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

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

I. INTRODUCTION

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

II. THE FTC'S STATUTORY AUTHORITY

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

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[2]15 U.S.C. § 45.

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

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

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

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

III. DECEPTIVE ADS & UNFAIR PRACTICES DIRECTED TO KIDS

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

The Commission's enforcement activities targeting deceptive advertising directed to children have been highly successful. During the past three decades, the Commission has brought a number of cases challenging deceptive performance claims in toy advertisements. For example, a ballerina doll was shown to pirouette on one toe unassisted in a TV ad; however, she could not perform in the playroom.[8] Toy helicopters were depicted on TV as flying and hovering in mid air; in reality, the helicopters were suspended by monofilament wires attached to poles and manipulated by unseen people.[9] A horse named "Nugget" was shown standing on his

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[5] *Id.* at 179.

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

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

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

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

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

In addition, the Commission has brought cases challenging nutritional claims for foods that are likely to be appealing to children. For example, the FTC challenged television ads claiming that Wonder Bread, as a good source of calcium, helps children's minds work better and aids their memory.[11] The Commission challenged that claim as unsubstantiated. Although some calcium is needed for brain function, there is no evidence that adding more calcium to the diet will improve brain function.

The cases involving nutritional claims include those where the Commission has challenged deceptive fat and calorie claims. For example, a television ad claimed that the Klondike Lite Ice Cream Bar was 93% fat free. The FTC alleged that claim was false because the entire bar, including the chocolate coating, actually contained 14% fat. (The Commission concluded that a reasonable consumer – and certainly an ordinary child – is not going to eat the bar without its chocolate coating.) The Commission also challenged the implied claim that the bar was low in fat. Each bar actually contained 10 grams of fat per serving, an amount well in excess of any reasonable level to support a low-fat claim.[12]

Similarly, a television ad for Carnation Liquid Coffeemate showed the product being poured over fruit and cereal while claiming it was low in fat. The FTC challenged the low-fat claim as false. Although the claim would be true for a one tablespoon serving appropriate for use in coffee, the claim was not true for the half cup of liquid consumers likely would use on cereal or fruit.[13] Most recently, the Commission challenged claims made by KFC that eating two of its fried chicken breasts is better for a consumer's health than eating a Burger King Whopper and is also compatible with "low carbohydrate" weight loss programs.[14]

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

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

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

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

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

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

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

Some of these unfairness cases involved safety issues. For example, a television advertisement for Uncle Ben's Rice, which emphasized the ease of preparation, depicted a young child engaged in cooking over a stove without adult supervision.[16] The Commission challenged the ad as unfair for inducing young children to engage in unsafe behavior. Similarly, the Commission challenged a television advertisement for a doll with hair that could be washed and dried; the ad depicted a girl six or seven years old using an electrical hairdryer next to a bathroom sink filled with water.[17]

In the early 1990s, unfairness cases involved economic injury to parents. Television ads with characters like Santa Claus, Popeye, the Easter Bunny, and P.J. Funny Bunny encouraged children to call 900 telephone numbers to talk to the fictional character and receive prizes. Charges for the calls, typically $2 for the first minute and 45 cents for each additional minute, were billed to parents' telephone bills.[18] The Commission alleged these practices were unfair because the party being billed – the parents – had no way to decline or control the charges.[19]

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

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

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

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

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

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

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

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

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

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

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

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

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

[23]15 U.S.C. § 6501, *et seq.*

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

Not all of the FTC's efforts to protect children have fared so well. In 1978, the FTC embarked on a well-intentioned, but ill-fated regulatory venture – a rulemaking that came to be known as "kidvid." The proceeding was intended to craft a rule restricting the television promotion of highly sugared foods to children – particularly those too young to understand either the nature of commercial advertising or the health risks of excessive sugar consumption. Three advocacy organizations – Action for Children's Television, the Center for Science in the Public Interest, and Consumers Union – had petitioned the Commission to act in this area.[25] The Commissioner of the Food and Drug Administration (FDA) also urged the Commission to act, citing the long-term risks to dental health from consumption of the most heavily advertised sugared products.[26]

In its Notice of Proposed Rulemaking (NPR), the Commission invited comment on the advisability and implementation of a proposed rule to accomplish the following:

1. Ban all television advertising for any product, which is directed to, or seen by, audiences with a significant proportion of children too young to understand the selling purpose of advertising;

2. Ban television advertising for food products posing the most serious dental health risks, which is directed to, or seen by, audiences with a significant proportion of older children; and

3. Require that television advertising for sugared food products not included in the ban, but directed to, or seen by, audiences with a significant proportion of older children, be balanced by nutritional or health disclosures funded by advertisers.[27]

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

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

[27]43 Fed. Reg. at 17,969; 1978 Staff Report at 10-11. Children too young to understand the purpose of advertising were considered initially to be those under the age of eight. (In its Final Report, staff revised this definition to include children six and younger. *See* text accompanying note 39, *infra*.) Older children were considered to be those between the ages of 8 and 11. 1978 Staff Report at nn.16-17. In addition, the Commission sought comment on the feasibility of alternative remedial approaches, including: (1) affirmative disclosures placed in the body of advertisements directed to children for highly cariogenic foods (*i.e.*, those most likely to cause tooth decay and cavities); (2) affirmative disclosures and nutritional information contained in separate advertisements directed to children (to be funded by the advertisers of highly cariogenic foods); (3) limitations placed on particular advertising messages and/or techniques used to advertise to very young children or to advertise highly cariogenic foods to all children; and (4) limitations upon the number and frequency of advertisements directed to very

The NPR was the culmination of extensive investigation into the nature and quantity of television commercials directed to children; children's perceptions of and responses to television advertising; the rise in sugar consumption in the United States, particularly among children; tooth decay as a public health problem; and alleged nutritional problems resulting from excessive sugar consumption.[28]

In response to the NPR, hundreds of written comments, comprising more than 60,000 pages, were submitted by a broad range of interested parties, including consumer organizations; individuals in academic, scientific, technical and government positions; broadcasters; product manufacturers; advertising agencies and associations; and individual consumers. Legislative hearings, held in San Francisco and Washington, DC, produced hearing transcripts of more than 6,000 pages.[29]

Three years later, FTC staff recommended that the Commission terminate the rulemaking proceeding. The Final Report stated:

> While the rulemaking record establishes that child-oriented television advertising is a legitimate cause for public concern, there do not appear to be, at the present time, workable solutions which the Commission can implement through rulemaking in response to the problems articulated during the course of the proceeding.[30]

The Commission adopted the recommendation and brought the kidvid rulemaking to a close.[31]

The children's advertising proceeding was toxic to the Commission as an institution. Congress allowed the agency's funding to lapse, and the agency was literally shut down for a

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

[28]1978 Staff Report at 51-156.

[29]FTC Final Staff Report and Recommendation ("Final Staff Report"), Mar. 31, 1981, at 13. This equates to a stack of documents 25 to 30 feet high.

[30]*Id.* at 2. An intervening factor was the FTC Improvements Act of 1980, Pub. L. No. 96-252, Sections 11(a)(1), 11(a)(3), 94 Stat. 374 (1980), codified in part at 15 U.S.C. § 57a(i) ("The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on the date of enactment of the Federal Trade Commission Improvements Act of 1980 or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.")

[31]46 Fed. Reg. 48,710 (Oct. 2, 1981).

brief time.[32] The FTC's other important law enforcement functions were left in tatters. Newspapers ran stories showing FTC attorneys packing their active investigational files in boxes for storage,[33] and entire industries sought restriction of, or even outright exemptions from, the agency's authority.[34] Congress passed a law prohibiting the FTC from adopting any rule in the children's advertising rulemaking proceeding, or in any substantially similar proceeding, based on an unfairness theory.[35] It was more than a decade after the FTC terminated the rulemaking before Congress was willing to reauthorize the agency.[36]

A congressional response of this magnitude was not simply the result of skilled lobbying by politically well connected industries, although they certainly did make their views known. Rather, it was the reaction to what was widely perceived as a grossly overreaching proposal. Even *The Washington Post*, normally a reliable friend of an activist FTC, editorialized that the proposal was "a preposterous intervention that would turn the FTC into a great national nanny." *The Washington Post* continued:

> [T]he proposal, in reality, is designed to protect children from the weaknesses of their parents – and the parents from the wailing insistence of their children. That, traditionally, is one of the roles of a governess – if you can afford one. It is not a proper role of government.[37]

This is an important lesson that the FTC learned, and it is even more true today. Parents in the year 2004 have many more options than did parents in the 1970s. Commercial-free television is readily available to any parent who thinks that his or her child should be protected from Ronald McDonald or Cap'n Crunch, along with thousands of hours of commercial-free programming on videotape or DVD, as well as the technology, such as TiVo, to record TV

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[32]*See* A.O. Sulzberger Jr., *After Brief Shutdown, F.T.C. Gets More Funds*, N.Y. Times, May 2, 1980, at D1. A congressional reaction of this magnitude is extremely unusual. Although budget disputes occasionally have shut down the government for days at a time, shutting down a single agency because of disputes over policy decisions is almost unprecedented.

[33]*E.g.*, Caroline E. Mayer, *It's Back to Business at the FTC*, Wash. Star, May 2, 1980, at B4.

[34]Michael Pertschuk, *Revolt Against Regulation* 73-74 (1982).

[35]Note 30, *supra*.

[36]*See* 139 Cong. Rec. S8253 (daily ed. June 22, 1993) (statement of Sen. Bryan); *id.* (statement of Sen. Gorton).

[37]Editorial, *The Washington Post* (Mar. 1, 1978), reprinted in Michael Pertschuk, *Revolt Against Regulation,* at 69-70 (1982). Former FTC Chairman Pertschuk characterizes the *Post* editorial as a turning point in the Federal Trade Commission's fortunes.

programs and play them back without the advertising.[38] Such alternatives make parental control over young children's viewing more feasible today than in the past. As discussed above, FTC law enforcement and rulemakings have involved practices that parents themselves cannot control (for example, misrepresenting toy performance, having children incur toll charges on their parents' phone bill, and collecting information from kids online without parental consent). These are a far cry from stopping ads that tout the joys of pre-sweetened cereals or "Happy Meals."

In part, the kidvid experience is a lesson in the proper role of government. However, the rulemaking holds other revealing lessons as well. This was by far the most exhaustive examination ever undertaken of the practical realities that would have to be addressed in any effort to restrict advertising to children. It is therefore worthwhile to examine what was learned and why the staff ultimately recommended that the rulemaking be terminated.

The reasons for the recommendation to close were complex. The staff concluded that children age six and younger lack the cognitive ability to understand and evaluate the persuasive message of advertising.[39] The staff also concluded, however, that a workable remedy could not be implemented. An informational remedy would not be effective for this age group (for the very same reasons that young children do not understand the nature of advertising).[40] Moreover, the proposed ban posed insurmountable practical problems.

The staff first examined audience composition data in an effort to identify television programs where young children constitute a majority or substantial share of the audience.[41] The data showed that if the ban were to apply when young children comprised 50%, or even 30%, of the TV audience, only one network program – the highly acclaimed Captain Kangaroo – would be affected.[42] Obviously, a remedy that added only one program to the list of commercial-free

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

[39]Final Staff Report at 20-35.

[40]*Id.* at 36.

[41]The FTC staff also considered alternative ways to structure a ban on advertising directed to young children, *i.e.*, with reference to ad content or program content, rather than audience composition data. This method also proved infeasible because of the overlap in age groups (*i.e.*, both younger and older children) to which both ad and program content appealed. *Id.* at 42-47.

[42]*Id.* at 37-39. Consistent with standard industry data and the staff's conclusions about children's cognitive abilities, audiences of "young children" were defined as children aged two

options would have accomplished nothing.[43]

Of course, if the audience share figure were lowered to 20%, the ban would encompass more programming. Even so, it would only have affected 24 network programs, most of them broadcast on weekend mornings. Unfortunately, however, the data also indicated that only 13% of television viewing by young children occurred on weekend mornings. The ban would thus have resulted in only a small reduction of young children's total exposure to TV advertising.[44] Moreover, the premise of this drastic remedy – the cognitive limitations of young children – would not apply to 80% of the audience where restrictions were imposed.[45]

There is little reason to believe that the fundamental facts about the distribution of the television audience are significantly different today. Television remains a mass medium. Although targeted programming clearly exists, most audiences are mixed. Young children watch television with older children; older children watch with teens; and teens are willing to do at least one thing with adults – watch television. Indeed, each of the Commission's examinations of self- regulatory efforts to reduce marketing of alcohol or mature entertainment programming to younger audiences has cautioned that a standard based on percentages alone does not affect many of the best media vehicles for reaching younger audiences.[46] That is precisely what the

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to six.

[43]Moreover, as broadcasters repeatedly emphasized throughout the rulemaking, it was advertising revenue that financed children's programming. A ban based on the share of young children in the audience would financially penalize those programs that did the best job of attracting an audience of young children.

[44]Final Staff Report at 40-42. *See* J. Abel, Network and Non-Network Sources of Programming and Advertising for Children, report and prepared statement, submitted to FTC, Nov. 24, 1978. The Final Staff Report describes the specific results for network television programming. The details are different, but the essential picture is the same for "spot" television – *i.e.*, advertisements that appear on local TV outlets. *See* J.H. Beales, III, An Analysis of Exposure to Non-Network Television Advertising, Nov. 21, 1978.

[45]Final Staff Report at 39-40.

[46]Federal Trade Commission, *Alcohol Marketing and Advertising: A Report to Congress* (Sept. 2003) ("2003 FTC Alcohol Report"); Federal Trade Commission, *Self-Regulation in the Alcohol Industry: A Report to Congress from the Federal Trade Commission* (1999) ("1999 FTC Alcohol Report"); Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (2000) ("2000 FTC Violent Entertainment Report"); Federal Trade Commission, *Marketing Violent Entertainment to Children: A Fourth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (2004) ("2004 FTC Violent Entertainment Report"). Programs with a large total audience of youth

children's advertising rulemaking makes plain.

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

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

V. ADVERTISING AND THE FIRST AMENDMENT
An Evolving Doctrine

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

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

[47]Final Staff Report at 48-55.

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

[49]*Id.* at 85.

[50]*Id.* at 82.

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

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

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

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

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

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

425 U.S. at 765.

[53]1978 Staff Report at 237.

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

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

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

[57]*Id.* at 566.

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

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

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

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

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

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

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

[63]21 U.S.C. § 353a.

[64]21 U.S.C. § 301 *et seq.*

[65]535 U.S. at 371.

between compounding and large-scale manufacturing might be possible here."[66] It concluded: "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort. Yet here it seems to have been the first strategy the Government thought to try."[67]

Not only are commercial speech bans disfavored, but the Supreme Court has struck down bans aimed at protecting children that also keep commercial speech from reaching adults. In 2001, the Supreme Court struck down a Massachusetts regulation that prohibited the outdoor advertising of tobacco products within 1,000 feet of a school or playground, as well as a provision that tobacco product advertising could not be placed lower than five feet from the floor of any retail establishment within 1,000 feet of a school or playground.[68] The Court concluded that the state's interest in preventing under-age smoking is compelling and that the regulations advanced that interest.[69] However, the outdoor advertising restrictions failed the third prong of the *Central Hudson* test, which "requires a reasonable fit between the means and ends of the regulatory scheme."[70] The state failed to show that the outdoor advertising regulations were "not more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use."[71] The Court further noted that because the purchase and use of tobacco products by adults is legal, the interest of tobacco retailers and manufacturers in conveying truthful information to adults must be considered:

> . . . [T]obacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a case involving indecent speech on the Internet we explained that 'the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech

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[66]*Id.* at 372. (*E.g.*, the government could ban the use of "commercial scale manufacturing or testing equipment for compounding drug products"; prohibit pharmacists from compounding more drugs than necessary for prescriptions already received; prohibit pharmacists from selling compounded drugs at wholesale to resellers; limit the amount of compounded drugs that a given pharmacy or pharmacist could sell out of state; or cap the volume of compounded drugs made or sold in a given period of time. *Id.* at 371-72.)

[67]*Id.* at 373.

[68]*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 534-36 (2001).

[69]*Id.* at 556-61.

[70]*Id.* at 561.

[71]*Id.* at 566. The Court emphasized, however, that "the least restrictive means" is not the standard. *Id.* at 556.

addressed to adults.'"[72]

The Court concluded:

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

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

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

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

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

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

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

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

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

[78]*Id.* at 560.

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

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

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

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

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

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

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

[82]*Id*.

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

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

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

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

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

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

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

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

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

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

[88]*Id*. at Appendix F.

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

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

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

children without cavities in their permanent teeth more than doubled to 55%.[92] There are a number of reasons for the decline in tooth decay among children, including improved dental care and increased fluoridation of water.[93] The presence or absence of advertising for highly sugared foods, however, was clearly not a factor in improved dental health.

Today the concerns about childhood nutrition have shifted from tooth decay to obesity. Particularly among children, obesity is a primary health concern in the U.S. According to the Centers for Disease Control and Prevention, the rate of overweight children ages 6 to 11 has more than doubled, while the rate for adolescents has tripled since 1980.[94] Today, about 1 in 5 children ages 2 to 5 and almost 1 in 3 older children are either overweight or at risk for being overweight.[95] Approximately 50% of obese children and adolescents will become obese adults.[96] An estimated 80% of overweight adolescents will be overweight as adults.[97] Considering the long-term health consequences, such as diabetes and high blood pressure, this trend is especially alarming.

As public health agencies and others search for the causes of this troubling increase in excess weight and obesity, they are also looking for effective ways to address the problem. One option that has been suggested is to restrict advertising of certain food products to children. For obvious reasons, such proposals send a shudder through those FTC staff members who remember all too clearly the aborted rulemaking of 25 years ago. Based on the history of FTC regulation of children's advertising, experience with the prior kidvid rulemaking, and the current state of the law with regard to commercial speech and the First Amendment, one can only conclude that restricting truthful advertising is not the way to address the health concerns regarding obesity.

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[92]*Id*.

[93]*Id*.

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

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

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

[97]*See* Kaiser Family Foundation, *Kaiser Family Foundation Releases New Report on Role of Media in Childhood Obesity*, News Release (Feb. 24, 2004), citing Styne, D., *Childhood and Adolescent Obesity: prevalence and significance*, Pediatric Clinics of North America (48), at 4 (2001).

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

Equally problematic would be constructing a legally supportable standard for acceptable times and places for advertisements for such foods. In the kidvid rulemaking proceeding, the Commission staff found that any ban would significantly restrict the availability of truthful advertising to adults without affecting the vast majority of advertising seen by children.[99] The difficulties have not gone away in the intervening years.

A proposed ban on the advertising of high calorie or high fat foods would have to withstand the analysis set forth in *Central Hudson*, discussed in section V, *supra*. The first prong of the test would be relatively easy to meet; we can assume that there is a substantial government interest in protecting children's health. The second and third prongs of the test, on the other hand, would prove to be difficult and probably insurmountable obstacles. There is no compelling evidence that restricting the advertising of "junk food" to children would advance the goal of protecting their health. To reach the conclusion that an advertising ban would promote this goal, one would need evidence of a link between food advertising and children's health, *i.e.*, that the advertising itself (as opposed to time spent in front of the TV) leads to increased caloric

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

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

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

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

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

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

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

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

markets for tobacco and alcohol products, which have been studied extensively, some studies find relatively small market-wide effects, and some find no such effect.[103] Moreover, even if some effect is presumed to exist, the FTC learned in the kidvid rulemaking that even drastic remedies may produce relatively small reductions in actual exposure to advertising. Thus, concluding that advertising restrictions would directly advance the government's interest in promoting children's health would require a considerable, and to date wholly unsupported, leap of logic.

Finally, the last prong of the *Central Hudson* test – whether the restrictions are no more extensive than necessary to serve the government's interest – would be especially difficult to meet if there are other more effective, less speech-restrictive means to protect children's health. Other remedies, such as more physical education requirements in school, more public education regarding nutrition and exercise, and restrictions on the kinds of foods sold to children in schools, are likely to prove more effective without banning speech. Supreme Court opinions have been crystal clear that concerns about children's welfare do not justify reducing all discourse to a level deemed appropriate for children. The Court has also made clear that restrictions on speech should be only a last resort, not the first option the government considers to address a problem.[104]

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industries.

Id. at 31.)

[103]Indeed, in a review of the literature regarding alcohol advertising and youth consumption, the most the FTC could conclude was that "the generally inconclusive nature of the empirical research does not rule out the existence of a clinically important effect of advertising on youth. 1999 FTC Alcohol Report at note 10. For opposing views on this subject, with extensive references to the research literature, *see* H. Saffer, *Economic Issues in Cigarette & Alcohol Advertising*, 28/3 J. Drug Issues 781-93 (1998), and *Advertising & Markets* (J. Luik & M. Waterson eds., 1996). *See also* Bagwell, *supra* note 101. It should also be noted that the Supreme Court has permitted litigants to justify speech restrictions "by reference to studies and anecdotes . . . or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Lorillard v. Reilly*, 533 U.S. at 555, *quoting Florida Bar v. Went For It, Inc.*, 515 U.S. at 628 (1995). Based on the evidence presented demonstrating a link between advertising and demand for cigars, the *Lorillard* Court found that the state's regulations on advertising of cigars and smokeless tobacco satisfied the requirement that they directly advance the state's interest in limiting youth tobacco use. Despite this finding, however, the *Lorillard* Court overturned the regulations on the grounds that they unnecessarily burdened speech directed to adults and therefore failed the last step of the *Central Hudson* test, that there be a reasonable fit between the means and ends of the government's regulatory scheme. 533 U.S. at 564-65.

[104]*Thompson v. Western States Med. Ctr.*, 535 U.S. at 373. In *Central Hudson*, 447 U.S. at 566 n.9, the Court also stated: "We review with special care regulations that entirely suppress

VIII. LESS RESTRICTIVE ALTERNATIVES TO AN ADVERTISING BAN

If a rule restricting the advertising of high calorie foods to children seems unlikely to be effective, what can the FTC do in this area? The Commission has been very concerned about the increase in childhood obesity and has worked closely with the Department of Health and Human Services to find solutions and to examine the possible impact of marketing on this problem.

The FTC should continue to take action against deceptive weight-loss, health-benefit, and nutrient-content claims.[105] Clearly, another useful step is to encourage more positive and informative ads addressing these issues. These would include truthful, non-misleading, low-calorie representations and ads that provide information about the importance of balanced nutrition. Such information can be presented in a way that it will be processed by all but the youngest children in the audience.

The Commission should continue its longstanding role of seeking to make sure government is not inadvertently inhibiting useful advertising claims. An FTC Bureau of Economics study showed that, following the institution of regulations under the Nutrition Labeling and Education Act, the incidence of comparative calorie claims in food advertising dropped dramatically from about 12% of ads to about 3%.[106] The FTC staff recently filed a comment with the FDA's Obesity Task Force suggesting that the agency consider relaxing some of its current regulations that restrict claims that could be helpful to those seeking to control calories.[107] For example, current food labeling rules impose a 25% threshold for reduced-calorie claims and prohibit such claims for foods that are already low in calories. However, these rules may suppress information that could be of benefit to consumers. Small incremental calorie reductions can become nutritionally significant in the aggregate, especially in the context of

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

[105]*See, e.g.*, Prepared Statement of the Federal Trade Commission Before the Subcommittee on Competition, Foreign Commerce, and Infrastructure of the Committee on Commerce, Science, and Transportation, U.S. Senate (June 11, 2003), Section II.D.; Prepared Statement of the Federal Trade Commission Before the Subcommittee on Commerce, Trade and Consumer Protection of the Committee on Energy and Commerce, U.S. House of Representatives (June 11, 2003), Section II.D.; A Reference Guide for Media on Bogus Weight Loss Claim Detection, *available at* www.ftc.gov/conline/edcams/redflag/index.html.

[106]P. Ippolito & J. Pappalardo, *Advertising Nutrition & Health: Evidence from Food Advertising 1977-1997*, at 52-55 (2002).

[107]Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning of the Federal Trade Commission, before the Food and Drug Administration in Docket No. 2003N-0338, In the Matter of Obesity Working Group, Public Workshop: Exploring the Link Between Weight Management and Food Labels and Packaging (Dec. 12, 2003) ("Obesity Working Group Comment").

longer term dietary changes. It has been estimated that even very modest daily changes have a substantial impact on weight over several weeks or months.[108]

Current food labeling rules also prohibit comparisons across food groups, as well as comparisons based on reduced portion size; comparisons must be made between standard serving sizes. However, dietary advice indicates that portion size matters, small differences add up, and substitution across food groups is an important way to construct a better diet.[109] Therefore, it is important for the government to consider whether food labeling rule changes would allow useful information to assist consumers in achieving better control of their caloric intake. The FTC will continue to work with the FDA as it consider those issues.

Finally, there is a great deal more that the food industry should be encouraged to do on a self-regulatory basis. Kraft, for example, has announced several initiatives to address the growing problem of obesity.[110] Kraft plans to eliminate all in-school marketing, to determine appropriate criteria to select products sold through in-school vending machines, and to develop guidelines for all advertising and marketing practices, including those targeting children, in order to encourage healthier lifestyles and diets.[111] These are promising initiatives to seek to address the problem of increasing childhood obesity without risking the infringement of First Amendment rights.

IX. CONCLUSION

Although the idea of banning certain kinds of advertisements may offer a superficial appeal in this context, it is neither a workable nor an efficacious solution to the health problem of childhood obesity. The Federal Trade Commission has traveled down this road before. It is not a journey that anyone at the Commission cares to repeat.

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[108]For example, reducing calorie intake by 100 calories a day, along with moderately increasing physical activity (*e.g.*, walking about 20 minutes a day), can cause weight loss of approximately 10 pounds in six months or 20 pounds in one year. U.S. Surgeon General, *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity 2001*, *available at* www.surgeongeneral.gov/topics/obesity/calltoaction/fact_whatyoucando.htm.

[109]Obesity Working Group Comment, at 13-19.

[110]Kraft Foods News Release, *Kraft Foods Announces Global Initiatives to Help Address Rise in Obesity* (July 1, 2003), *available at* http://164.109.16.145/obesity/pressrelease.html.

[111]*Id*.