Remarks of

J. Howard Beales, III

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Competition, Advertising, and Health Claims: Legal and Practical Limits on Advertising Regulation

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The views I express today are my own, and do not necessarily represent the views of the Commission or any individual Commissioner.

Good afternoon. Thanks for that introduction and thanks also to George Mason for inviting me to this symposium. These days it seems like it's hard to open the newspaper or listen to the news without seeing or hearing something about America's obesity epidemic and, increasingly, the problem of childhood obesity. 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.[1] 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.[2] Considering the long-term health consequences of childhood obesity, such as diabetes and high blood pressure, and the likelihood that approximately 50% of children and adolescents who are obese will become obese adults, this trend is especially alarming.[3]

As public health agencies and others search for the causes of this alarming increase in overweight and obesity, they are also looking for effective ways to address it. One option that has been raised is to restrict advertising to children. The Federal Trade Commission, of course, is not a public health agency, but we do have a long history of regulating marketing to children. I believe this experience can help inform decisions about effective ways of addressing childhood obesity.

This afternoon I'd like to describe quickly the FTC's basic authority to regulate advertising. Then I'll describe a few cases, rules, and reports we've issued on marketing to children, before turning to what the Commission learned 25 years ago when it tried to restrict the marketing of sugary foods to children.

The Commission's basic authority derives from Section 5 of the FTC Act, which broadly prohibits unfair or deceptive acts or practices in commerce.[4] Most of the cases we've brought involving ads to kids have involved deception. An act or practice is "deceptive" if it misleads consumers acting reasonably under the circumstances and is material, that is, likely to affect the

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[1]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.

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

[3]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.

[4]15 U.S.C. § 45.

purchase or use decision.[5] Ads are interpreted from the standpoint of the reasonable consumer. If an ad is directed to children, the FTC will consider it from the standpoint of an ordinary child.[6]

The FTC's cases challenging deceptive performances in toy ads aptly illustrate the ordinary child standard. For example, the FTC has challenged advertisements showing a dancing ballerina doll spinning on her toes unassisted, and ads depicting toy helicopters hovering in mid air. A child would expect the toys to perform as shown in the ads, but these toys could not achieve these feats in real life.[7]

The Commission also has brought cases challenging claims regarding foods' nutritional content. For example, the FTC challenged ads claiming that Wonder Bread, as a good source of calcium, helps kids' minds work better and helps their memory.[8] The Commission challenged that claim as unsubstantiated; although calcium does affect brain function, there is no evidence that adding calcium to the diet will improve brain function.

The Commission has also challenged deceptive fat and calories claims made in food advertising. For example, an ad claimed that the Klondike Lite Ice Cream Bar was 93% fat free. The FTC alleged that claim was false because the bar actually had 14% fat when you included the bar's chocolate coating – and who's going to eat the bar without the coating? The Commission also challenged the implied claim that the bar was low in fat. The bar actually had 10 grams of fat per serving, well in excess of any reasonable level to support that claim.[9]

Similarly, an ad for Carnation Liquid Coffeemate showed the product being poured over fruit and cereal while claiming it was low in fat. The FTC challenged that claim because, while the express low fat claim was true for the one tablespoon serving appropriate for use in coffee, it was not true for the half cup consumers would use on cereal or fruit.[10]

Some of the cases we've brought under Section 5 of the FTC Act involving ads to kids have involved unfair practices. An act or practice is "unfair" if it causes or is likely to cause

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[5]Deception Policy Statement, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 168-170 (1984).

[6]Id. at 180.

[7]Hasbro, Inc., 116 F.T.C. 657 (1993) (consent order); Lewis Galoob Toys, Inc., 114 F.T.C. 187 (1991) (consent order).

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

[9]The Isaly Klondike Co., 116 F.T.C. 74 (1993) (consent order).

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

substantial consumer injury, the injury is not reasonably avoidable by consumers, and the injury is not offset by countervailing benefits to consumers or competition.[11]

For example, in the early 1990s, television ads with characters like Santa Claus, Popeye, and P.J. Funny Bunny encouraged kids to call 900 telephone numbers to talk to the fictional character and receive prizes. The calls cost $2 for the first minute and 45 cents for each additional minute and were billed to parents' phone bills.[12] The Commission alleged these practices were unfair because the party being billed – the parents – had no way to control the charges.[13]

In addition to case law, the Commission enforces two rules directly affecting children. In 1992, pursuant to the Telephone Disclosure and Dispute Resolution Act, the FTC issued its 900 Number Rule. The Rule bans the advertising of 900 number services to children under age 12 and requires ads directed to kids aged 12 to 17 to disclose clearly that they must have a parent's permission to call.[14] In addition, in 1999, pursuant to the Children's Online Privacy Protection Act, the FTC issued its COPPA Rule governing the online collection of personal information from children under 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 kids under 13 or the providers have actual knowledge that visitors are under 13.[15]

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[11]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."); Unfairness Policy Statement, appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984).

[12]E.g., Phone Programs, Inc., 115 F.T.C. 977 (1992) (consent order).

[13]The Commission also used its unfairness authority to challenge R.J. Reynolds' Joe Camel advertising campaign. Although widely misperceived as an action based on the cartoonish nature of the advertising, the Commission's allegations were based on an extensive investigation, including extensive empirical studies of the effect of the advertising in the under-age market. However, the case was never resolved on the merits. 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.

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

[15]Children's Online Privacy Protection Rule, 16 C.F.R. Part 312.

All of the Commission's law enforcement and regulatory activities are constrained by the First Amendment's limits on government regulation of speech, including commercial speech such as advertising. In the Central Hudson[16] case, the Supreme Court set out the test for determining whether a government restriction on commercial speech infringes the First Amendment. First, the Court said, if the speech is misleading or concerns unlawful activities, it may be banned outright. But for non-misleading speech regarding lawful activity, there is a three-pronged inquiry: 1) is there a substantial government interest at issue; 2) does the proposed regulation directly advance the asserted government interest; and 3) is the regulation not more extensive than necessary to serve that interest?[17]

It's worth noting here that the Supreme Court clearly disfavors speech-restrictive approaches. In a case decided in 2002 involving an FDA regulation of certain advertising by pharmacies, the Court said, "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."[18] In its First Amendment decisions, the Supreme Court consistently emphasizes that the government should use more speech, including counterspeech, to advance its goals whenever possible rather than restricting speech.[19]

Not only are commercial speech bans disfavored, but courts resist bans aimed at protecting kids that also keep commercial speech from adults. The Supreme Court has stated that restrictions on speech may not be over-inclusive, even if there is a substantial government interest. In 2001, the Supreme Court struck down a Massachusetts regulation of tobacco advertising that included a prohibition on placing outdoor tobacco advertising within 1,000 feet of a school, as well as a provision that tobacco advertising could not be placed lower than five feet from the floor of any retail establishment within 1,000 feet of a school.[20] The Court explained that although the State's interest in preventing under-age smoking is compelling, because the sale and use of tobacco products by adults is legal, the interest of tobacco retailers and manufacturers in conveying truthful information to adults about tobacco products must be considered as well. The Court cited its earlier reasoning in a case involving indecent speech on

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

[17]Id. at 566.

[18]Thompson v. Western States Med. Ctr., 535 U.S. 357, 373 (2002).

[19]44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 508 (1996); Peel v. Attorney Registration & Disciplinary Comm'n of Illinois, 496 U.S. 91, 110 (1990); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 478 (1988); In re R.M.J., 455 U.S. 191, 206 n.20 (1982).

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

the Internet that "the governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults."[21]

In contrast to government regulations, industry self-regulatory approaches do not have to satisfy First Amendment standards, and often are more flexible and adept at addressing concerns about advertising to kids than governmental regulation. 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.[22] 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."[23] CARU has an active enforcement program, handling over 100 inquiries a year, with about 10% of those involving food ads.

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.[24] The alcoholic beverage industry has voluntary codes of conduct restricting where alcoholic beverage ads may appear. In its 1999 Report, the Commission found that only one-half of the alcohol companies were in compliance with the codes' standard that alcohol ads should not be placed in media with a 50% or more under-21 audience.[25] 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%.[26] More recently, the industry has lowered its under-age threshold to 30%, a significant shift.

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[21]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)).

[22]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.

[23]Id.

[24]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").

[25]See generally 1999 FTC Alcohol Report.

[26]See generally 2003 FTC Alcohol Report.

The Commission has also studied the marketing of violent R-rated movies, explicit-content labeled music, and Mature-rated video games to children. 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.[27] The Commission also found that children aged 13 to 16 could easily buy these products at retail.[28]

Again 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.[29] Under continued Congressional and FTC scrutiny, including three 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.[30]

Not all Commission initiatives to protect children have been as balanced or as successful as the ones I have just described. Most notably, in the 1970s, in response to concerns about the advertising of highly sugared foods to children, the Commission explored restricting or even banning television advertising of these foods to children. The Commission's experience in the late 1970s is the most directly analogous to current calls for a ban on the advertising of "junk foods" to children. The inscription on the National Archives building across the street from my office reads, "What Is Past Is Prologue. Learn from the Past." Hoping to learn from the past, I'd like to review our prior experience and discuss what lessons might be drawn from it.

The FTC's 1978 children's advertising rulemaking proceeding was the culmination of reports, hearings, and proposals for guidelines on children's television advertising dating back to the early 1970s. This proceeding stemmed from concerns, similar to those being voiced today, regarding the large amount of TV advertising to which young children were exposed in general, and concerns that the advertising of highly sugared foods to children promotes dental caries, or tooth decay.[31]

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[27]Federal Trade Commission, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording and Electronic Game Industries (2000).

[28]Id. at Appendix F.

[29]Id. at 52-56.

[30]See, e.g., Federal Trade Commission, Marketing Violent Entertainment to Children: A Twenty-One Month Follow-Up Review of Industry Practices in the Motion Picture, Music Recording and Electronic Game Industries (2002).

[31]Notice of Proposed Rulemaking, In the Matter of Children's Advertising, 43 Fed. Reg. 17,967 (1978); FTC Staff Report on Television Advertising to Children (Feb. 1978).

After several years of consideration, in 1978 the FTC issued a Notice of Proposed Rulemaking seeking comment to explore the issues, including a staff proposal to consider three major alternative actions:

- Ban all television advertising to kids ages 8 and under, on the theory that these children are too young to understand advertising's selling purpose;[32]

- Ban television ads for the most cariogenic foods (i.e., those foods most likely to cause tooth decay and cavities) to kids 12 and under; or

- Require television advertising for sugared food products to older children to be accompanied by nutritional or health disclosures funded by advertisers.

In this rulemaking proceeding, which is sometimes referred to as "kidvid," the FTC received hundreds of public comments; held numerous hearings; and compiled a voluminous 60,000-page record. Acting on the recommendations in a staff report, legislative direction from Congress, and its own review of the information, the Commission ultimately terminated the rulemaking in September 1981.[33] It is an issue I am personally familiar with. As a new staff economist at the FTC, my first consumer protection assignment was to work on this rulemaking.

There were policy and practical reasons for the termination that are quite instructive when considering current proposals to ban or restrict advertising to children. Thus, a careful review of the kidvid proposals and the staff's conclusions with respect to them is worthwhile.

First and foremost, the Commission learned that protecting parents from their children's requests that the parent purchase particular food products simply is not a sufficient basis for government action. Certainly for the youngest children that the rulemaking focused on, it is parents who buy the food, not the children themselves. This is frequently true for older children as well. Kids' pestering their parents with demands for "junk foods" may be annoying and aggravating, but it is not unfair or deceptive under the FTC Act. Even the Washington Post issued a blistering editorial characterizing the FTC's proposals to restrict advertising as "a preposterous intervention that would turn the FTC into a great national nanny." The Washington Post continued:

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[32]The staff ultimately concluded that the appropriate cut-off was 6 and under. FTC Final Staff Report and Recommendation, In the Matter of Children's Advertising, TRR No. 215-60 (Mar. 31, 1981) ("Final Staff Report re Children's Advertising"), at 18.

[33] 46 Fed. Reg. 43,710 (1981). Although the White House had changed hands in 1980, the determination to close the rulemaking was made by three of the four Commissioners who had initiated it, with the fourth, then-FTC Chairman Michael Pertschuk, recusing himself.

> [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.[34]

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 televison is readily available to any parent who thinks his or her child should be protected from Ronald McDonald or Cap'n Crunch, along with thousands of hours of commercial-free programing on videotape or DVD, as well as the technology to record programming and play it back without the advertising.[35] FTC law enforcement and rulemakings since kidvid, such as those I described earlier, 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 ads that tout a food's fun factor.

Second, in kidvid we learned that it is very difficult to fashion workable rules restricting the advertising of "junk food" to kids. Nutrition is complex, as are the health effects of food. For example, the record in the kidvid proceeding revealed that the causes of tooth decay are complex, and that it wasn't simply the presence of added sugars that led to caries, but that the sticky or adhesive nature of the foods contributed to their cariogenic nature. The rulemaking record did not find a scientific basis for determining the cariogenic nature of individual foods that was sound enough to support a government-mandated rule.[36] In fact, some evidence suggested that some beverages with high added sugar content like soft drinks were relatively less cariogenic than sticky solid foods such as dried fruit.[37] Just imagine a rule to fight cavities that allowed soft drink advertising and banned the California raisins.

For the Commission today to restrict junk food advertising to children, we would first have to define junk food. How would we do that? Would we really want to permit advertising of calorie-free diet soft drinks but prohibit advertising for fruit juice? While some combination of caloric density and low nutritional value sounds appealing, scientifically supportable standards would have to be set for both elements. In this regard, it's worth noting that FDA's

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[34]Editorial, The Washington Post (March 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.

[35]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. See Media Info Center, available at www.mediainfocenter.org/compare/penetration. In 1980, DVDs and Blockbuster did not exist.

[36]Final Staff Report re Children's Advertising at 3-4, 84-85.

[37]Id. at 73-77.

food labeling rule requiring foods to have a minimum amount of certain nutrients in order to make health claims (the so-called jelly bean rule) prevents health claims for many fruits and vegetables.[38] Good nutrition is about good diets, not "good" versus "bad" foods. That should be particularly apparent in the case of obesity, because eating too much of an otherwise healthy diet will still lead to weight gain.

A third lesson from the kidvid rulemaking was that it was difficult to fashion an effective, legally supportable definition of where these foods could not be advertised. As I said before, one of the proposals was to ban all TV ads to young children. To implement such a ban, the Commission would have had to define advertising directed to young children. How would the FTC do that? Typically you'd measure the audience – in other words, look at audience composition data and, if a certain percentage of the audience is in the restricted age group, prohibit ads for disfavored products. The staff considered standards based on a majority or substantial share of the audience being ages 6 and under. What the staff found was that if one were to say advertisements could not be placed on any program where 50%, or even 30%, of the audience was this young, only one network show – Captain Kangaroo – would have been affected.[39] Clearly, such a remedy would not have been effective. Indeed its only likely effect would have been the prompt cancellation of the good Captain, a show that millions of children enjoyed. Furthermore, children watch television at many times of the day and week and therefore view a variety of programming, including shows not targeted to young children.

Because a 30% cut-off would not be effective, the staff considered lowering it to 20%. But a ban on advertising on programs where only 20% of the audience was under-age would affect the vast majority – 80% – of the audience who do not have the cognitive limitations that provided the rationale for the ban.[40] It would be exceedingly difficult to argue that such a remedy was no more restrictive than necessary.

Even a 20% cut-off would also have had surprisingly little effect on how much advertising kids see. Nearly all the television programs with a 20% or more 6 and under audience aired on weekend mornings, but weekend morning viewing only accounted for 13% of young children's TV viewing.[41] Young kids would still be exposed to ads during other time periods, such as weekday afternoons and early evenings. Demonstrating that such a relatively

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[38]See 21 C.F.R. § 101.14(e)(6). But see 60 Fed. Reg. 66206 (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 therefore health claims should be allowed for such foods).

[39]Final Staff Report re Children's Advertising, at 39.

[40]Id.

[41]Id. at 40-41.

small reduction in exposure to advertising would directly advance the government's interest is difficult.

Why is this different from alcohol advertising, where, as I noted earlier, the alcohol industry voluntarily limited under-age exposure to its ads by lowering the audience composition standard from 50% to 30% under-age? It's because the legal drinking age is 21, and far more programs are affected under the 30% standard than would be the case when younger age groups, such as under ages 8 or 12, are considered.

Thus, in the kidvid proceeding, the staff concluded that it was not feasible to implement restrictions on television advertising to children ages 6 and under, based on audience composition data.

The staff also considered a ban based on ad content, rather than audience composition. But the staff found it was difficult to define ads directed to those 6 and under based on an ad's themes and techniques without also including ads directed to older children; there was just too much overlap in the age groups to which the ads appealed.

Finally, in addition to being ill-conceived and impossible to implement meaningfully, the kidvid proceeding was also toxic to the Commission as an institution. In 1980, 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.[42] The provision is still part of the FTC Act today. Congress also allowed the agency's funding to lapse and the agency was literally shut down for a brief time. The FTC's other important law enforcement functions were left in tatters. The newspapers ran stories showing FTC attorneys packing their active investigational files in boxes for storage and entire industries sought restriction of, or even outright exemptions from, the agency's authority. It was more than a decade after the FTC terminated the rulemaking before Congress was willing to reauthorize the agency.[43]

This leads directly to the First Amendment implications of proposals to restrict advertising to children, because any government restriction would have to pass First Amendment muster under the Central Hudson test I referred to earlier. While the commercial speech doctrine was just developing when the Commission issued its children's advertising proposals, in the 25 years since then, the Supreme Court has provided much additional guidance as to how to evaluate proposals to restrict speech.[44]

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[42]FTC Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

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

[44]See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Cincinnati v. Discovery Network, 507 U.S. 410 (1993); Board of Trustees of SUNY v. Fox, 492 U.S. 469

So let's consider how a proposed ban on children's advertising would fare under the Central Hudson test. The first prong is relatively easy to meet – I think we can assume there is a substantial government interest in protecting children's health. It would be much more difficult to meet the last two prongs of the test, however. I'm unaware of any compelling evidence that restricting junk food advertising to kids would directly advance kids' health. To reach that conclusion, one would need evidence on the link between such advertising and kids' health, that is, that the advertising itself (as opposed to just time in front of the TV) leads to increased caloric consumption leading to being overweight. The evidence suggests that kids today actually spend less time watching television than they did 20 years ago, but increasingly more time in front of largely food advertising-free computer screens.[45] Thus, it's far from clear that restricting television advertising would directly advance kids' health.

It may seem obvious that food advertising directed to children will cause children to eat more food (or more junk foods), and therefore to gain weight. However, this is surprisingly difficult to demonstrate. We know that advertising increases the demand for individual brands of food; otherwise, companies would not pay for the advertising. But if ads for one brand of candy merely steal market share from other brands of candy, they do not increase children's consumption of candy in general. Certainly in most markets, the great bulk of advertising's effect is to shift demand across brands, rather than to expand the demand for the entire product category.[46] Whether there is any market expansion at all remains highly controversial. In the markets for tobacco and alcohol products that have been studied extensively, some studies find

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(1989); Riley v. National Fed'n of Blind, Inc., 487 U.S. 781 (1988); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

[45]The average amount of time children spent watching television actually declined from over 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 (over 4 ½ hours per day); the average school-aged child watched over 29 hours per week (over 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).

[46]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) (forthcoming), available at www.columbia.edu/~kwb8/ (provides a survey of Lambin and more recent research on the sales-advertising relationship).

relatively small market-wide effects, and some find no such effect.[47] Even if we assume that some effect exists, as we learned in kidvid, even drastic remedies produce relatively small reductions in advertising exposure. Thus, concluding that advertising restrictions directly advance the government's interest requires a considerable leap of faith.

Also, 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 kids' health. For example, there might be more physical education requirements in school, more public education regarding the need to exercise and eat right, or restrictions on the kinds of food sold in schools. The Supreme Court has been crystal clear that concerns about children's welfare do not justify reducing all discourse to a level that is fit for kids. The Court has also made clear that restrictions on speech should be a last resort, not, as here, the first thing the government considers.[48]

The Commercial Speech Doctrine's tests for lawful regulation of advertising reflect practical policy-oriented considerations, as well as legal requirements. For example, when we began kidvid in 1978, only 26% of children ages 6 to 17 had no cavities in their permanent teeth.[49] Two decades later, the number of children without cavities in their permanent teeth more than doubled to 55%.[50] Clearly, the demise of the children's advertising rulemaking had nothing to do with this substantial reduction, but neither did the presence, or absence, of food advertising. There are a number of reasons for the decrease in tooth decay among children, including improved dental care and increased fluoridation.[51] The same is likely true for obesity. Engaging in quixotic quests with little empirical foundation will simply divert us from the need to look for solutions that really work.

So if a rule restricting advertising to kids seems unlikely to work, what can the FTC do? We are very concerned about the increase in obesity and will work closely with the Department of Health and Human Services to find solutions and to examine the possible impact of marketing on this problem.

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[47]For opposing views 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 46.

[48]Thompson v. Western States Med. Ctr., 535 U.S. 357, 373 (2002).

[49]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).

[50]Id.

[51]Id.

We will also continue to take action against deceptive weight-loss, health-benefit, and nutrient-content claims.[52] Another useful step clearly is to encourage more positive ads on these issues such as truthful, non-misleading, low-calorie claims.

We will also look closely 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 ads dropped dramatically from about 12% of ads to about 3%.[53] 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.[54]

For example, current food labeling rules have a 25% threshold for reduced-calorie claims and prohibit such claims for foods that are already low-calorie. But small incremental calorie reductions can become nutritionally significant in the aggregate, especially in the context of 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.[55]

Current food labeling rules also prohibit comparisons across food groups, as well as comparisons based on reduced portion size, because you must compare standard serving sizes. But 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.[56] So, it's important for the

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[52]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.

[53]P. Ippolito & J. Pappalardo, Advertising Nutrition & Health: Evidence from Food Advertising 1977-1997 (2002).

[54]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").

[55]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.

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

government to consider whether food labeling rule changes would help consumers better control their calorie intake by allowing useful information. We will continue to work with the FDA as they consider those issues.

Finally, I think there is much more the 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.[57] 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 kids, to encourage healthier lifestyles and diets.[58] These are promising initiatives to address the issue of increasing childhood obesity without risking the infringement of First Amendment rights.

George Santayana said that, "Those who cannot remember the past are condemned to repeat it."[59] Those of us who lived through kidvid remember the past and have no desire to repeat it. We will tread very carefully when responding to calls to restrict truthful advertising to children.

Thank you.

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[57]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.

[58]Id.

[59]George Santayana, The Life of Reason, Vol. I (1905).