

Remarks of Heather Hipsley¹
Assistant Director, Division of Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
Food Update Foundation 2008 Annual Meeting
Panel: Obesity and Marketing to Kids: A Moving Target
Ponte Vedra Beach, Florida
April 14, 2008

I. Introduction

I am pleased to be here today, and I would like to thank the Food Update Foundation for inviting me to be part of this panel. The title of this panel is “Obesity and Marketing to Kids: A Moving Target.” As this title suggests, the policy landscape on this issue has really evolved over the last 30 years or so. According to the CDC, the prevalence of overweight kids has increased about three-fold over the last 25 or 30 years.² Marketing and advertising to kids has also evolved with technology – 30 years ago, we didn’t contemplate the existence of the Internet, let alone behavioral advertising, text message advertising, and word of mouth marketing on blogs and social networking sites. And on the legal front, First Amendment jurisprudence on advertising regulation has changed over the last decades.

Despite these changes, some things have remained constant. The FTC has continued to be involved in advertising and marketing to children. For those of you who are not familiar with the Federal Trade Commission and its mission – let me give you a brief introduction. The FTC is an independent agency with five Commissioners at the helm and a staff of approximately 1100 employees, primarily lawyers and economists. The agency has two essential missions – to

¹ The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner.

² Centers for Disease Control and Prevention, “Obesity and Overweight: Childhood Overweight,” available at <http://www.cdc.gov/nccdphp/dnpa/obesity/trend/index.htm>.

protect consumers and promote competition. It carries out these missions through its two primary bureaus, the Bureau of Consumer Protection and the Bureau of Competition. The agency accomplishes its missions primarily through law enforcement, but it also engages in rulemaking, research, policy development, and consumer and business education. The authority of the Commission stems from Section 5 of the FTC Act, which – elegant in its simplicity – prohibits unfair or deceptive practices in commerce. That is a broad mandate and, indeed, a very large task in this technological age.

Although the Commission has been looking at advertising and marketing to kids for many years, its focus is constantly being reshaped by the dynamics of the marketplace and by the needs of consumers. Health care and health issues are an important and growing part of this landscape. Therefore, with the alarming rise in childhood overweight and obesity rates, the Commission made it a priority to find new ways to address the problem.

The statistics from the CDC are startling: nearly 20% of children between the ages of 6 and 11 are overweight.³ The long-term health consequences – with increased risk for cardiovascular disease and increased prevalence of type 2 diabetes – are obviously very serious.

The causes of the problem are complex, with numerous contributing factors in the way kids live today – inadequate physical activity; too much time spent before television, computer, and video-game screens; and over reliance on food choices that are quick and easy, but not necessarily healthy for daily consumption. In confronting new and growing problems such as this one, there is always the temptation to search for a target to blame and an easy “fix” to the

³ Centers for Disease Control and Prevention, “Obesity and Overweight: Childhood Overweight,” available at <http://www.cdc.gov/nccdphp/dnpa/obesity/trend/index.htm>.

problem. But that approach rarely works, and in this case, the solutions are as complex and multi-faceted as the sources of the problem. Finding meaningful ways to address the issue demands creativity from all of us – the food and entertainment industries, government agencies, and consumer advocacy groups. For the FTC, there is a bit of *deja vu* in tackling this issue. So before I tell you what we are doing now – and what we are asking you to do – let me relate to you an episode from the archives of FTC history.

II. The “Kidvid” Experience

In the 1970s, the Commission embarked upon a well-intentioned, but ultimately ill-fated, effort to regulate television advertising directed toward children. That proceeding – which came to be known as “kidvid” – had long-range negative consequences for the agency, as well as its consumer protection mission. The health issue during that time was not obesity, but dental cavities. Nevertheless, the concern about marketing efforts to persuade young children to ask for and consume sugary foods that may be harmful to them was similar to the concern we hear today.

In April 1978, the Commission published in the *Federal Register* a Notice of Proposed Rulemaking that invited comment on a proposed rule to do 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.⁴

In response to that very ambitious proposal, hundreds of written comments were submitted by consumers and consumer organizations; individuals with academic, scientific, and technical expertise; broadcasters; product manufacturers; and advertising agencies and associations. Hearings were held in two cities. And three years later the proceeding was terminated, with none of the recommendations adopted. The evidence – contained in thousands of pages of comments and testimony – showed cause for concern, but no clear way to craft workable rules restricting the advertising of food to kids.

Howard Beales, former Director of the Bureau of Consumer Protection, published a law review article in which he described the children’s advertising proceeding as “toxic” to the Commission.⁵ That statement is not an exaggeration. Congress allowed the FTC’s funding to lapse, and the agency was even shut down for a brief time. Congress passed a law prohibiting the FTC from adopting any rule with regard to children’s advertising based on the theory that such advertising was unfair under the FTC Act.⁶ And it was more than a decade later before Congress was willing to re-authorize the agency. Even *The Washington Post* excoriated the FTC for trying to become “a great national nanny.”

⁴ 43 Fed. Reg. 17967, 17969 (Apr. 27, 1978).

⁵ J. Howard Beales, III, “Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present,” 12 *Geo. Mason L. Rev.* 873, 879 (2004).

⁶ FTC Improvements Act of 1980, Pub. L. No. 96-252, Sections 11(a)(1), 11(a)(3), 94 Stat. 374 (1980) (current version in 15 U.S.C. § 57a(h) (1980)).

What we learned from that experience is the great difficulty of designing rules to restrict advertising to children. The data gathered by our staff in 1978 showed that if an advertising ban were to apply when young children (six and under) comprised 50%, or even 30%, of the TV audience, only one network program – the popular and highly acclaimed Captain Kangaroo – would have been affected. The situation is even more complex today, as children are exposed to advertising in many kinds of media that did not exist 30 years ago.

In addition, as I alluded to earlier, First Amendment protection of commercial speech is much broader today than it was 30 years ago. Any government-imposed limitation on advertising that is not deceptive or misleading would have to be based on a showing that the restriction would *directly* advance a substantial state interest and that the interest could not be served as well by a more limited restriction on commercial speech.⁷ That would be a very high hurdle to clear. Clearly, there is a substantial interest in improving children’s diets and health. Crafting restrictions on advertising that could be shown directly to advance that interest, on the other hand, would be a daunting – perhaps insurmountable – task. For that reason, the Commission has made it a priority to identify and promote actions that the food industry, the entertainment industry, and others can take to address the problem.

III. Childhood Obesity Initiatives

In 2005, the FTC, together with the Department of Health and Human Services, convened a workshop on Marketing, Self-Regulation, and Childhood Obesity. This event brought together some of the largest food manufacturers and entertainment companies, as well as academics, consumer advocates, pediatricians, and government officials. Out of that workshop

⁷ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

came a series of recommendations:

- enhanced self-regulation to change the nutritional profile of products marketed to children;
- reformulation of products, particularly those marketed to children, to make them lower in calories and more nutritious;
- use of packaging to make nutritious, lower calorie products more appealing to children and to help consumers with portion control;
- labeling initiatives, such as nutrition icons or seal programs, to help consumers easily identify more nutritious, lower calorie choices;
- revision of policies and practices for marketing in the schools;
- use of TV and movie characters popular with children to promote nutritious foods; and
- development of public education programs, targeted to both kids and adults, that address both nutrition and fitness.⁸

In July 2007, the FTC and HHS conducted a follow-up forum to review progress in implementing self-regulatory and educational initiatives, and we were happy to showcase a number of significant developments in the two-year intervening period.⁹ We were especially pleased to hear that our joint workshop and report had provided a stimulus for many of those industry initiatives.

⁸ FTC, *Perspectives on Marketing, Self-Regulation, & Childhood Obesity: A Report on a Joint Workshop of the Federal Trade Commission and the Department of Health and Human Services* (Apr. 2006) at 50-54, available at <http://www.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCandHHSReportonJointWorkshop.pdf>.

⁹ See <http://www.ftc.gov/bcp/workshops/childobesity/index.shtml>.

The most dramatic of these efforts was announced in 2006 by the Council of Better Business Bureaus and the BBB's National Advertising Review Council. The Children's Food and Beverage Advertising Initiative is a bold effort to change the profile of food advertising directed to children under 12 and to encourage healthier eating choices. To date, 13 major food companies have joined the Initiative making concrete pledges that when fully implemented will significantly alter the landscape of food marketing to kids. Lee Peeler will provide more details about the program, but I find it very encouraging that many of these companies have committed either not to advertise directly to children under 12 or to limit such advertising – including TV, radio, print, and Internet – to foods that qualify as “better for you” by meeting specified nutritional standards, such as limitations on calories, fat, sugar, and sodium and/or providing certain nutritional benefits to children. In addition, the companies have pledged to limit use of licensed characters to promote “better-for-you” products or healthy lifestyles, not to seek product placements in child-directed media, not to advertise food or beverages in elementary schools, and to use only their “better-for-you” products in interactive games directed to kids. These CBBB pledges are a major step forward, and we expect they will bring about a significant change in children's food marketing.

At the same time, media and entertainment companies are using their considerable talent to reach young audiences with positive health messages. Disney, Nickelodeon, and Cartoon Network have adopted policies to limit the licensing of their characters to foods meeting certain nutritional guidelines. As a result, Nickelodeon's SpongeBob and Dora the Explorer now appear on packages of carrots and spinach. Disney has formed a partnership with Imagination Farms to license favorite Disney characters to promote fresh fruits and vegetables. Ion Media Networks –

which through a partner produces children's weekend programming on NBC and Telemundo – made a commitment not to air advertising for less healthy foods and beverages on children's programs and to create story lines that promote good eating habits and physical activity.

In another important initiative, the Alliance for a Healthier Generation – a partnership of the American Heart Association and the William J. Clinton Foundation – has set standards for changing the nutritional profile and limiting the container size of beverages and snacks sold to kids in school, from elementary through high school. A number of food and beverage companies have joined this effort. As of September 2007, the Alliance reported a 41% reduction in the total number of calories contained in beverages shipped to the schools between 2004 and the 2006-07 school year. It also reported a 45% reduction in the number of full-calorie drinks shipped to schools and a 23% increase in shipments of water. The industry is committed to 100% compliance by the 2009-10 school year. In addition, the beverage industry is supporting proposed legislation that would set limits even exceeding those of the voluntary guidelines for beverages sold in schools.

We welcome all of these industry initiatives, but at the same time we want to urge more:

1. We want to see more companies join the CBBB initiative so that it grows to cover the universe of food companies that engage in marketing to kids.
2. We want to encourage companies to expand their definitions of “advertising directed to children.” We don't want to see marketing efforts simply shifted to other venues, such as new digital technologies.
3. We want to see stepped-up efforts directed to product reformulation. The nutritional criteria adopted for “better for you” products should not be set in stone, but can be improved

upon as companies find ways to lower the sugar, fat, and sodium without sacrificing taste and appeal.

4. We want to see the media and entertainment companies expand their participation in this effort, so that cross-promotions with popular kids' movies and TV characters will favor the more rather than the less nutritious foods and drinks.

Other countries are also adopting the self regulatory model. The Canadian Children's Food and Beverage Advertising Initiative, announced in April 2007, is a voluntary effort undertaken by 16 of Canada's leading food and beverage companies. Advertising Standards Canada, an independent self-regulatory body, administers the program, which is similar in structure and scope to the CBBB program in the U.S. In December 2007, 11 food and beverage companies announced their participation in a European Union Pledge Programme to be implemented by the end of 2008. Thus, the idea of a pledge program initiative seems to be catching on. Because many food marketers are multi-national companies, there is a great deal of overlap in program participation. Eight of the EU participants and 11 of the Canadian participants are members of the CBBB initiative.

IV. The Food Marketing Report

As many of you are aware – and some all too well aware, I'm sure – our Division of Advertising Practices is working very diligently on a study of food marketing directed to kids. Initiated at the request of Congress, this is a comprehensive study of promotional expenditures and activities targeted toward both children and adolescents. The Commission report will explore what is happening not only in the traditional measured media – TV, radio, and print – but also in the many non-traditional, and generally unmeasured, promotional activities targeted

to kids. The Internet, for example, has opened up a whole new venue for reaching kids, with websites offering online games that incorporate branded food products right into the game. Digital devices, such as cell phones – now in the hands of most teenagers and even many younger children – afford other kinds of marketing opportunities, such as text messaging. These new electronic media are far less costly for advertisers than the traditional broadcast media, and our children, of course, are far more adept at using them than many of us will ever be. We are also collecting information about forms of marketing that may not be new, but have not heretofore been measured, such as product packaging, in-store promotions, premium distribution, character licensing, athletic sponsorship, event sponsorship, movie theater advertising, and celebrity endorsements. In addition, we are looking at product placement in movies, on TV programs, and in video games; marketing in the schools; marketing in connection with philanthropic activities, and – in a kind of “back to the future” phenomenon – even word-of-mouth marketing. One might have thought that went out with the 19th century, but apparently it’s back with the 21st.

We are finding that everything is connected – one advertising campaign will incorporate many of these venues at the same time. Premiums or prizes often are tied to a licensed character or sponsored team or athlete and promoted on the Internet, in stores, and on packaging, as well as in broadcast or print media. To collect the prize, you find a code on the product, in the package, or under a bottle cap, and you enter the code on the company’s website to see if or what you have “won.” The prize itself frequently will display a food or beverage brand name or logo. Moreover, products are no longer just advertised adjacent to a TV program or a film – the products may also be embedded within the story itself.

We are also finding that the media and entertainment companies are spreading their promotions of children's movies or popular TV characters across many food products and companies. A hit children's movie of 2006, for example, was promoted in connection with most of the food categories covered in our data request – beverages, a fast-food restaurant, candy, cereals, snacks, baked goods, prepared foods, dairy products, and - we are happy to report – fresh fruit. The promotions made use of TV, packaging, point of sale materials, movie theater ads, websites, prizes and premiums, as well as stickers on fruit.

This is a significant study, because we are measuring something that has not been measured before. Other researchers have not had access to this data, and in many cases the companies themselves had not previously compiled such data. This report will provide the first comprehensive look at the entire landscape of how foods are marketed to children and adolescents.

We appreciate the fact that those of you who were called upon to participate in this endeavor, *albeit* involuntarily, have had to dig deep into your records and even re-structure your accounting to come up with the data we requested. Our compulsory process orders were sent to 44 food, beverage, and quick-serve restaurant companies in August of last year, seeking data for 2006. Our selection of target companies was based on extensive staff research into the foods and drinks most heavily marketed to kids. In addition, we included some fresh produce companies that are now beginning to promote fruits and vegetables to children – an activity we certainly want to encourage.

The responses to the orders arrived in November and December, and our staff has spent the winter working with the companies to resolve any problems and inconsistencies in the

submissions. In general, I can say that the companies were thorough and conscientious in preparing their responses, and we are grateful for that. Now we are engaged in data analysis and writing – or number and word crunching. We expect the report to be submitted to Congress – and released to the public – sometime this summer. Expenditures will be reported by food and marketing categories, but always in aggregated form so that the confidentiality of individual company data will be protected.

This study has been a massive undertaking – both for us and for the companies that were “asked” to participate in the research. However, it will provide an important benchmark – activities and expenditures for food marketing to children and teens in 2006. Thus, the data will provide a “before” photo, as it pre-dates implementation of the CBBB initiative and reflects a time early in the implementation of the Alliance guidelines for in-school marketing. If the FTC study is repeated at some point down the road – and I should warn you that studies of this nature often are repeated in order to document change in the marketplace – the 2008 report will be the baseline for measuring the impact of self-regulatory initiatives.

Another important piece of research was published by the Commission last year. Economists in the FTC’s Bureau of Economics compared children’s exposure to TV advertising in 1977, based on data gathered for the “Kidvid” rulemaking proceeding, with their exposure in 2004.¹⁰ What they found is that children’s exposure to food ads on TV has not risen and may have fallen modestly. Children ages 2-11 saw approximately 5,500 food ads in 2004, which constituted 22 percent of their total TV ad exposure. This is about 9 percent less than the

¹⁰ *Children’s Exposure to TV Advertising in 1977 and 2004: Information for the Obesity Debate*, FTC Bureau of Economics Staff Report (June 2007), available at <http://www.ftc.gov/os/2007/06/cabecolor.pdf>.

number of food ads they were estimated to have seen in 1977. The leading categories of food ads seen by kids in 2004 included fast-food restaurants, sugared cereals, sweets, snacks, and sweetened drinks. The same categories were present in 1977, but were dominated by cereals and sweets.

V. Conclusion

The food marketing report will complement the Bureau of Economics study – with its focus on expenditures and activities in the many newer media that did not exist in 1977.

Although kids' exposure to food advertising on TV has remained fairly constant over the past 30 years, marketing to kids certainly has become more omnipresent because of the Internet and other new electronic media.

Few people would disagree with the notion that childhood obesity is an extremely complex problem, or that there are many social and economic factors that have contributed to rising obesity rates. At the FTC, we're not interested in assigning blame. The simple fact is that all segments of society: parents, schools, government, health care professionals, food companies, and the media have an obligation to fight this public health crisis, regardless of how we got here. Industry self-restraint from promoting high fat, high calorie, low-nutrition products to children is one arrow in the quiver against childhood obesity. We have seen a good start down the road of self-regulation. However, it is only a start. More needs to happen, and the pace needs to accelerate. Thank you, and I would be happy to take any questions.