not gone far enough in its enforcement efforts (President Obama Appoints Jon Leibowitz Chairman of the FTC 2009). He has been vocal on the issue of food marketing to children, stressing its obesogenic effects and calling for firmer governance. "If companies don't do the right thing,"

he stated in a 2008 interview, "the failure of self-regulation may make the next Congress and the next president more inclined toward government regulation" (Urken 2008). Indeed, President Obama's campaign statements indicated that if voluntary guidelines for food marketing prove ineffective, the "guidelines should be made mandatory and . . . the Federal Trade Commission should have the authority and the resources to monitor and enforce compliance" (What the Candidates Had to Say 2008). In a concurring statement to the 2008 FTC report on food marketing to children, Leibowitz (2008: 1) further opined, "To be fair, most large food marketers are beginning to take their self-regulatory obligations seriously, and for that they deserve recognition. Yet some companies still need to step up to the plate and others need to strengthen their voluntary measures, not only because it is in the public interest, but also because it is in their self-interest: a failure of self-regulation may make the next Congress — and next administration — more inclined towards government regulation." Leibowitz also noted, "Some in industry may criticize us for using our bully pulpit to encourage companies to do a better job of marketing healthier products to youth. Such criticism would be misguided. . . . A little government involvement — combined with a lot of private sector commitment — can go a long way toward the healthier future for our children that all of us want to see" (ibid.: 3). David Vladeck is an outspoken consumer-protection advocate who spent three decades at the Public Citizen Litigation Group, the litigating arm of the well-known consumer advocacy organization. Pro-consumer groups have celebrated Vladeck's appointment as a victory, having lobbied the administration to appoint someone who would regulate more vigorously than the previous director. In a speech shortly after assuming office, Vladeck indicated that he will maintain an aggressive pace of investigation and engage in increased policy and rule making, including taking a "hard look" at advertising to children (Arnold and Porter LLP 2009).

In the short term, the FTC's number one agenda item is likely to remain its effort to obtain greater authority to regulate the financial services industry. However, given the appointments of Leibowitz and Vladeck, as things settle out in that area, it seems probable that the commission will direct greater attention to the issue of food marketing to children.

The recent convening of the Interagency Working Group on Food Marketed to Children creates a special window of opportunity for the FTC to change policy directions. The Omnibus Appropriations Act for fiscal year 2009 included a provision for this joint effort of the FTC, Food and Drug Administration (FDA), Centers for Disease Control and Prevention, and

Department of Agriculture (U.S. House Committee on Rules 2009: 39). The statutory mandate for the working group is to "conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children" (ibid.). The statute specifically directs the working group, in developing standards, to consider evidence concerning the role of consumption of various foods and nutrients in promoting or preventing obesity among children. The group's work is currently under way and will soon become public, as the group is required to submit a report and set of recommendations to Congress by July 2010.

In summary, there is currently both the evidence base to justify stronger regulation of food advertising to children and the political climate necessary to support such an initiative within the FTC.

Scope of FTC Authority to Regulate Child-Oriented Advertising

Federal Agency Jurisdiction over Child-Oriented Food Advertising

Three agencies have jurisdiction over regulation of child-oriented food advertising: the Federal Communications Commission (FCC), FDA, and FTC. The Federal Communications Act of 1934 (47 U.S.C. § 201[b] [1934]) gives the FCC broad power to regulate "common carriers" engaged in interstate or foreign communication. The applicability of this authority to broadcast advertising was not clarified by Congress until 1990, when the Children's Television Act imposed restrictions on the amount of advertising that could be aired during children's television programming and required the FCC to promulgate a rule setting forth television broadcasters' responsibilities toward children (Children's Television Act of 1990, 47 U.S.C. § 303a–b). Before that, the FCC operated under a joint agreement executed with the FTC in 1972 that gave the FTC primary jurisdiction over regulation of unfair or deceptive advertising (Federal Trade Commission and Federal Communications Commission 1972).

Since the 1990 statute became effective, the FCC has been more active in children's advertising regulation but still has engaged in rule making fairly infrequently (Astrachan et al. 2008: chap. 49, sec. 3, 3–49). It has acted to limit the amount and timing of child-oriented television advertising, to restrict advertisers' ability to display Internet addresses during chil-

dren's programs (Commercial Limits in Children's Programs, 47 C.F.R. § 73.670 [2008]), to specify the types of educational and informational programming for children that broadcasters must carry (Educational and Informational Programming for Children, 47 C.F.R. § 73.671 [2008]), and to extend these requirements to cable operators as well as television broadcasters (Commercial Limits, 47 C.F.R. § 76.225).

Whereas the FTC and the FCC have overlapping authority in the area of child-oriented broadcast advertising, the FTC and the FDA have overlapping jurisdiction in the area of food marketing. Congress delegated regulatory authority in this domain to the FDA via the Food, Drug, and Cosmetics Act of 1938 (21 U.S.C. § 403[a] [1938]) and to the FTC in the Federal Trade Commission Act of 1938 (15 U.S.C. §§ 5, 12, 13 [1938]). Since 1954, these two agencies have operated under a negotiated division of authority in which the FDA has taken responsibility for regulating food labeling and the FTC has taken responsibility for regulating the truth or falsity of food advertising. This agreement was formalized in a series of memoranda of understanding, the most recent of which was issued in 1971 (Food and Drug Administration 1971). Because advertising is likely a more powerful influence on children's food preferences than food labels, this division of authority has made the FTC the primary agency of interest for those interested in curbing the marketing of obesogenic foods to young people.

The Federal Trade Commission Act of 1938

In 1938, Congress granted the FTC the power to regulate "unfair or deceptive acts or practices in or affecting commerce" (Federal Trade Commission Act, 15 U.S.C. § 45[a][1]) and to prohibit "any false advertisement" for food products that is "misleading in a material respect" (Federal Trade Commission Act, 15 U.S.C. §§ 12, 15). The FTC's authority extends to marketing practices in a wide range of venues, including the Internet. Statutory restrictions on its consumer-protection jurisdiction relate primarily to a small number of products and services (for example, banking services and airline services) over which other federal agencies have been given regulatory authority.

The commission carries out these powers through two processes that differ substantially in scope and effect. The first, more limited mechanism is adjudication. To challenge individual advertisements that the FTC has reason to believe are deceptive or unfair, it can initiate investigations and, through an administrative law judge, make formal determinations. The

administrative law judge's decisions are appealable to the full commission and then to the judicial courts. The FTC can also file litigation directly in the federal courts. Among the remedies available to the commission are quashing advertisements, levying fines, or requiring advertisers to give refunds to consumers; requiring advertisers to make corrective disclosures or run corrective advertisements; and filing lawsuits to obtain financial redress for consumers (Federal Trade Commission 2001). To address deception in advertising, the FTC has historically favored mandatory disclosures over bans on advertisements, where feasible (Federal Trade Commission 2002), although this could certainly change in the new administration.

Second, the FTC can regulate deceptive or unfair advertising practices that occur on a widespread or industrywide basis through formal rule making. It is authorized by the Federal Trade Commission Act to promulgate "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" (15 U.S.C. § 57a). Like other federal agencies, before proposed rules become final the commission must hold hearings at which interested parties may offer comments and argument. Once rules are finalized, the commission may enforce them by levying fines of up to $11,000 per violation and by filing suit to obtain consumer redress (Federal Trade Commission 2008a).

Congress initially delegated substantial discretion to the FTC to define the meaning of the statutory terms "deceptive" and "unfair," subject to judicial review (FTC Policy Statement on Unfairness, *appended to* International Harvester Co., 104 F.T.C. 949 [1984]). However, it has intervened at various points to clarify, formalize, and in some cases alter the FTC's understanding of these doctrines.

The Deception Doctrine. As a matter of policy, in order to find an advertisement "deceptive" within the meaning of the Federal Trade Commission Act, the FTC must be satisfied that three elements are present: (1) a claim was made, (2) the claim is likely to mislead a reasonable consumer, and (3) the claim was material (FTC Policy Statement on Deception, *appended to* Cliffdale Assoc., Inc., 103 F.T.C. 110 [1984]). Claims may be either express or implied, and implied claims may arise from an advertiser's omission of information as well as from information included in the ad. In evaluating whether an implied claim has been made, the FTC may look to extrinsic evidence — for example, the nature of the transaction — in addition to scrutinizing the ad itself. The most important consideration is "the net impression" conveyed to the public (Federal Trade Commission 1994).

In order to show that a claim is made by omission, the FTC must make a case that the advertiser has omitted information that is necessary to prevent the ad from being misleading—that is, the ad features a "misleading omission" (*Katharine Gibbs School v. Federal Trade Comm'n*, 612 F.2d 658, 665 [2d Cir. 1979]). This requires the FTC to show that the failure to include the information is misleading because the information is material in light of the consequences of using the product or relying on the claims in the ad (*Alberty v. Federal Trade Comm'n*, 182 F.2d 36, 38 [D.C. Cir. 1950]). For example, in an action against the advertiser of a weight-loss program, the FTC found that the advertisements made a material omission in failing to notify the public that the weight-loss method involved injection of a prescription drug that had not been approved by the FDA for purposes of weight control (*Simeon Management Corp. v. Federal Trade Comm'n*, 579 F.2d 1137, 1146 [9th Cir. 1978]).

The second component of a deception finding is a determination that the claim is likely to mislead a reasonable consumer under the circumstances. The FTC need not show that the advertisement has actually misled anyone, only that it has the "capacity to deceive" (*Charles of the Ritz Dist. Corp. v. Federal Trade Comm'n*, 143 F.2d 676 [2d Cir. 1944]); it also need not prove that the advertiser intended to mislead anyone (*Federal Trade Comm'n v. Sterling Drug, Inc.*, 317 F.2d 669 [2d Cir. 1963]). Reasonableness is evaluated from the perspective of the ordinary consumer, but if the advertisement targets a particular demographic group, such as children, the effect of the claim on a reasonable member of that group is considered (FTC Policy Statement on Deception, *appended to* Cliffdale Assoc., Inc., 103 F.T.C. 110 [1984]).

The reasonableness requirement means that the FTC will not consider an advertisement deceptive if it involves mere "puffery"—clearly exaggerated representations (usually statements of opinion rather than fact) that ordinary consumers do not take seriously (FTC Policy Statement on Deception, *appended to* Cliffdale Assoc., Inc., 103 F.T.C. 110 [1984]). On the other hand, for health-related claims in advertisements for food and other products, the FTC requires that the advertiser be able to substantiate the claim with "competent and reliable scientific evidence" (Federal Trade Commission 1994).

The third component of deceptiveness concerns the materiality of the claim. A material claim is one that "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product" (Cliffdale Assoc., Inc., 103 F.T.C. 110, 165 [1984]). Materiality is presumed for all express claims; intentional implied claims;

health and safety claims; and claims about price, purpose, quality, and performance of the product (FTC Policy Statement on Deception, *appended to* Cliffdale Assoc., Inc., 103 F.T.C. 110 [1984]). For other types of claims, the FTC may bring evidence regarding the importance of the general subject matter of the claim, the advertiser's own assessment of the success of its claims, or an association between the dissemination of the claim and increased sales of the product (Federal Trade Commission 2002).

Two features of the deception doctrine make it especially attractive from a regulatory standpoint. First, the FTC is not required to prove an injury to consumers. The deception itself is considered to be injurious, given that it involves a material issue affecting the consumer's decisions about the product. This facilitates regulatory action in situations where advertisements are believed to contribute to consumer injury but the causal relationship is difficult to establish empirically. Second, courts presume that deceptive ads have no countervailing societal benefits that must be weighed against their faults. There is no such presumption applied to findings made under the unfairness doctrine.

In the context of child-oriented advertising, the deception doctrine has been used to challenge advertisements for toys that do not function as depicted in the ads (Ideal Toy, 64 F.T.C. 297 [1964]). In the context of food advertisements, it has frequently been invoked to challenge nutritional claims that are unsubstantiated or that would not be valid if the product was consumed in the way that a reasonable consumer would ordinarily consume it (Beales 2004).

The Unfairness Doctrine. There has been considerable change over time in the application of the unfairness doctrine. Presently, the FTC is required to make three showings in order to find an advertisement "unfair." The commission must show that (1) the ad is likely to cause substantial injury to consumers, (2) the injury is not reasonably avoidable by consumers, and (3) the injury is not outweighed by offsetting benefits to consumers or competition (Federal Trade Commission Act, 15 U.S.C. § 45[n]).

To show substantial injury, the FTC may demonstrate either that serious harm occurs to a small number of consumers or that a relatively minor harm occurs to a large number (Beales 2003). In evaluating reasonable avoidance, the FTC considers the availability to consumers of other sources of information as well as precautions or other measures that consumers could take to prevent injury. Essentially, it looks for practices that impede consumers from freely making informed decisions. Evaluation of the offsetting benefits element involves consideration of benefits

that consumers enjoy as a result of the advertiser's practice as well as what it would cost to impose a remedy to eliminate the unfair practice or ameliorate its harms (FTC Policy Statement on Unfairness, *appended to* International Harvester Co., 104 F.T.C. 949 [1984]).

Previous formulations of the unfairness doctrine left somewhat wider latitude for the FTC to restrict advertising than the current test does. From 1964 to 1980, the FTC interpreted the doctrine as requiring it simply to weigh three factors: whether the advertisement caused substantial and unjustified consumer injury, whether it violated established public policy, and whether it was in other ways "immoral, unethical, oppressive, or unscrupulous" (Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose, 28 Fed. Reg. 8355 [1964]; *Sperry v. Hutchinson*, 405 U.S. 233, 244–245 n. 5 [1972]). Unfairness determinations were usually made by establishing a significant, unjustified injury, which essentially required the same showings that the FTC must make today: substantial injury, no reasonable avoidance, and no countervailing benefits (FTC Policy Statement on Unfairness, *appended to* International Harvester Co., 104 F.T.C. 949 [1984]).

What made the previous interpretation broader than the contemporary one was that, in theory, the "unethical or unscrupulous" prong could be asserted as an alternative basis for an unfairness finding. Over time, though, the FTC found this prong to be largely duplicative of the substantial injury criterion, since truly unethical practices tended to cause injury (FTC Policy Statement on Unfairness, *appended to* International Harvester Co., 104 F.T.C. 949 [1984]). In addition, the "established public policy" provision was occasionally invoked as an independent basis for an unfairness determination. However, the FTC asserted that this was limited to cases in which "the policy is so clear that it will entirely determine the question of consumer injury"—in other words, cases in which "the legislature or court, in announcing the policy, has already determined that such injury does exist" (ibid.). In 1994, Congress eliminated any lingering possibility that public policy could constitute the sole basis for an unfairness finding. It adopted amendments to the Federal Trade Commission Act which stipulated that, although "the Commission may consider established public policies as evidence to be considered with all other evidence," public policy considerations "may not serve as a primary basis" for an unfairness determination (Federal Trade Commission Act, 15 U.S.C. § 45[n]; Beales 2004).

Historically, the FTC has used the unfairness doctrine to challenge

child-oriented advertisements that pose potential safety risks to children — for example, by depicting products being used in unsafe ways — or that could lead to economic injury to parents (Beales 2004). A common thread running through such cases has been the difficulty that parents face in avoiding the harm (ibid.). For instance, a television ad for Uncle Ben's rice touted the product's ease of preparation by depicting a young child cooking it on a stove without adult supervision. The commission alleged unfairness because the ad could lead young children to engage in unsafe cooking practices (Uncle Ben's, Inc., 89 F.T.C. 131 [1977]). The possibility of young children receiving cooking burns satisfied the substantial injury prong of the unfairness test; the fact that the ad suggested cooking without an adult present made it hard for parents to avoid the harm, satisfying the reasonable avoidance prong; and there were no offsetting benefits to the ad. Similarly, the commission found it unfair to advertise multivitamins to children under age twelve because they were "unqualified by age or experience to decide for themselves whether or not they need or should use" multivitamins and because the manufacturer's use of the Spiderman character in the ad could lead a child to overconsume the vitamins in the belief that they had properties they did not have (Hudson Pharm. Corp., 89 F.T.C. 82 [1977]).

Historical Contractions of FTC Authority

Congress has twice narrowed the FTC's authority to restrict advertising on the basis of unfairness — through the 1994 amendment and, much earlier and much more significantly, through legislation passed in 1980 that took aim at initiatives to restrict children's advertising. In 1978, the commission launched a children's advertising rule-making initiative, which became known as "kidvid," to restrict television advertising of high-sugar foods to children. The objective of the initiative was to reduce the incidence of dental caries in children. The FTC proposed three specific types of restrictions: a ban on all television advertising "for any product that is directed to, or seen by, audiences with a significant proportion of children too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising" (defined as children under age six); a ban on television ads for the most cariogenic foods that were directed to or seen by audiences with a significant proportion of older children (between ages eight and eleven); and a requirement that television ads for other sugared food products that were directed to or seen by audiences with a significant proportion of older children "be balanced by nutritional and/or health dis-

closures funded by advertisers" (Children's Advertising: Proposed Trade Regulation Rulemaking and Public Hearing, 43 Fed. Reg. 17,967–17,972, 17,969 [1978]).

The FTC based the proposed rule on findings that child-oriented advertising violates both the deception doctrine and the unfairness doctrine:

> It is both unfair and deceptive, within the meaning of section 5 of the FTC Act, to address televised advertising for *any* product to young children who are still too young to understand the selling purpose of, or otherwise comprehend or evaluate, the advertising. This conclusion rests, in part, on legal precedents which hold that even adults—a group much less vulnerable than children—are not to be exposed to "disguised" or "hidden" advertising. The policy of those precedents is to proscribe efforts to bypass the defenses which adults are presumed to have when they understand that advertising is being addressed to them. (Federal Trade Commission 1978: 27)

Moreover, the FTC opined, the advertising of highly sugared foods to children was deceptive in that it made "at least the implicit claim that consumption of the advertised products is desirable," while omitting the material fact that "the products can also pose health risks" (ibid.: 35).

The proposed rule stirred a maelstrom of controversy. In the notice-and-comment period following issuance, the FTC received over sixty thousand written comments and held hearings resulting in over six thousand pages of transcripts (Beales 2004). Critics castigated the FTC for overstepping its bounds and imposing unwanted, paternalistic regulation.

In response to public sentiment and aggressive lobbying from the food industry, Congress temporarily suspended all funding for the FTC, restoring it only after passing legislation in 1980 that narrowed the commission's authority to regulate children's television advertising. The FTC Improvements Act of 1980 (15 U.S.C. § 57a[h] [1980]) took away the FTC's authority to "promulgate any rule" based on a determination that children's advertising constitutes an unfair act or practice. The legislation left the door open for the FTC to ban particular child-oriented advertisements under the unfairness doctrine, but hobbled the agency by prohibiting broader rule making on the basis of unfairness.

Stung by this action and operating under the leadership of a new chair appointed by President Reagan, FTC staff recommended that the commission terminate the kidvid rule-making process (Children's Advertising: Termination of Rulemaking Proceeding, 46 Fed. Reg. 48,710–48,714 [1981]). Its detailed final report cited a lack of "workable solutions which

the Commission can implement through rulemaking" (Federal Trade Commission 1981). The FTC also began to modify its interpretation of the unfairness doctrine at this time, moving it toward the current test and placing new emphasis on a requirement of consumer injury (Beales 2003). Since the 1994 legislation codifying that change, "perhaps chastened" by its past experience, the FTC has asserted its unfairness authority infrequently (ibid.). It has instead relied on the deception doctrine, even in situations where it did not appear to fit the facts of the case well.

In sum, the FTC's current scope of authority to regulate child-oriented advertising consists of three tools: the power to find that individual advertisements are unfair, the power to find that individual advertisements are deceptive, and the power to promulgate rules deeming a specified class of advertisements deceptive.

Prospects and Directions for Future Regulation

Barriers to Effective Regulation

The FTC's ideological and pragmatic attraction to industry self-regulation is likely the most important reason the commission has not sought to more aggressively regulate food advertising to children. However, as the foregoing discussion of the commission's scope of authority has suggested, there are several other factors that currently make such regulation challenging. With respect to the unfairness authority, these include restrictions on the commission's rule-making powers, the doctrine of reasonable avoidance, causation issues, tailoring problems, and constitutional constraints. The last two factors also affect the prospects for regulation under the deception doctrine.

Restrictions on Rule Making under the Unfairness Doctrine. Unquestionably, among the most significant impediments to aggressive FTC regulation of child-oriented advertising is the legislative withdrawal of its rule-making authority under the unfairness doctrine. Although the FTC retains the ability to issue cease-and-desist orders for particular advertisements on the basis of unfairness, broad rule making of the kind contemplated in the kidvid initiative is precluded. This is a significant handicap because, as a basis for rule making about children's food advertising, the unfairness doctrine has the potential to be at least as useful as the deception doctrine.

In theory, the unfairness authority could be used to combat any advertising that encourages children to engage in unsafe behavior. Liberally construed, this might include consumption of any food that offers minimal nutritional value yet is energy rich and, therefore, obesogenic. More conservatively interpreted, it would include consumption of extremely energy-rich foods (for instance, the three-pound, 683-calorie serving of Coca-Cola offered by 7-Eleven convenience stores in the "Extreme Gulp" refillable mug) or frequent consumption of other high-calorie offerings. Restoration of the FTC's former unfairness authority would open the door for the commission to issue high-impact regulations that, because they are narrowly tailored to the objective of preventing unsafe behaviors in children, would stand a relatively good chance of surviving a First Amendment challenge.

Reasonable Avoidance. Even if the FTC was given unfettered ability to deploy the unfairness doctrine to engage in rule making for children's advertising, it would still be required to make the requisite showings for an unfairness finding: likelihood of consumer injury, inability of consumers to take reasonable steps to avoid the harm, and lack of offsetting benefits to consumers or competition. The reasonable avoidance prong might pose a particular challenge.

Opponents of food advertising regulation could raise two strong arguments that any consumer harm that may result from advertising can reasonably be avoided. First, they might point to the availability of nutritional information and advice in venues other than advertisements. Children receive nutritional messages from a variety of sources, including parents, school, and peers, in addition to the mass media. Moreover, nutritional information about advertised foods is often readily available on the Internet. Arguably, this suggests that the information marketplace for food choices is flourishing.

Second, opponents could emphasize parents' role in controlling their children's food consumption. Where an advertising practice is targeted to children, the FTC's reasonable-avoidance inquiry will examine whether parents have a fair opportunity to prevent the behavior that leads to physical or economic injury. It could be argued that parents have substantial control over their children's eating habits both by virtue of their moral influence and because they control the means of purchasing food. As a result, they can avoid the harms associated with obesogenic food through responsible parenting.

Several counterarguments might be offered. Although alternative

sources of information about nutrition are available, the playing field is hardly level for the various nutritional messages. Spending by advertisers of energy-dense foods vastly outstrips spending by the government to promote good nutrition, and the volume of advertising messages to which children are exposed dwarfs the time allocated to nutrition education in schools and most homes. This imbalance speaks to the ability of a "reasonable child" to sort through the various messages received and make informed choices.

The imbalance also bears on the reasonableness of expecting parental influence to compete with and outweigh media influences in shaping children's food choices. In other unfairness cases involving risks to children, the FTC has not stressed the primacy of parents' responsibility to provide countermessages. For example, the fact that parents could educate or admonish their children about safe cooking practices as a means of rebutting the suggestion in the Uncle Ben's rice advertisement that young children could cook rice without supervision did not foreclose a finding of unfairness.

A second counterargument, discussed above, is that regardless of the amount of information at their disposal, young children have a limited ability to weigh the risks, costs, and benefits of different food choices. Hence, advertising to young children resembles other sales practices that the FTC has highlighted as unfair, describing them as "unreasonably creat[ing] or tak[ing] advantage of an obstacle to the free exercise of consumer decisionmaking" (FTC Policy Statement on Unfairness, *appended to* International Harvester Co., 104 F.T.C. 949 [1984]). Indeed, one example the FTC has given of such practices is when sellers "exercise undue influence over highly susceptible classes of purchasers" (ibid.). Young children certainly fit this description.

Third, as discussed earlier, parents' ability to control their children's food consumption is constrained by a number of factors. Again, precedent does not suggest that the FTC will take a hard line with respect to parental responsibility. For instance, although parents could instruct their children not to make calls to costly "900 numbers," an FTC rule prohibits companies from advertising such numbers to children under the age of twelve unless the services offered are truly educational in nature; it also requires all 900-number advertisements targeted to children under age eighteen to direct listeners to seek parental permission before calling (Federal Trade Commission 1996). In a consent order issued prior to this rule, the FTC discussed the fact that without a highly prominent and vehement directive that children must seek parental permission, there were "no

reasonable means for persons responsible for payment of these charges to exercise control over the transaction," and the advertisements therefore were unfair (Teleline, Inc., 114 F.T.C. 399 [1991]). Along the same lines, it could be argued that parents cannot constantly control their children's food consumption and thus cannot reasonably avoid the harm associated with excessive consumption of advertised obesogenic food products.

Causation Issues. The causal relationship between food advertising and obesity presents a further challenge to crafting legally defensible advertising regulations under the unfairness doctrine. In order to restrict advertising on the basis of unfairness, the FTC must demonstrate consumer injury. This necessitates proof of a causal link between the specific advertisements to be restricted and some substantial harm to consumers.

Ordinarily, such an inquiry focuses on the actions that an advertisement induces on the part of consumers. For example, in the Uncle Ben's rice case, the unfairness allegations centered on the suggestion that children could cook the product on a stove without supervision. For most kinds of products, the health or safety risk associated with the behavior induced by the advertisement would be obvious. However, when FTC action is premised on the notion that consumption of the product, rather than a particular way of using it, is what creates the risk of injury, the showing becomes more complicated. The FTC must show not only that the ads induce consumption of the product but also that consumption poses health hazards.

For consumables with recognized toxicities, such as children's multivitamins, this showing will be straightforward. But it will be more challenging for ordinary foods because the harms alleged to be associated with their consumption typically have multifactorial causation. Obesity and other health conditions may be attributable to consumption of a number of different foods as well as to other factors, such as genetic predispositions, other environmental exposures, and lifestyle factors.

The difficulty of isolating which advertisements cause injury to child viewers became apparent during the kidvid rule making, when the FTC attempted to determine which food products to target for advertising restrictions. It was unclear how much any one food contributed to tooth decay (Federal Trade Commission 1981). A more general causation issue that emerged during kidvid was uncertainty about the empirical association between exposure to television advertising and children's food attitudes and preferences. FTC staff identified reliable evidence that television advertising persuaded children to ask for the advertised product, but

found the evidence linking advertising and food preferences "inconclusive" overall (ibid.: 48, 713). This made it difficult to establish consumer injury in the form of either dental caries or obesity. With respect to the latter, when the rule making got under way in 1978, there was "a body of responsible scientific opinion which holds . . . that the overconsumption of sucrose probably contributes to obesity" but "a scientific controversy as to whether heavy sugar consumption can lead to such other long-term health problems as heart disease and diabetes" (Federal Trade Commission 1978: 166–167).

Although the evidence base today is much broader, demonstrating a causal pathway between advertising exposure and obesity-related health harms would still pose a challenge for the FTC. Proving that exposure to food advertising affects children's food preferences, nutritional attitudes, and consumption patterns would not be particularly onerous (Chernin 2008). However, as discussed earlier, showing a more direct nexus between advertising exposure and obesity could be.

One way to make a tight case for causality would be to focus on advertisements that promote frequent consumption of energy-dense foods or consumption of very high-calorie food portions or products. For example, the FTC could focus on advertising messages promoting frequent consumption of fast food or the purchase of entrees such as Hardee's "Monster Thickburger," which weighs in at 1,420 calories and 108 grams of fat (Hardee's Food Systems 2009). There is a high degree of face validity to the argument that consumption of such products leads to excess weight gain. On the other hand, it may be difficult to prove that advertising of particular food products contributes substantially to obesity. Studies that parse the advertising-obesity relationship to this level of detail are simply not available at this time. This reality reinforces the case for advertising regulations that are targeted to a particular age group of children rather than a very specific class of foods such as soft drinks or fast food.

A final showing that the FTC may have to make is that obesity constitutes a consumer injury, either in and of itself or because it elevates a child's risk for other health conditions. There is some social and scientific controversy about whether obesity is inherently unhealthy (Raebel et al. 2004; Finkelstein, Ruhm, and Kosa 2005; Chan et al. 1994; Wild and Byrne 2006; Poirier et al. 2006; Smith 2004; Willett, Dietz, and Colditz 1999). However, the evidence that overweight and obese individuals are more likely than normal-weight persons to develop major chronic health conditions such as diabetes and heart disease and to require more health care services is quite compelling (Poirier et al. 2006; Smith 2004; Raebel

et al. 2004; Finkelstein, Ruhm, and Kosa 2005; Finkelstein et al. 2009; Colditz et al. 1995; Chan et al. 1994; Wild and Byrne 2006; Willett, Dietz, and Colditz 1999). Although the development of obesity-related physical health conditions is not inevitable for all obese individuals, research has demonstrated that obese children and adolescents suffer serious psychosocial impacts as a result of their weight. On average, their self-reported health-related quality of life is on par with that of children and adolescents with cancer (Schwimmer, Burwinkle, and Varni 2003).

In summary, the requirement that unfairness findings include a finding of substantial consumer injury entails thorny questions of causation. The likelihood that the FTC could make the necessary showings is significantly greater today than it was during the kidvid rule making, but some links in the causal chain between exposure to food advertising and obesity-related health harms remain better established than others.

Tailoring Problems. A significant obstacle to effective FTC rule making under both the unfairness doctrine and the deception doctrine is the challenge of defining the class of advertisements that is to be subject to regulation. Adequate tailoring of the regulation is a constitutional requirement. Specification of the target advertisements or practices is also a necessary element of an unfairness or deceptiveness showing under the Federal Trade Commission Act. Yet the FTC has struggled with defining child-oriented advertising in the past.

The difficulty of tailoring advertising restrictions to advertisements that are targeted to an audience of predominantly young children emerged during the kidvid rule-making process. The FTC considered three potential definitions of child-oriented advertising, each of which it ultimately deemed unsatisfactory (Federal Trade Commission 1978: 329). First, it considered imposing restrictions on the basis of the type of television program during which the advertisements were shown, but it became apparent that there were very few television programs for which young children comprised a substantial share of viewers. Conversely, young children made up a substantial proportion of the audience of programs aimed primarily at older viewers. Second, the FTC considered prohibiting advertising that was "aimed at young children" but could not arrive at a workable definition of that concept. Third, it considered restricting advertisements based on the cariogenic potential of the product advertised. However, it could not identify a scientifically accepted method of measurement.

Each of these problems would seem to extend to defining child-oriented food advertising for purposes of preventing obesity. However, several

developments since kidvid have improved the prospects for adequate tailoring. First, a consensus has emerged among key groups of experts as to the age at which children acquire the capacity to understand the persuasive intent of advertising. Whereas in 1978, FTC staff concluded that it was "difficult to identify precisely the age group that is too young to understand the selling purpose of, or otherwise comprehend or evaluate commercials" (Kunkel et al. 2004), it is now much clearer that children under the age of eight are an appropriate group to target.

As discussed earlier, the Institute of Medicine's 2006 review of the relevant literature (McGinnis, Gootman, and Kraak 2006), including a report by the American Psychological Association (Kunkel et al. 2004), determined that children younger than eight lack the cognitive ability to recognize that advertisements are intended to persuade and that children as old as eleven may be unable to marshal these cognitive skills in response to some kinds of advertising. Children under five typically do not even understand that there is a difference between commercials and other television programming (ibid.). Because of these empirical findings, the American Psychological Association concluded that "advertising specifically directed to audiences of children below the age of roughly 7–8 years should be considered unfair" (American Academy of Pediatrics, Committee on Communications 2006: 2563).

Second, workable definitions of children's advertising are available today. Even in 1978, the FTC recognized that it could look to the advertising industry itself for such a definition and that "if those definitions are workable in the self-regulatory context, they ought to be workable in the context of trade regulation rules" (Federal Trade Commission 1978: 343).

Thus, one reasonable option would be to rely on criteria articulated by CARU, whose guidelines state the following:

> National advertising primarily directed to children under 12 years of age . . . . [should be] determined by an analysis of factors, no single one of which will necessarily be controlling, including: (a) whether the content of the media in which the advertisement appears is intended for children under 12 (considering the content's subject matter, format, projected audience demographics, and extent to which other advertising in that content is intended for children under 12); (b) whether the advertisement appears during, or just before or after, a television program aired during what is generally understood to be children's programming, considering the time of day during which the advertisement

> appears and the media outlet; (c) whether the advertisement appears during, or just before or after, a television program which is counted towards the broadcaster's or cablecaster's Children's Television Act obligations; and (d) whether, based on available information (including the subject matter and format of the advertisement), the advertiser intended to direct the advertisement primarily to children under 12. (Children's Advertising Review Unit 2009: 4)

In response to a congressional request to study food and beverage marketing to children, the FTC itself recently articulated several factors that could be used to determine whether an advertisement is "directed to" children. These bear a striking similarity to CARU's factors: they include the proportion of the audience that children comprise, the total number of children reached, the time of day and venue of the advertisement, and "whether the advertising features characters, performers, or celebrities who are popular with children, or contains themes, language, or other attributes designed to appeal to children" (Federal Trade Commission 2008b: ES-10).

Additionally, implementing regulations for the Children's Television Act for 1990 provide a definition of children's television programming that could be used to identify child-oriented television advertisements. The act defines children's programming as "programs originally produced and broadcast primarily for an audience of children 12 years old and younger" (Commercial Limits, 47 C.F.R. § 73.670). Notwithstanding the apparent vagueness of this definition — it provides no criteria for determining what is "produced and broadcast primarily" for children — it has proved workable over the past two decades. These implementing regulations were specifically referenced as a "useful benchmark" in the FTC's 900-number rule making (Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992: Notice of Proposed Rulemaking, 58 Fed. Reg. 13,370 [2008]). The 900-number rule further fleshed out a working definition of "advertisements directed to children under twelve" by adopting a rebuttable presumption that all of the following would be included:

> Advertisements appearing in publications directed to children (e.g., children's books, magazines, and comic books); advertisements appearing during or immediately adjacent to television programs directed to children (e.g., children's programming as defined by the FCC, animated programs, and after-school specials directed to children); advertisements broadcast during or immediately adjacent to radio programs directed to

> children; advertisements appearing on a commercially prepared video directed to children; and advertisements or promotions appearing on product packaging directed to children. In addition, any advertisement, regardless of placement, that is directed to children under 12 in light of its subject matter, visual content, age of models, language, characters, tone, message, or the like, will also be presumed directed to children under the age of 12. (Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act, 58 Fed. Reg. at 13,370)

Thus, whether the age group selected is children under twelve or children under eight, there exists ample precedent for tailoring advertising restrictions based on the target audience of the advertisement or the television program during which it appears.

Advertising restrictions could be tailored even more narrowly by focusing on advertisements that are not only child oriented but also promote particularly unhealthful products. The key challenge would be identifying the products most likely to contribute to childhood overweight and obesity. Scientific studies linking consumption of particular foods to childhood obesity are just beginning to emerge; the available studies have focused primarily on sugar-sweetened beverages and fast food (James et al. 2004; Malik, Schulze, and Hu 2006; Chou, Rashad, and Grossman 2008; Schulze et al. 2004). However, in the absence of a wider scientific literature, regulations could again be based on standards adopted in the context of private regulatory initiatives. For example, the Alliance for a Healthier Generation and major food companies have agreed on standards for what constitutes "nutritional, lower calorie" snacks (Alliance for a Healthier Generation 2006b). The Institute of Medicine also has offered a set of standards by which to classify the healthfulness of foods and beverages, for the purpose of guiding policy on the sale of "competitive foods" in schools (Stallings and Yaktine 2007).

Thus, the definitional challenges faced by the kidvid regulators have largely dissipated over time. It is feasible to tailor regulations on the basis of the target audience and possibly also the nature of the product advertised. The major tailoring challenge that remains is to craft a regulation that would effectively restrict child-oriented advertising of obesogenic foods yet not unduly restrict advertising to adults. As is explained below, leaving open sufficient avenues through which commercial speakers can communicate with adult consumers carries considerable constitutional importance. Restrictions on advertisements that are seen by both adults and children, such as outdoor billboards and posters, will be vulnerable to

legal challenge if they eliminate a significant share of the advertising space through which companies communicate with adults (*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 [2001]). Because of this concern, it is desirable for advertising regulations to be based on the target or actual audience of the advertisement rather than simply the type of product advertised. It is also crucial for the regulator to be able to demonstrate a careful analysis of the impact of the restriction on commercial communications with adults.

Constitutional Limits on Regulation. Like other forms of regulation of commercial speech, FTC actions to restrict advertising are subject to the strictures of the First Amendment. In evaluating the constitutional permissibility of commercial speech restrictions, courts apply the four-prong test articulated by the Supreme Court in the landmark *Central Hudson Gas* case (*Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 [1980]). The first prong establishes the threshold requirement for commercial speech to receive First Amendment protection: the speech must be truthful and not misleading. The last three prongs set forth the conditions under which the state may regulate nonmisleading speech: the state must have a substantial interest in doing so, the regulation must directly and materially advance that interest, and the regulation must be narrowly tailored to accomplishing the state's purpose.

As an administrative agency, the FTC is entitled to judicial deference when it has made specific findings of fact or statutory interpretation that bear on whether these four criteria are satisfied. Rather than conducting a de novo review, a reviewing court will apply the "substantial evidence" test, asking only whether substantial evidence supports the FTC's finding (*Kraft, Inc. v. Federal Trade Comm'n*, 970 F.2d 311, 316–317 [7th Cir. 1992]). For example, in reviewing the constitutionality of an FTC decision to quash an advertisement because it is deceptive within the meaning of the Federal Trade Commission Act, courts will ask whether substantial evidence supports the finding of deceptiveness. This deference will have important implications since a judicially affirmed deceptiveness finding will place the advertisement in the category of unprotected misleading speech.

How significant a constraint would the *Central Hudson* requirements be in practice if the FTC were to more aggressively regulate food advertisements to children? If its action was limited to advertisements that it could reasonably find to be inherently or actually misleading, the First Amendment would present no difficulty. The Supreme Court has held that

inherently or actually misleading advertising "may be prohibited entirely" (*Federal Trade Comm'n v. Brown and Williamson Tobacco Corp.*, 778 F.2d 35, 43 [D.C. Cir. 1985]; In re R.M.J., 455 U.S. 191, 203 [1982]).

In contrast, advertising that is only *potentially* misleading receives some protection under the First Amendment. Under the prevailing commercial-speech analysis, restrictions on such advertising must be no "broader than reasonably necessary to prevent the deception" and may not absolutely prohibit the advertising "if the information also may be presented in a way that is not deceptive" (*Federal Trade Comm'n v. Brown and Williamson Tobacco Corp.*, 778 F.2d at 43; In re R.M.J., 455 U.S. at 203). Thus, the FTC has wide constitutional latitude to issue cease-and-desist orders for individual advertisements or classes of advertisements with similar kinds of claims that are always misleading or can be shown to have actually misled consumers. But broader rule making, such as a blanket ban on food advertising to young children, would require an FTC finding that such advertising is inherently deceptive, with sufficient supporting evidence to withstand judicial review. As is discussed below, some evidence to undergird such an argument does exist.

If it could only be established that such advertising *could* be deceptive, or if the FTC sought to restrict advertising on the basis of an unfairness finding rather than a deception finding, the restriction would need to satisfy the other three prongs of the *Central Hudson* test. The second prong, the government's substantial interest in imposing the restriction, would not likely be a matter of much dispute. The FTC would assert an interest in preventing childhood obesity and its associated health harms. Previous commercial speech jurisprudence suggests that when health harms are asserted as substantial, courts rarely push back, and even the aggrieved advertiser is likely to concede the point (*Lorillard*, 533 U.S. at 525; Pomeranz, Mermin, and Le 2009).

The last two prongs of *Central Hudson* present the greatest challenges for food advertising restrictions (Pomeranz, Mermin, and Le 2009). Establishing that a regulation directly and materially advances the government's interest in obesity prevention entails all of the complexities of proving causation between receipt of advertising messages and heightened risk of excess weight gain that were discussed above. Empirical evidence of some kind will need to be marshaled—preferably scientific studies, although the Supreme Court has claimed that these are not required (*Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 [1995]; Pomeranz, Mermin, and Le 2009). Additionally, it requires a showing that the specific advertising

restriction imposed will have an appreciable impact and that the FTC's overall regulatory scheme in the area of food advertising restrictions is rational. The broader the restriction, the larger the effect must be (Pomeranz, Mermin, and Le 2009).

The final prong of the *Central Hudson*, which requires that commercial speech regulations restrict no more speech than necessary, invokes the tailoring concerns discussed above. The FTC must show that its actions leave open ample avenues for advertisers to communicate with adults — that is, that they are well targeted to children (*Lorillard*, 533 U.S. at 525). Where it seeks to quash advertisements or ban classes of advertisements, the FTC must also establish that its interests cannot reasonably be pursued through alternative policies or through less stringent restrictions on advertising (for example, restrictions on the content of advertisements rather than a blanket prohibition on advertising of certain products). This showing will be particularly important where the advertising in question is merely *potentially* deceiving. Like the FTC itself, courts in such cases will likely prefer disclosure requirements — such as mandatory warnings, disclaimers, and provision of additional information that reduces the likelihood that consumers will be misled — to advertising restrictions (*Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 [1985]; Pomeranz, Mermin, and Le 2009).

Overall, the First Amendment and other doctrinal and practical issues present significant barriers to more aggressive FTC regulation of food advertising to children. These obstacles are not, however, insurmountable. A shift in the commission's political will — as may come about with the change in presidential administrations — could produce greater openness to a number of strategies for establishing the permissibility of a revitalized FTC initiative to regulate food advertising to children.

Strategies for FTC Regulation

Three primary strategies could form the cornerstones of a reinvigorated FTC regulatory presence in the domain of children's food advertising: more aggressive regulation under the deception doctrine, restoration of the FTC's rule-making authority under the unfairness doctrine, and greater FTC participation in industry self-regulation initiatives (see table 1). I discuss the prospects for each in turn.

Table 1 Possible Regulatory Strategies under the Deception and Unfairness Doctrines

	Deception	Unfairness
FTC findings required	A claim was made Claim is likely to mislead a reasonable consumer Claim was material	Advertisement is likely to cause substantial injury to consumers Consumers cannot reasonably avoid the injury Injury is not outweighed by offsetting benefits to consumers or competition
Current scope of FTC authority	Adjudication Rule making	Adjudication
Advantages	Questions of injury causation avoided Offsetting benefits of advertisements not considered Strong case that advertisements are inherently misleading for young children Existence of rule-making authority	Can address advertising practices that are manipulative but do not mislead May be more useful than deceptiveness for protecting older children, who understand the persuasive intent of advertising

Source: For FTC findings required/Deception—FTC Policy Statement on Deception, *appended to* Cliffdale Assoc., Inc., 103 F.T.C. 110 (1984). For FTC findings required/Unfairness—Federal Trade Commission Act of 1938, 15 U.S.C. § 45(n). Remainder, author's own analysis.

Note: FTC = Federal Trade Commission

Regulation under the Deception Doctrine. A regulatory strategy based on the deception doctrine could take a number of forms. The narrowest strategy would be for the FTC to pursue action against individual advertisements that create the perception that an obesogenic food is healthful. Deception claims could also be brought where an advertisement suggests that a food should be consumed in large portions or with high frequency but makes claims based on consumption of a lesser amount.

This approach lies squarely within the FTC's traditional use of the deception authority; the FTC frequently uses this authority to issue cease-and-desist orders against advertisements that make unsubstantiated health claims or otherwise misrepresent the healthfulness of a food product.

A 2004 FTC settlement with KFC Corporation over advertising of its chicken meals illustrates the approach well (KFC Corporation: Analysis to Aid Public Comment, 69 Fed. Reg. 32,552 [2004]). The FTC's complaint charged that KFC had made two deceptive claims in its advertisements: that eating KFC fried chicken (specifically, two Original Recipe chicken breasts) was more healthful than eating a Burger King Whopper and that eating the chicken was compatible with maintaining a low-carbohydrate diet for weight loss purposes. One television advertisement featured a woman putting a bucket of KFC fried chicken down in front of her husband and announcing, "Remember how we talked about eating better? Well, it starts today!" The ad then stated that "Two KFC breasts have less fat than a BK Whopper" and portrayed the husband as making a health-related concession by eating it: "You know, I'm doing this for you." It concluded with the tagline that KFC was "a fresh way to eat better" (Federal Trade Commission 2004a: 1–3).

The FTC challenged these claims on the basis that the advertised chicken had more trans fat, cholesterol, sodium, and calories than the Whopper and that the leading low-carbohydrate diet plans advised against the consumption of breaded, fried foods. The consent order prohibited KFC from making the challenged claims as well as from making any representations about the fat, cholesterol, sodium, calorie, or other nutrient content of its chicken products; about the compatibility of its food with any weight loss program; or about the health benefits of its food, unless the company could substantiate the claim with "competent and reliable scientific evidence" (Federal Trade Commission 2004b: 3). In a press release accompanying the agreement, the FTC chair remarked that "today's action signals food advertisers that the FTC will not tolerate misleading advertisements to consumers who are trying to eat healthier and watch their weight" (Federal Trade Commission 2004c).

The FTC could take similar action against other advertisements that, through express or implied claims or material omissions, create the impression that the advertised food is more healthful than it is. There would be few difficulties of proof involved in such an approach, since health claims are presumed to be material. However, because such advertisements may be relatively rare in the broad universe of food and beverage ads, this approach may prove to be a limited remedy. One area in which it could be useful is challenging advertisements that characterize foods as healthful based on a serving size that is unlikely to reflect what reasonable consumers will actually eat.

A more aggressive approach would be to target advertisements that do not make health claims per se but that omit information necessary for consumers to understand the consequences of consuming the food as suggested by the ad. The FTC contemplated this approach during the kidvid rule making: its 1978 staff report asserted that advertisements for highly sugared foods were deceptive because all such advertising "makes at least the implicit claim that consumption of the advertised products is desirable. The material but unrevealed fact is that the products can also pose health risks" (Federal Trade Commission 1978: 35).

Evidence from public health research supports the notion that consumers may not appreciate the obesogenic potential of many advertised foods. Consumers tend to underestimate the caloric value of foods, particularly restaurant menu items (Wansink and Chandon 2006). Children's exposure to television appears to predict the likelihood that they will incorrectly identify which of two foods is more healthful (Harrison 2005; Signorielli and Staples 1997). Studies also have found that about half of all nutrition-related information in television advertisements is misleading or inaccurate (Byrd-Bredbenner and Grasso 2000).

Some advertising practices may compound the likelihood that consumers' perceptions of food choice risks and benefits will be skewed. For example, the FTC's report during kidvid highlighted as particularly problematic advertisements that suggested that sugary foods should be consumed frequently or as snacks between meals — such behaviors likely elevate the risk of developing dental caries. Similarly, ads suggesting that energy-dense foods should be consumed frequently or in large portions may belie the associated risk of excess weight gain. Also of concern are advertisements for food products whose caloric content is particularly hard to guess because the food is highly processed or is prepared in a way that causes it to deviate substantially from the caloric value of a homemade analog. For example, a Pepperidge Farm Roasted White Meat Chicken Premium Pot Pie has 1,020 calories (Center for Science in the Public Interest 2009); an appetizer of cheese fries at Outback Steakhouse contains a surprising 3,000 calories (*Good Morning America* 2002); and, according to the My-Calorie-Counter Web site, the Panera Bread Tuna Salad on Multigrain Bread Café Sandwich contains 840 calories, compared to approximately 330 calories for a homemade tuna salad sandwich. In all of these circumstances, the FTC could make a strong case that the omission of calorie information or other warnings or disclaimers has the capacity to deceive a reasonable consumer about the healthfulness of the product and that this is likely to influence the consumer's consumption

decisions about the product. Such an argument would be particularly strong where the consumers targeted by the ad are children, who are especially likely to be unaware of the products' nonobvious qualities.

Finally, the FTC could pursue a much broader strategy of rule making under the deception doctrine. It could seek to ban or sharply limit food advertising to young children generally on the basis that it is inherently deceptive. The kidvid initiative proceeded on the theory that if, by virtue of their young age, "children could not understand the difference between an ad and a program, could not understand the selling intent of an ad, did not know they were being advertised to, then fundamentally they were being deceived" (Westen 2006). Unlike the aforementioned strategies, this approach would not reference the content of particular advertisements; as a result, advertisers would not be able to evade the restriction by altering that content except insofar as the advertisement was targeted to children.

This distinction also affects the remedies that the FTC would seek under the three approaches. In general, to deal with deceptive advertising, the FTC historically has preferred to require disclosures rather than ban advertisements. If this preference persists under the current leadership, to address flaws in particular advertisements through the first and second approaches described above, the FTC could require advertisers to alter the representations made in advertisements, include additional information, or both. Particularly for misleading omissions, disclosures are likely to be an effective means of protecting consumers (Ramsey 2006: 385). Formulating them in a way that children can understand poses challenges, but this has not deterred the FTC from utilizing this remedy in the past. For example, it has suggested specific language for informing children of the need to obtain a parent's permission to call a 900 number (Teleline, Inc., 114 F.T.C. 399).

In contrast, the third approach frames the deception problem in a way that would be very difficult to remedy through the provision of more or different information in advertisements. The FTC argued as much during the kidvid rule making, rejecting mandatory disclosures as an alternative to bans on advertising to very young children because "young children have trouble understanding (and sometimes even perceiving) such disclosures" (Federal Trade Commission 1978: 43). The conclusion that only restrictions or bans on advertising to young children would constitute a sufficient remedy is supported by the American Psychological Association, which has reported that "studies make clear that young children do not comprehend the intended meaning of the most widely used disclaim-

ers" (Kunkel et al. 2004: 5), and, further, that they cannot be effectively educated about the persuasive nature of advertising:

> Media literacy training has been suggested as a potential means to alleviate young children's unique susceptibility to televised commercial persuasion. However, . . . there is little evidence that media literacy interventions can effectively counteract the impact of advertising on children of any age, much less the younger ones who are most vulnerable to its influence. Both theory and research regarding children's cognitive development suggest that children aged 8 years and under will be unlikely to benefit from critical viewing interventions intended to teach them about advertising's persuasive intent, even if they are successful in mastering the knowledge such curricula convey. (ibid.: 21)

The breadth of the restrictions imposed in the third approach would raise constitutional hackles, and the FTC would need to be prepared to mount a vigorous response based on the notion that advertising to young children is not within the ambit of First Amendment protection because of its intrinsically misleading nature. The aforementioned studies of esteemed medical and public health organizations concluding that young children are unable to recognize the persuasive intent of advertising and to distinguish it from entertainment or more objective sources of information would play a critical role.

To summarize, the deception doctrine holds possibilities both for tighter policing of individual food advertisements and for rule making to restrict food advertising to children. Because no proof of consumer injury or lack of offsetting benefits is required, the doctrine avoids the difficult questions of causation that would arise in unfairness-based regulation. The evidence base to support arguments that various advertising practices are deceptive when targeted at young children is quite thick. Finally, this avenue of regulation is attractive in that a persuasive showing of deceptiveness will defeat First Amendment objections.

Restoration and Use of the Unfairness Authority. Under its existing scope of authority, the FTC could initiate proceedings to ban or alter individual advertisements on the basis of unfairness. However, such efforts would have to be carefully targeted in order to make the required showings, making the unfairness doctrine a relatively limited regulatory tool.

The commission would first have to demonstrate a likelihood that the advertisement would cause substantial consumer injury, something that would be difficult to do for most advertisements because moderate levels

of consumption of the advertised food will not ordinarily lead to excessive weight gain. Focusing on advertisements that advocate consumption of very high-calorie foods or frequent consumption of other energy-dense foods would be a prudent strategy. The FTC would next have to demonstrate that the injury was not reasonably avoidable. As suggested earlier, there are several arguments relating to children's cognitive abilities, the availability of nutritional information in other venues, and parental ability to control children's food choices that might be advanced to support such a finding. Finally, the FTC would need to rule out the possibility that the harms of the advertisements are outweighed by offsetting benefits to consumers or competition. Where the advertised food is widely agreed to be inappropriate for children due to its ingredients, portion size, or other characteristics or where the advertisement suggests consuming the product with a frequency that is not healthy for children, the case should not be difficult to make. In other circumstances, it may be harder. However, if the advertisement targets very young children, the argument that it provides no benefits to consumers will be strong because there is little or no prospect of the target audience using the information to make informed purchasing and consumption decisions.

Although there is some latitude for FTC action under the existing scope of unfairness authority, a more aggressive role for the FTC in regulating children's advertising would certainly be facilitated by restoration of the full scope of this authority. If Congress were to repeal the legislation that rescinded the FTC's rule-making authority under the unfairness doctrine, the commission would be at liberty to pick up the mantle of the kidvid effort, with appropriate strategic adjustments to account for developments in commercial speech doctrine, political climate, and scientific knowledge over the last three decades.

One option would be to again propose a complete ban on food advertising to very young children (this could also be done under the deception authority). Such a strategy raises constitutional red flags. However, there is a reasonable argument that a regulation that was crafted so as to primarily affect communications with the target age group, rather than older viewers, could survive scrutiny under *Central Hudson*. The tailoring requirement of that precedent requires only that the regulator demonstrate a reasonably good fit between the regulation's shape and its objective, and as the FTC concluded during the kidvid rule making, "to the extent that the unfairness or deceptiveness to be remedied is inherent in *any* television advertising addressed to children too young to appreciate its selling purpose or otherwise comprehend or evaluate it, it is difficult to see how

any remedy short of a ban would suffice" (Federal Trade Commission 1978: 43).

An alternative strategy would focus on eliminating particular advertising techniques that take advantage of children's limited cognitive development. There is some precedent for such prohibitions: the FCC has long maintained a policy prohibiting "host selling," or the use of television program characters to deliver commercial messages (Children's Television Programming, 6 F.C.C. Record 2111, 2118, 2127 n. 147 [1991]). The rule is driven by the awareness that such a technique reinforces young children's difficulty distinguishing between television program content and advertising.

To identify a broader range of unfair advertising practices, the FTC could turn to the guidelines issued by CARU. CARU's guidelines include a number of principles that are useful for evaluating the fairness of an advertisement—for instance, that advertisements "should not stimulate children's unreasonable expectations about product quality or performance" (Children's Advertising Review Unit 2009: 5). They also list specific practices that should be avoided. These include using sales pressure to create a sense of urgency; suggesting that children ask parents or other adults to buy the product; implying that the product will help a child gain peer acceptance, intelligence, or other qualities, including the special qualities of characters appearing in the advertisement; and unduly exploiting children's imagination. With respect to food advertising, the guidelines specify that the portions advertised should not exceed a reasonable amount, the advertisement should encourage responsible use of the product, and snack foods should not be portrayed as substitutes for meals. These practices and others identified in the child psychology literature as potentially exploitative could be the subject of FTC rule making under the unfairness authority if that authority were reinstated.

Regulating child-oriented food advertisements as a class, rather than individually, offers advantages in terms of the specific showings required to make out a case of unfairness. With respect to consumer injury, the question of whether a particular advertisement is likely to make a substantial contribution to childhood obesity falls away. The FTC can focus on the harms associated with the broader practice of advertising unhealthful foods to children, which, the commission concluded during kidvid, are of two kinds: "such advertising causes 'substantial injury' to children to the extent that it induces them to consume products which pose health risks and interferes with their education on matters of nutrition. It injures the parent-child relationship in that it puts parents to the hard choice of

allowing their children to take those health risks or of enduring the strife that can accompany denial of requests induced by television advertising" (Federal Trade Commission 1978: 34).

The analysis of reasonable avoidance would also focus not on the specific behaviors promoted in individual advertisements but on the big-picture questions of whether children are able to avoid the harms of excessive consumption of energy-rich foods and, if not, whether parents reasonably can be expected to exert the necessary influence and control to help children avoid these harms. The FTC's 1978 conclusion about reasonable avoidance — that advertising to young children "has the capacity to induce them to take health risks that they are incapable of evaluating for the purposes of deciding whether, on balance, the products that pose those risks are desirable" (ibid.: 29–30) — has been reinforced by additional scientific findings over time. Further, it remains equally true today that "where a child is confronted with a situation which is immediately attractive, but which has long-run dangers, it does not suffice to inform the child of the dangers and then leave the child to fend for himself or herself. The law recognizes that a child's capacity for adequate self-protection has not yet developed" (ibid.: 33). Both findings speak directly to the issue of reasonable avoidance. Children's limited ability to weigh risks and benefits also supports the appropriateness of unfairness rule making regarding children's food advertising by undercutting arguments that advertisements have offsetting consumer benefits in that they facilitate informed choices in the market.

Rule making under both the unfairness and the deception authority could be further facilitated by legislative reform of the procedural requirements for rule making. Section 18 of the Federal Trade Commission Act — the so-called Magnuson-Moss procedures — imposes an onerous set of requirements that have hampered the FTC's ability to promulgate new rules, slowing the process in some cases and precluding it altogether in others (Pomeranz, forthcoming). For example, the act requires that the FTC provide a formal hearing at which interested individuals can air complaints about a proposed rule. FTC rule makings pursuant to the Magnuson-Moss procedures typically take three to ten years (Federal Trade Commission 2009).

The FTC would prefer to follow the procedures specified in the Administrative Procedures Act, which applies to other federal agencies. Under these simpler notice-and-comment procedures, rule making can typically be completed in a year. The FTC has repeatedly asked Congress for this authority, most recently to pursue rule making in the realm of consumer

credit and debt (ibid.). The 2009 Omnibus Appropriations Act provided such authority in the limited area of rule making concerning mortgage loans (ibid.). If Congress were to provide this authority more broadly, it would improve prospects for expeditious rule making on food advertising to children.

Further Encouragement of Voluntary Restrictions. A final strategy would be for the FTC to strengthen its role in encouraging voluntary self-regulation on the part of the food and beverage industries. Although the commission has been vocal in its support for such initiatives and has initiated workshops and other efforts to increase dialogue both within the industries and between the industries, the commission, and nutritional experts, it could do more to foster strong and credible self-regulation.

The FTC is clearly committed to its partnership with industry and would like to see self-regulation become more robust. By convening workshops for food companies, publishing reports on potential strategies for voluntary regulation, making presentations to industry groups, and in other ways engaging in dialogue with the food industry, the FTC has no doubt contributed momentum to self-regulatory initiatives. For example, it appears that the children's obesity workshop convened by the FTC and the Department of Health and Human Services in 2005 spurred CARU to revise its guidelines and to hire additional investigative staff (Council of Better Business Bureaus 2008: 3). However, the commission could do more.

One area in which the FTC could participate more vigorously is standard setting. In a recent assessment of the Children's Food and Beverage Advertising Initiative, the FTC stated that it "encourages" participants to clarify and standardize terms like "healthy dietary choices" but made no substantive recommendations to the initiative other than to expand pledges to include all forms of advertising and to cover independently owned and operated franchises (Federal Trade Commission 2008b). Although the FTC cannot require the initiative or CARU to adopt particular standards for advertising practices that should be curtailed or nutritional standards for child-oriented food advertising, it could play a leadership role in making recommendations along these lines and convening further working groups of nutrition experts, authorities in child development and psychology, and advertisers to consider them. This would be preferable to the passive role the FTC has taken to date with respect to standard setting, and if the process was conducted with a high degree of scientific rigor and sensitivity to advertisers' needs, there is a strong possibility of voluntary uptake of the standards on the part of CARU or individual companies.

The FTC could also work with CARU to better define "deceptive" and "unfair" advertising practices. The FTC's wealth of experience in interpreting these terms could be shared with CARU and the food industry through greater detail in the CARU guidelines, through separate guidance documents, or both. Because the 2006 revision of the guidelines gave CARU new authority in the area of unfair advertising practices, this is a particularly opportune time for the FTC to lend its expertise in the interpretation of the unfairness doctrine. Working through CARU, it could pursue the kind of unfairness rule making that it cannot do directly at present.

In addition to standard setting, the FTC could contribute to industry self-regulation by promoting transparency about the commitments companies have made. With the CBBB and CARU, it could make further efforts to generate positive publicity for companies that have pledged to join the initiative or in other ways have reformed their food advertising practices. Although the CBBB and CARU, as representatives of the advertising companies, would be reluctant to "name names" of companies that have declined to participate in the initiative, the FTC would be in an excellent position to do so. The commission could also analyze and publicize any loopholes or omissions in the commitments that pledging companies undertake — for example, distinguishing between companies that promise to limit advertising to healthful foods and those that promise only to include healthy lifestyle messages in their ads. FTC participation in this area would elevate the public profile of these commitments and lend an additional stamp of approval to companies that have made significant changes to their advertising practices. It could encourage growth in the number and strength of pledges made by increasing the public relations benefits of full participation and calling attention to companies that have refused to join the cause.

Finally, the FTC could abet efforts to enforce compliance with voluntary commitments. It could partner with CARU in offering a mechanism for receiving consumer complaints and referring them for CARU investigation. It could signal more strongly to CARU that it wishes to have cases of persistent noncompliance with the unfairness or deceptiveness standards in the CARU guidelines referred to the commission for follow-up. It could assist CARU in disseminating the findings of its investigations and could develop a mechanism for making complaints, as well as investigation outcomes, public. An external advisory board including government, industry, nutrition, and consumer representatives could provide useful guidance to the FTC in this work.

Each of these FTC actions would reinforce the potency and credibility of voluntary regulatory initiatives. None would require a significant alteration in the positions that the FTC has taken recently concerning its proper role in the marketplace or the efficacy of industry self-regulation. Because these strategies do not alter the fundamental reality that self-regulation relies on the voluntary commitments of advertisers and on the political will of monitoring bodies that are ultimately controlled by those advertisers, they are a second-best alternative to direct government regulation. However, they represent a feasible means of expanding the FTC's role in the context of perceived constitutional, statutory, and political constraints.

Conclusions

Despite the FTC's troubled history in the area of regulating children's advertising, there are a number of opportunities for the FTC to play a more aggressive and constructive role in ensuring that advertising practices do not continue to drive the epidemic of childhood obesity. The FTC has considerable latitude to regulate individual food advertisements more rigorously, invoking either the deception doctrine or the unfairness doctrine. Broader rule making under the unfairness doctrine would require congressional intervention to restore the FTC's former scope of authority, but several possibilities exist for rule making on the basis that advertising to young children is a deceptive practice. Finally, the FTC could step up its current efforts to encourage the food industry to more stringently police and limit its own advertising practices and could provide mechanisms for giving self-regulation more teeth.

It is not clear at this juncture whether self-regulation will prove sufficient to arrest and reverse the harms associated with food advertising to children. If the food industry is willing to voluntarily comply with stringent restrictions on advertising to children, there may be little need for additional direct government regulation. Such a prospect is attractive in light of the legal and political battles that would need to be fought and won in order for the FTC to reassert itself in this area. However, at this time, self-regulation initiatives are neither substantive enough to achieve significant public health gains nor sufficiently binding to make companies' commitments durable. These initiatives also lack mechanisms to overcome the collective-action problem that results when some but not all companies are willing to reduce their advertising to children. A reinvigorated role for the FTC should begin — but not necessarily end — with steps that help the food industry overcome these challenges.

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