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## A Proposal for Congressionally Mandated Federal Regulation of Child-Directed Food and Beverage Television Advertisements to Combat Childhood Obesity

Andrew Harvey

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# A PROPOSAL FOR CONGRESSIONALLY MANDATED FEDERAL REGULATION OF CHILD-DIRECTED FOOD AND BEVERAGE TELEVISION ADVERTISEMENTS TO COMBAT CHILDHOOD OBESITY

*Andrew Harvey*<sup>†</sup>

“One of the greatest responsibilities we have as a Nation is to safeguard the health and well-being of our children. We now face a national childhood obesity crisis, with nearly one in every three of America’s children being overweight or obese . . . .”<sup>1</sup>

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1. Barack Obama, Presidential Proclamation—National Childhood Obesity Awareness Month, THE WHITE HOUSE (Sept. 1, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/01/presidential-proclamation-national-childhood-obesity-awareness-month>.

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## INTRODUCTION

Childhood obesity rates have more than tripled in the past thirty years.<sup>2</sup> During this time, the obesity rate in children aged six to eleven years has increased from 7 percent to 20 percent, and the obesity rate in adolescents aged twelve to nineteen years has increased from 5 percent to 18 percent.<sup>3</sup> The rise in childhood obesity rates is strongly correlated with a rise in childhood physical health complications. One such complication is fatty liver, a previously unrecognized ailment now present in about one-third of obese children.<sup>4</sup> Type 2 diabetes and an array of other afflictions that affect most human organs are also increasingly common.<sup>5</sup> Childhood obesity can also influence a child's emotional health, causing low self-esteem, negative body image, and depression.<sup>6</sup>

In addition to having short-term effects on an individual's formative years, childhood obesity has been shown to lead to long-term health ailments. Children and adolescents who are overweight have a 70 percent chance of being overweight or obese as adults.<sup>7</sup> Adult obesity, in turn,

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2. *Childhood Obesity Facts*, CTRES. FOR DISEASE CONTROL AND PREVENTION (Sept. 15, 2011), <http://www.cdc.gov/healthyyouth/obesity/facts.htm> [hereinafter CDC].

3. *Id.*

4. David S. Ludwig, *Childhood Obesity—The Shape of Things to Come*, 357 *NEW ENG. J. MED.* 2325, 2325 (2007).

5. *Id.*

6. *About Childhood Obesity*, AM. ACAD. OF PEDIATRICS, <http://www.aap.org/obesity/about.html> (last visited Mar. 11, 2013).

7. *Childhood Obesity*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE ASPE, [http://aspe.hhs.gov/health/reports/child\\_obesity](http://aspe.hhs.gov/health/reports/child_obesity) (last visited Mar. 9, 2013).

leads to an increased risk of stroke, cancer, and osteoarthritis.<sup>8</sup> More significantly, childhood obesity is associated with an increased likelihood of premature death.<sup>9</sup>

While childhood obesity rates and related complications are rising, the amount of money being spent on child-directed food and beverage television advertisements is increasing rapidly.<sup>10</sup> The nutritional content of the foods and beverages in these child-directed advertisements is generally poor.<sup>11</sup> While parents are certainly responsible for the nutritional content of the foods their children eat, there is only so much that they can reasonably do<sup>12</sup> when their children are bombarded with unhealthy advertisements. Thus, childhood obesity is a societal problem that must be addressed. This Note argues that a federal solution is the best means for doing so.

Due to the impact that child-directed advertising has had on childhood obesity and the inadequacy of the food and beverage industry's self-regulation, the government should look to regulatory alternatives. A compelling and effective precedent for such regulation is the restrictions placed on tobacco advertising and marketing to children. In this Note, I argue that we should look to this precedent for constructing and passing a federal law that restricts the food and beverage industry's ability to advertise to children via television. Part I of this Note focuses on the advertising techniques that food and beverage companies utilize to target children. It then discusses several recent studies that show the connection between food and beverage advertisements and childhood obesity. Part II examines past and present efforts to regulate child-directed television advertisements and demonstrates that further action is needed to lower childhood obesity rates. Part III suggests that the United States should look to tobacco advertising laws for inspiration to pass a law that restricts child-directed food and beverage television advertising. Part IV analyzes the challenge that the First Amendment poses to any restriction of commercial speech. Part V concludes with a proposal for restrictions on child-directed television advertising.

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8. CDC, *supra* note 2.
  9. Paul W. Franks et al., *Childhood Obesity, Other Cardiovascular Risk Factors, and Premature Death*, 362 NEW ENG. J. MED. 485, 487–88 (2010).
  10. Susan Linn & Courtney L. Novosat, *Calories for Sale: Food Marketing to Children in the Twenty-First Century*, 615 ANNALS AM. ACAD. POL. & SOC. SCI. 133, 134 (2008).
  11. See FED. TRADE COMM'N, *MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION* 9 (2008) [hereinafter *FTC, MARKETING FOOD TO CHILDREN AND ADOLESCENTS*], available at <http://www.ftc.gov/os/2008/07/P064504foodmktgreport.pdf>.
  12. See *infra* Part I.A.4.

I. ADVERTISING USED TO TARGET CHILDREN AND ITS  
IMPACT ON CHILDHOOD OBESITY

A. *Child-Directed Television Advertising Techniques*

As of 2009, there were 74.5 million children under the age of seventeen living in the United States.<sup>13</sup> Children watch a lot of television advertisements. A 2007 Kaiser Family Foundation report of thirteen television networks found that those networks aired an average of about eleven minutes of advertisements per hour of programming.<sup>14</sup> Because food and beverage companies stand to gain so many consumers by advertising their products to children, they have developed many techniques to further their agendas. Four major advertising methods that companies have developed to entice children are: (1) spending a lot of money, (2) advertising foods filled with ingredients that keep children coming back for more, (3) outsmarting children, and (4) targeting parents indirectly.

1. Money Spent Advertising to Children

Spending large amounts of money on television advertisements is a simple yet effective approach that food and beverage companies use to target children. Corporations spent \$100 million on all types of advertising to children in 1983.<sup>15</sup> A 2008 Federal Trade Commission report to Congress found that forty-four participating companies spent a combined total in excess of \$1.6 billion—over \$36 million per company on average—to encourage U.S. children and adolescents to consume their products in 2006.<sup>16</sup> Of the \$1.6 billion, the companies committed \$458 million to television advertisements geared specifically to children aged two to eleven.<sup>17</sup> Of that \$458 million, \$142 million was spent on breakfast cereals and \$91 million on restaurant food.<sup>18</sup> Another \$69 million was spent advertising snacks and \$33 million to advertise candy and frozen desserts.<sup>19</sup> For children aged twelve to seventeen, the companies spent \$376 million on television advertisements.<sup>20</sup> Ads for fast food

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13. *Number of Children Ages 0-17 in the United States by Age*, CHILDSTATS.GOV, <http://www.childstats.gov/americaschildren/tables/pop1.asp> (last visited Sept. 2, 2013).
14. WALTER GANTZ ET AL., FOOD FOR THOUGHT: TELEVISION FOOD ADVERTISING TO CHILDREN IN THE UNITED STATES 8 (2007), available at <http://www.kff.org/entmedia/7618.cfm>.
15. Linn & Novosat, *supra* note 10, at 134.
16. FTC, MARKETING FOOD TO CHILDREN AND ADOLESCENTS, *supra* note 11, at 7.
17. *Id.* at 7, 15.
18. *Id.* at 15.
19. *Id.*
20. *Id.*

restaurants accounted for \$105 million of the costs, carbonated beverages for \$99 million, and “candy/frozen desserts” for \$69 million.<sup>21</sup> As of 2007, corporations were spending a combined \$10–15 billion alone on food and beverage advertisements aimed at children.<sup>22</sup> These amounts are likely to increase in the future.<sup>22</sup>

A 2007 Kaiser Foundation report found that children’s programming shows more food advertisements than all other genres of shows.<sup>23</sup> The study concluded that ABC Family, Cartoon Network, and Nickelodeon, “ad-supported children’s cable networks,” broadcasted around three and a half minutes of food ads per hour.<sup>24</sup> In contrast, the four largest broadcast networks—FOX, ABC, CBS, and NBC<sup>25</sup>—only featured about two minutes of food ads per hour.<sup>26</sup>

## 2. Nutritional Content of Foods Advertised to Children

The fact that food and beverage companies spend a lot of money to target children with television advertisements would be positive if they promoted healthy foods. However, the majority of ads are for foods that health-conscious groups have designated as best consumed “in moderation, occasionally, and/or in small portions.”<sup>27</sup> The Kaiser Foundation reported that 34 percent of television advertising directed at children and teenagers is for candy and snacks.<sup>28</sup> Another 29 percent of such advertisements were for cereal.<sup>29</sup> By comparison, only 4 percent of child and teen-directed advertisements were for dairy products, and no advertisements were for healthier food groups such as fruits and vegetables.<sup>30</sup>

A separate study found that “foods advertised during television programs children watch most remains nutritionally unbalanced.”<sup>31</sup> Specifically, this study found that foods advertised to children were particularly high in sugar and that a child-consumer of the diet advertised on television “would exceed limits for sodium and sugar, and

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21. *Id.*

22. Linn & Novosat, *supra* note 10, at 134.

22. *See id.*

23. GANTZ ET AL., *supra* note 14, at 8.

24. *Id.*

25. *Id.* at 27.

26. *Id.* at 8.

27. *Id.* at 18.

28. *Id.* at 9.

29. *Id.*

30. *Id.*

31. Kristen Harrison & Amy L. Marske, *Nutritional Content of Foods Advertised During the Television Programs Children Watch Most*, 95 AM. J. PUB. HEALTH 1568, 1572 (2005).

fail to obtain adequate fiber, vitamin A, calcium, and iron.”<sup>32</sup> The high sugar content is particularly troubling in light of recent studies that have illustrated sugar’s addictive qualities. A 2008 Princeton study showed that rats exposed to sugar experience all three elements of addiction—increased consumption, withdrawal, and craving and relapse.<sup>33</sup> A University of Florida study also concluded that “fatty processed foods and high fructose sugar treats can be as addictive as cocaine and cigarettes.”<sup>34</sup>

### 3. Outsmarting Children

To identify and use the most effective techniques to induce children to consume their products, food and beverage companies routinely solicit the services of marketing experts to create campaigns that use “cutting-edge marketing strategies” to reach children.<sup>35</sup> These companies include Coca-Cola, McDonalds, Frito-Lay, and Kraft.<sup>36</sup> This practice has become so controversial that in 1999, a large group of psychologists wrote to the president of the American Psychological Association (APA) complaining that APA members were using psychology to “promote and assist the commercial exploitation and manipulation of children.”<sup>37</sup> The letter specifically asked the APA to condemn the use of psychology to advertise to children and make additional efforts to limit the practice.<sup>38</sup>

One technique that food and beverage companies employ is the promotion of the “persuasive appeal” of their product.<sup>39</sup> The most common appeal to children is taste, which is used in 35 percent of ads marketed to children.<sup>40</sup> Other frequently used appeals include fun (18

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32. *Id.* at 1571.

33. Kitta MacPherson, *Sugar Can Be Addictive, Princeton Scientist Says*, NEWS AT PRINCETON (Dec. 10, 2008, 6:00 AM), <http://www.princeton.edu/main/news/archive/S22/88/56G31>.

34. Kyrsty Hazell, *Fatty and Sugary Foods are as Addictive as Cocaine and Nicotine, Warn Health Experts*, THE HUFFINGTON POST UK, (last updated Apr. 11, 2011, 11:27 AM), [http://www.huffingtonpost.co.uk/2011/11/03/fatty-and-sugary-food-as-addictive-as-cocaine-and-nicotine\\_n\\_1073513.html](http://www.huffingtonpost.co.uk/2011/11/03/fatty-and-sugary-food-as-addictive-as-cocaine-and-nicotine_n_1073513.html).

35. JEFF CHESTER & KATHRYN MONTGOMERY, INTERACTIVE FOOD & BEVERAGE MARKETING: TARGETING CHILDREN AND YOUTH IN THE DIGITAL AGE 20 (2007), available at <http://digitalads.org/documents/digiMarketingFull.pdf>.

36. *Id.*

37. Letter from Samella Abdullah, Ph.D., et al., to Richard Suinn, President of the Am. Psychological Ass’n (Sept. 30, 1999) (regarding the use of psychology to exploit and influence children for commercial purposes).

38. *Id.*

39. GANTZ ET AL., *supra* note 14, at 10.

40. *Id.*

percent) and premiums or contests (16 percent).<sup>41</sup> Another technique is brand recognition,<sup>42</sup> which aims “to promote product sales by taking a product and identifying it with a lifestyle to which consumers aspire.”<sup>43</sup> Brand recognition involves companies creating their own “animated spokescharacters”<sup>44</sup> that are typically are modeled after “animals, people, the food products, and even utensils.”<sup>45</sup> These characters usually appear for many years and are advertised for one particular product line of a company.<sup>46</sup> The “persuasive appeal” concept and “animated spokescharacters” are often combined together. One example of this is Ronald McDonald having a good time in McDonald’s restaurants without food products being referenced.<sup>47</sup> Another example is Tony the Tiger featured in an “adventure scenario.”<sup>48</sup>

Contests and premiums are frequently used in food advertisements directed at children.<sup>49</sup> In fact, advertisements for children or teenagers have a greater likelihood of including “free gifts, premiums, or contests” than other advertisements.<sup>50</sup> Finally, companies often use celebrities to draw attention to their advertisements and give credibility to their products.<sup>51</sup>

While some children and adolescents may at least recognize the tactics that food and beverage advertisements employ, studies indicate that young children have difficulty both differentiating commercials from programming and recognizing the “persuasive intent” of advertisements.<sup>52</sup> It has been shown that children below the ages of four or five

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41. *Id.*
  42. FTC, MARKETING FOOD TO CHILDREN AND ADOLESCENTS, *supra* note 11, at 38.
  43. COMMITTEE ON FOOD MARKETING AND THE DIETS OF CHILDREN AND YOUTH, FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY? 136 (J. Michael McGinnis et al., eds., 2006) [hereinafter FOOD MARKETING TO CHILDREN AND YOUTH].
  44. FTC, MARKETING FOOD TO CHILDREN AND ADOLESCENTS, *supra* note 11, at 38.
  45. *Id.*
  46. *Id.*
  47. Dale Kunkel, *Children and Television Advertising*, in HANDBOOK OF CHILDREN AND THE MEDIA 375, 377 (Dorothy G. Singer & Jerome L. Singer eds., 2001).
  48. *Id.*
  49. GANTZ ET AL., *supra* note 14, at 11–12; *see also* FTC, MARKETING FOOD TO CHILDREN AND ADOLESCENTS, *supra* note 11, at 45–46.
  50. GANTZ ET AL., *supra* note 14, at 12.
  51. *Id.*; *see also* FTC, MARKETING FOOD TO CHILDREN AND ADOLESCENTS, *supra* note 11, at 46.
  52. Kunkel, *supra* note 47, at 378.

years old cannot regularly discern programs from commercials.<sup>53</sup> This includes circumstances when devices to separate programs from commercials are used.<sup>54</sup> Further, children younger than seven or eight years old generally do not understand the persuasive intent of advertisements.<sup>55</sup> Doing so involves both understanding that advertisers intend for viewers to buy their goods and realizing that advertisements include “biased messages” that “must be interpreted differently than unbiased messages.”<sup>56</sup>

#### 4. Targeting Parents Indirectly

Food and beverage companies know that children and teenagers do not generally have large quantities of money to spend. Thus, these companies must make sure that parents are aware of their products. To do so, companies will devise strategies that encourage children to “nag their parents” to purchase products.<sup>57</sup> The essence of this concept is that food and beverage companies strategically design advertisements to induce children to repeatedly ask their parents for the advertised product.<sup>58</sup> The Institute of Medicine study discussed above has confirmed this trend, finding that “there is strong evidence that television advertising influences the food and beverage purchase requests of children ages 2–11 years.”<sup>59</sup> This study further found that younger children might be more influenced by television advertising to request money for food and beverages than older children.<sup>60</sup>

##### *B. The Connection Between Advertisements and Childhood Obesity*

If child-directed television advertisements did not induce children to purchase and consume a company’s products, why would food and beverage companies spend billions of dollars per year on those advertisements? Clearly, these companies feel that their huge investment is turning an overall profit. The vast majority of food advertised to children is not healthful.<sup>61</sup> However, food and beverage companies

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53. BRIAN L. WILCOX ET AL., REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN 5 (2004), *available at* <http://www.apa.org/pi/families/resources/advertising-children.pdf>.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 39.
58. SUSAN LINN, CONSUMING KIDS: THE HOSTILE TAKEOVER OF CHILDHOOD 31–34 (2004).
59. FOOD MARKETING TO CHILDREN AND YOUTH, *supra* note 11, at 379.
60. *See id.*
61. *See supra* Part I.A.2.

continue to deny that television advertisements harm children and claim that their advertisements only affect brand choices.<sup>62</sup>

One thing can be said with nearly absolute certainty—the more television that children and adolescents watch, the more likely they are to be obese.<sup>63</sup> This was the key finding of a 1985 study that analyzed groups of children aged six to eleven and twelve to seventeen over a period of years to determine whether children who watched more television had a greater likelihood of being obese than those who watched less television.<sup>64</sup> The study documented a causal association between the amount of television watched and obesity in children.<sup>65</sup>

Other studies have positively demonstrated that television advertisements influence children's food preferences. One such study compared the effects of commercials for branded items to the effects of commercials for non-branded items on children's preferences for both types of foods.<sup>66</sup> The study concluded that food advertisements affect children's selections of both branded and non-branded foods.<sup>67</sup> In particular, the study found that both types of advertisements tend to influence children to want "energy-dense, nutrient-poor foods."<sup>68</sup> An Institute of Medicine study confirmed these results for children aged two to eleven, finding "strong evidence" that children in this age group prefer advertised food and beverages.<sup>69</sup> However, the same study found "insufficient evidence" about television advertising's influence on teens aged twelve to eighteen.<sup>70</sup>

The study concluded that for "diet-related health," there is "strong" statistical evidence that watching food and beverage television advertisements is "associated" with the body fat content of children and teenagers.<sup>71</sup> However, the study stopped short of finding a causal

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62. Jennifer L. Harris et al., *A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can Be Done*, 30 ANN. REV. PUB. HEALTH 211, 212 (2009).
63. William H. Dietz, Jr. & Steven L. Gortmaker, *Do We Fatten Our Children at the Television Set? Obesity and Television Viewing in Children and Adolescents*, 75 PEDIATRICS 807, 808–09 (1985).
64. *Id.* at 808.
65. *Id.* at 811.
66. Emma J. Boyland et al., *Food Commercials Increase Preference for Energy-Dense Foods, Particularly in Children Who Watch More Television*, 128 PEDIATRICS 93, 96 (2011).
67. *Id.* at 99.
68. *Id.*
69. FOOD MARKETING TO CHILDREN AND YOUTH, *supra* note 11, at 379.
70. *Id.*
71. *Id.*

relationship between television advertisements and obese children because the research did not exclude other potential explanations.<sup>72</sup>

More recent studies have found a more convincing link between child-directed television advertisements and childhood obesity. One study compared data collected in 1997 on children's television-viewing habits with data collected in 2002.<sup>73</sup> The study then broke down the television channels watched into two groups that were characterized both by the types of commercials shown and by whether in-program commercials were shown.<sup>74</sup> This study found that obesity in children was solely associated with viewing television channels that show in-program advertisements.<sup>75</sup> Children who viewed television channels without commercials had no greater likelihood of being obese.<sup>76</sup> Thus, the study concluded "it is the viewing of television advertisements for foods of low nutritional quality that leads to obesity, not television watching per se."<sup>77</sup>

A second study showing a strong connection between advertisements and childhood obesity employed an economic analysis.<sup>78</sup> This study focused on the potential causal link between fast-food restaurant advertising and childhood obesity<sup>79</sup> by examining the weekly amount of spot television advertisements aired to children in different local regions.<sup>80</sup> The results showed "a strong positive effect of exposure to fast-food restaurant advertising on the probability that children and adolescents are overweight."<sup>81</sup> Furthermore, the study suggested that if all television advertisements for fast food were banned, the number of overweight children aged three to eleven would be reduced by 18 percent and that the number of overweight children aged twelve to eighteen would decrease by 14 percent.<sup>82</sup>

As the above studies demonstrate, it is very difficult to prove a direct correlation between child-directed television advertisements and

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72. *Id.* at 379–80.

73. Frederick J. Zimmerman & Janice F. Bell, *Associations of Television Content Type and Obesity in Children*, 100 AM. J. PUB. HEALTH 334, 334 (2010).

74. *Id.* at 335.

75. *Id.* at 336.

76. *Id.*

77. *Id.*

78. Shin-Yi Chou et al., *Fast-Food Restaurant Advertising on Television and Its Influence on Childhood Obesity*, 51 J. L. & ECON. 599, 599 (2008).

79. *Id.* at 600.

80. *Id.* at 604–05.

81. *Id.* at 616.

82. *Id.*

childhood obesity. However, the most recent studies have shown a strong enough connection between television advertisements and childhood obesity to require intervention.

## II. EFFORTS TO REGULATE CHILD-DIRECTED TELEVISION ADVERTISEMENTS

The federal government has attempted more than once to restrict child-directed food and beverage advertisements.<sup>83</sup> Rising public concern over childhood obesity has also inspired two recent efforts to change the way that food and beverage companies advertise to children. These efforts are: (1) the Better Business Bureau's "Children's Food and Beverage Advertising Initiative"<sup>84</sup> and (2) the Interagency Working Group on Food Marketed to Children's *Preliminary Proposed Nutritional Principles to Guide Industry Self-Regulatory Efforts*.<sup>85</sup>

### A. *Previous Attempts at Federal Regulation*

The power to regulate television advertisements is shared by two government agencies: the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC).<sup>86</sup> Under the Communications Act,<sup>87</sup> the FCC has the power to regulate broadcasting as "public convenience, interest, or necessity requires."<sup>88</sup> Accordingly, the FCC has the task of regulating broadcasters to protect the public interest.<sup>89</sup> The FTC is governed by the FTC Act,<sup>90</sup> which states that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or

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83. Kunkel, *supra* note 47, at 385–87.

84. COUNCIL OF BETTER BUS. BUREAUS, THE CHILDREN'S FOOD & BEVERAGE ADVERTISING INITIATIVE IN ACTION: A PROGRESS REPORT ON THE FIRST SIX MONTHS OF IMPLEMENTATION: JULY–DECEMBER 2007 3 (2008), *available at* <http://www.bbb.org/us/storage/0/Shared%20Documents/CFBAI%20Report.pdf> [hereinafter PROGRESS REPORT ON THE FIRST SIX MONTHS OF IMPLEMENTATION].

85. INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, PRELIMINARY PROPOSED NUTRITION PRINCIPLES TO GUIDE INDUSTRY SELF-REGULATION: REQUEST FOR COMMENTS 1 (2011), *available at* <http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf> [hereinafter PRELIMINARY PROPOSED NUTRITION PRINCIPLES].

86. Kunkel, *supra* note 47, at 387.

87. *What is the Communications Act of 1934?*, ROOSEVELT INSTITUTE, <http://www.rooseveltinstitute.org/new-roosevelt/what-communications-act-1934> (last visited Aug. 26, 2013).

88. Communications Act, 47 U.S.C. § 303 (2012).

89. Kunkel, *supra* note 47, at 385.

90. Federal Trade Commission Act, 15 U.S.C. § 41 (2006).

practices in or affecting commerce” are unlawful.<sup>91</sup> Thus, the FTC is able to regulate all “unfair” or “deceptive” advertising techniques.<sup>92</sup> The FCC and the FTC have each attempted to use their regulatory powers to restrict child-directed advertising.

#### 1. The FCC

In 1971, Action for Children’s Television (ACT) proposed that the FCC eliminate all commercials, sponsorships, and product placements in children’s television programming.<sup>93</sup> Although the FCC denied the proposal, it did decide to (1) specifically limit the amount of commercials shown to children to twelve minutes per hour on weekdays and nine and a half minutes per hour on weekends,<sup>94</sup> and (2) require a “clear separation” between children’s programs and advertising.<sup>95</sup> In 1984, the FCC decided to deregulate its restriction on the number of commercials permitted during children’s programming.<sup>96</sup> However, the Children’s Television Act (CTA), passed by Congress in 1990, reestablished limitations on the length of advertisements permitted during children’s programming.<sup>97</sup> The new standards, which are still in effect today, “limit the duration of advertising in children’s television programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays.”<sup>98</sup> The CTA also gave the FCC continuing power to review and modify the limitations on advertisement length “in accordance with the public interest.”<sup>99</sup> Thus, although the FCC has yet to do so,<sup>100</sup> it could conceivably issue revised regulations that further limit the length of advertisements during children’s programming. However, the FCC does

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91. *Id.* at § 45(a)(1).

92. Kunkel, *supra* note 47, at 387.

93. Children’s Television Programs: Report and Policy Statement, 39 Fed. Reg. 39,396, 39,396 (Nov. 6, 1974); *see also* Kunkel, *supra* note 47, at 385.

94. Children’s Television Programs: Report and Policy Statement, 39 Fed. Reg. 39,396, 39,400 (Nov. 6, 1974).

95. *Id.* at 39,401.

96. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 49 Fed. Reg. 33,588, 33,588 (Aug. 23, 1984); *see also* Kunkel, *supra* note 47, at 385.

97. Children’s Television Act, 47 U.S.C. § 303a(b) (2012); *see also* Kunkel, *supra* note 47, at 386.

98. Children’s Television Act, 47 U.S.C. § 303a(b) (2012).

99. *Id.* at § 303a(c).

100. *Children’s Educational Television: FCC Consumer Facts*, FCC.GOV 1, <http://transition.fcc.gov/cgb/consumerfacts/chilDTV.pdf> (last updated Dec. 12, 2012).

not appear to have any regulatory power over the content of advertisements geared toward children.<sup>101</sup>

## 2. The FTC

To make either an “unfair” or a “deceptive” ruling under the FTC Act, the FTC must first deem whether the practice at issue violates FTC-created guidelines. When determining whether a practice is “unfair,” the FTC looks primarily at “whether the practice injures consumers.”<sup>102</sup> For a consumer injury to exist, the injury must: (1) be substantial, (2) not be outweighed by any countervailing benefits to consumers or competition that the practice produces, and (3) be an injury that consumers themselves could not reasonably have avoided.<sup>103</sup> To be substantial, the injury must not be “trivial or merely speculative.”<sup>104</sup> It is notable that “unwarranted health and safety risks” is an example of a potential substantial injury.<sup>105</sup> For the second element, the FTC requires that a practice cause more injury overall than benefit.<sup>106</sup> When determining whether the injury could have been reasonably avoided under the third prong, the FTC mainly considers whether seller behavior “unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision making.”<sup>107</sup>

In comparison, the FTC requires that three findings be made in order to rule that an advertisement is “deceptive.”<sup>108</sup> First, a “representation, omission or practice that is likely to mislead a consumer” is required.<sup>109</sup> Second, the representation is analyzed “from the perspective of a consumer acting reasonably in the circumstances.”<sup>110</sup> Third, “the representation, omission, or practice” must be “material.”<sup>111</sup>

In the late 1970s, in response to petitions by ACT and the Center for Science in the Public Interest, the FTC proposed a rule that would

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101. David A. Darwin, *Advertising Obesity: Can the U.S. Follow the Lead of the UK in Limiting Television Marketing of Unhealthy Foods to Children?*, 42 *VAND. J. TRANSNAT'L L.* 317, 333 (2009).

102. FED. TRADE COMM'N, *FTC POLICY STATEMENT ON UNFAIRNESS* (1980), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. FED. TRADE COMM'N, *FTC POLICY STATEMENT ON DECEPTION* (1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

109. *Id.*

110. *Id.*

111. *Id.*

prohibit all television advertisements targeting young children and significantly restrict television advertisements for sugared foods to older children.<sup>112</sup> However, food and beverage companies strongly objected to the proposed rule and lobbied Congress.<sup>113</sup> Under intense pressure from the food and beverage industry, Congress caved and passed the FTC Improvements Act of 1980.<sup>114</sup> This new law prohibited the FTC from regulating children's advertising by ruling that the advertising is "unfair."<sup>115</sup> Thus, unless the FTC finds an advertisement to be "deceptive," it no longer has any authority to regulate the content of advertisements targeting children.

Since the FTC Improvements Act, the FTC has declined to take action to regulate television advertisements during children's programming and is unlikely to do so without congressional approval. Thus, self-regulatory efforts by the food and beverage industry have been the only source of restrictions on the content of advertisements geared toward children.

*B. The Children's Food and Beverage Advertising Initiative*

1. Background

The Children's Food and Beverage Advertising Initiative (CFBAI) was launched in November 2006 by the Council of Better Business Bureaus (BBB) together with ten food and beverage companies.<sup>116</sup> Today, seventeen companies participate in the CFBAI.<sup>117</sup> The CFBAI is a self-regulatory program with the self-pronounced goal "to shift the mix of advertising messaging directed to children under twelve to encourage healthier dietary choices and healthy lifestyles."<sup>118</sup> The CFBAI has been revised several times since its inception and currently has five guiding "core principles" that participating companies must follow.<sup>119</sup> These core

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112. Children's Advertising: Proposed Trade Regulation Rulemaking and Public Hearing, 43 Fed. Reg. 17,967, 17,968 (proposed April 27, 1978); see generally Kunkel, *supra* note 47, at 387.

113. Kunkel, *supra* note 47, at 387.

114. *Id.*

115. FTC Improvements Act, 15 U.S.C. § 57a(h) (2006).

116. PROGRESS REPORT ON THE FIRST SIX MONTHS OF IMPLEMENTATION, *supra* note 84, at 3.

117. ELAINE D. KOLISH, COUNCIL OF BETTER BUS. BUREAUS, INC., WHITE PAPER ON CFBAI'S UNIFORM NUTRITION CRITERIA 8 (2011), available at <http://www.bbb.org/us/storage/0/Shared%20Documents/White%20Paper%20on%20CFBAI%20Uniform%20Nutrition%20Criteria%20July%202011.pdf>.

118. PROGRESS REPORT ON THE FIRST SIX MONTHS OF IMPLEMENTATION, *supra* note 84, at 3-4.

119. COUNCIL OF BETTER BUS. BUREAUS, CHILDREN'S FOOD AND BEVERAGE ADVERTISING INITIATIVE PROGRAM AND CORE PRINCIPLES STATEMENT 1-3 (2010), available at [http://cms-admin.bbb.org/storage/0/Shared%](http://cms-admin.bbb.org/storage/0/Shared%20Documents/White%20Paper%20on%20CFBAI%20Uniform%20Nutrition%20Criteria%20July%202011.pdf)

principles, each of which apply only to advertisements geared towards children under the age of twelve, are: (1) companies will only advertise “better-for-you products,” a unique standard developed by each company that is consistent with scientific or government standards; (2) companies will only incorporate “better-for-you products” in interactive game giveaways; (3) companies will only use third-party licensed characters, celebrities, and movie tie-ins in ways that comply with their advertising promises; (4) companies will not pay for or actively seek product placements in programming geared to children under twelve; and (5) companies will not advertise branded food or beverages in elementary schools.<sup>120</sup>

In addition, participating companies each create a “pledge”—a public commitment to advertising “that will further the goal of promoting healthy dietary choices and healthy lifestyles to children under 12.”<sup>121</sup> Each pledge is required to include two key definitions: a company’s definition of “advertising primarily directed to children under twelve” and a company’s definition of “better-for-you products.”<sup>122</sup> The sole requirement for the first definition is for children under the age of twelve to constitute 25–50 percent of the audience.<sup>123</sup> Companies are currently given considerable leeway to formulate their own standards to define “better-for-you products.”<sup>124</sup> Examples of standards that companies may employ are: (1) the FDA’s definition of “healthy” foods and (2) products that are eligible for “an FDA authorized health claim.”<sup>125</sup> Each company’s pledge is enforced solely by the CFBAI.<sup>126</sup> If a company refuses to comply with its pledge, the CFBAI has the authority to both expel the company from participation and report the expulsion to the FTC.<sup>127</sup>

In July 2011,<sup>128</sup> the CFBAI announced the addition of “uniform nutrition criteria” to be followed by companies participating in the

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20Documents/Core%20Principles%20Final%20Letterhead%2012-2-09.pdf  
[hereinafter CORE PRINCIPLES STATEMENT].

120. *Id.* at 1–3.

121. *Id.* at 1.

122. *Id.* at 3–4.

123. *Id.* at 3.

124. *Id.* at 4.

125. *Id.*; see 21 C.F.R. § 101.65(d)(2) (2010) (providing various criteria the FDA uses in assessing whether foods are “healthy”); see 21 C.F.R. § 101.70–101.83 (2010) (providing the process for petitioning the FDA for an authorized health claim).

126. CORE PRINCIPLES STATEMENT, *supra* note 119, at 4.

127. *Id.*

128. See William Neuman, *Food Makers Push Back on Ads for Children*, N.Y. TIMES, July 15, 2011, at B1 (explaining that the food and beverage industry was likely acting in an attempt to preempt government action).

program.<sup>129</sup> The “uniform nutrition criteria,” which are set to go into effect on December 31, 2013,<sup>130</sup> divide food and beverage products into ten categories that have specific calorie, saturated fat, sodium, and sugar limitations with which participating companies must comply.<sup>131</sup> The categories are: (1) juices; (2) dairy products; (3) grain, fruit and vegetable products, and items not in other categories; (4) soups and meal sauces; (5) seeds, nuts, and nut butters and spreads; (6) meat, fish, and poultry products; (7) mixed dishes; (8) main dishes and entrees; (9) small meals; and (10) meals.<sup>132</sup>

## 2. Problems with Self-Regulation

The CFBAI is a positive development and a step in the right direction. However, the program suffers from a few key deficiencies. First, the CFBAI contains a few major loopholes. One loophole is that participating companies can still use characters that they created themselves to advertise any of their products, not just products that are “better-for-you.”<sup>133</sup> This omission is critical because company-owned characters like Tony the Tiger and Ronald McDonald are key components in many child-directed television advertisements.<sup>134</sup> Further, company-owned characters are probably both most effective for and aimed towards children under the age of twelve. A second loophole in the CFBAI is that it sets no standards for children twelve and older. Thus, companies can hook younger children on their products using characters that they own and then barrage the older children with any kind of advertisements for any kind of products. A third loophole is that the imminent “uniform nutrition criteria” do not have categories that include snack foods or soft drinks.<sup>135</sup>

Another deficiency in the CFBAI is that it fails to set meaningful nutritional standards. Under the current standards, companies are free to set their own definition for what constitutes a “better-for-you” product.<sup>136</sup> Products that currently qualify under these definitions are:

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129. Press Release, Council of Better Bus. Bureaus, Council of Better Business Bureaus Announces Groundbreaking Agreement on Child-Directed Food Advertising (July 14, 2011), *available at* <http://www.bbb.org/us/article/Council-of-Better-Business-Bureaus-Announces-Groundbreaking-Agreement-on-Ch-28325>.

130. KOLISH, *supra* note 117, at 2.

131. *Category-Specific Uniform Nutrition Criteria*, COUNCIL OF BETTER BUS. BUREAUS (July 2011), <http://www.bbb.org/us/storage/16/documents/cfbai/CFBAI-Category-Specific-Uniform-Nutrition-Criteria.pdf>.

132. KOLISH, *supra* note 117, at 6–7.

133. CORE PRINCIPLES STATEMENT, *supra* note 119, at 2.

134. *See supra* Part I.A.3.

135. KOLISH, *supra* note 117, at 6–7.

136. *See supra* Part II.B.1.

Cinnamon Toast Crunch, Lucky Charms, Fruit Roll-Ups, Fruit Loops, Lunchables Fun Pack—BBQ Chicken Shake Up, and Kellogg’s Rice Krispies cereal.<sup>137</sup> There are few parents who would honestly believe that any of those products would improve their children’s health. Further, two-thirds of the products that meet participating companies’ “better-for-you” definitions already satisfy the “uniform nutrition criteria” to be implemented in the near future.<sup>138</sup> Thus, the new nutritional standards are unlikely to make much of an impact.

Finally, the guidelines are self-regulatory. This means that the food and beverage industry is essentially setting its own standards for child-directed advertising. There are many potential pitfalls associated with self-regulation.<sup>139</sup> Inevitably, participating companies are not going to accept standards that will severely restrict their ability to advertise and sell their products to children.

*C. Interagency Working Group on Food Marketed to Children*

1. Background

In 2009, Congress established the Interagency Working Group on Food Marketed to Children (IWG) through the Omnibus Appropriations Act.<sup>140</sup> The Act instructed the IWG to research and develop food marketing recommendations to address both marketing aimed at children under eighteen years old and situations where marketed food “represents a significant component of the diets of children.”<sup>141</sup> The IWG’s main objective in creating nutritional recommendations for child-marketed foods was “the promotion of children’s health through better diet with particular—but not sole—emphasis on reducing the incidence of childhood obesity.”<sup>142</sup>

In April 2011, the IWG released a set of *Preliminary Proposed Nutrition Principles* (PPNP) geared at child-directed food marketing.<sup>143</sup>

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137. COUNCIL OF BETTER BUS. BUREAUS, CHILDREN’S FOOD AND BEVERAGE ADVERTISING INITIATIVE: FOOD AND BEVERAGE PRODUCTS THAT MEET PARTICIPANTS’ APPROVED NUTRITION STANDARDS 6–8 (2011), *available at* <http://www.bbb.org/us/storage/0/Shared%20Documents/April%202011.pdf>.

138. *See* KOLISH, *supra* note 117, at 4.

139. *See generally* Roy F. Baumeister et al., *Self-Regulation Failure: An Overview*, 7 PSYCHOL. INQUIRY 1, 1–13 (1996) (discussing numerous ways that self-regulatory efforts commonly fail).

140. PRELIMINARY PROPOSED NUTRITION PRINCIPLES, *supra* note 85, at 1.

141. *Id.* at 2.

142. *Id.* at 3.

143. *Interagency Working Group Seeks Input on Proposed Voluntary Principles for Marketing Food to Children*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (April 28, 2011), <http://www.hhs.gov/news/press/2011pres/04/20110428a.html>.

The PPNP covers children aged two to seventeen<sup>144</sup> and centers around two core nutritional principles.<sup>145</sup> “Principle A” represents the idea that “advertising and marketing” should influence children “to choose foods that make a meaningful contribution to a healthful diet.”<sup>146</sup> “Principle B” is meant to inspire children by using advertising and marketing to “minimize consumption of foods with significant amounts of nutrients that could have a negative impact on health or weight—specifically, sodium, saturated fat, *trans* fat, and added sugars.”<sup>147</sup> Additionally, the IWG recommended that companies focus on regulating food groups that are marketed most often to children.<sup>148</sup> In doing so, the IWG created its own categories of foods that are marketed to children the most.<sup>149</sup> The categories are: (1) breakfast cereals, (2) snack foods, (3) candy, (4) dairy products, (5) baked goods, (6) carbonated beverages, (7) fruit juice and non-carbonated beverages, (8) prepared foods and meals, (9) frozen and chilled desserts, and (10) restaurant foods.<sup>150</sup>

Under Principle A, all foods advertised to children would include a specific number of “listed food groups,” dependent on the serving size of the advertised food, in order to improve the diets of children.<sup>151</sup> The listed groups are: “fruit, vegetable, whole grain, fat-free or low-fat milk products, fish, extra lean meat or poultry, eggs, nuts and seeds, or beans.”<sup>152</sup> Under Principle B, the IWG’s aim is to limit the amount of bad nutrients that children consume by setting specific limits on the amounts of “sodium, saturated fat, *trans* fat, and added sugars” that can be in child-directed food advertisements.<sup>153</sup>

The PPNP includes definitions of “what constitutes marketing targeted to” children and adolescents.<sup>154</sup> Recognizing that young children are more vulnerable to deceptive advertising tactics, the definitions divide children into two categories: (1) children aged two to eleven, and (2) children aged twelve to seventeen.<sup>155</sup> Within these age groups, the proposal recommend relying mostly on “objective criteria” to define

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144. PRELIMINARY PROPOSED NUTRITION PRINCIPLES, *supra* note 85, at 1.

145. *Id.* at 3.

146. *Id.*

147. *Id.*

148. *Id.* at 7.

149. *Id.*

150. *Id.*

151. *Id.* at 8.

152. *Id.*

153. *Id.* at 11.

154. *Id.* at 16.

155. *See id.* at 17.

when companies are directing their advertising to children or adolescents.<sup>156</sup> The PPNP broke “objective criteria into three categories: (1) audience share, (2) company marketing plans, and (3) opinion research data.<sup>157</sup> The IWG recommended the use of audience share to ensure that commonly watched adult programs were not targeted by the proposal.<sup>158</sup> Company marketing plans were to be used to accurately recognize which advertisements were created to target children or teenagers.<sup>159</sup> Finally, opinion research data would indicate whether celebrities, athletes, or sports teams used in advertisements were especially revered by children or teenagers.<sup>160</sup>

## 2. The PPNPs: A Step in the Right Direction

The IWG’s PPNPs are a positive development in the fight against childhood obesity. In particular, there are two strategies used by the PPNPs that Congress should retain and use in any future law designed to regulate child-directed food and beverage advertisements. First, the PPNPs created meaningful food groups that ensure all foods and beverages that contribute the most to childhood obesity will be regulated. This is an improvement over the CFBAI, which left out snack foods and soft drinks.<sup>161</sup> Second, the PPNPs used audience share to ensure that advertisements watched by adults were not regulated. This strategy makes it more likely that the PPNPs would survive a future constitutional challenge.<sup>162</sup>

While the PPNPs are an improvement over CFBAI, they are not without problems. First, the PPNPs are voluntary. Thus, there are no consequences for any food and beverage company that decides to disregard them. The lack of consequences means that food and beverage companies do not have a meaningful incentive to abide by the PPNPs. Second, the PPNPs fail to address the many ways that food and beverage companies advertise to children. Any effective restriction on child-directed advertisements must not only address the nutritional content of the foods advertised but also the techniques that food and beverage companies use to promote their products.

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156. *Id.* at 18–19.

157. *Id.*

158. *Id.* at 18.

159. *Id.* at 19.

160. *Id.*

161. *See supra* Part II.B.2.

162. *See infra* Part IV.C (explaining to be narrowly tailored under the fourth prong of *Central Hudson*, any regulation of child-directed advertisements would need to avoid restricting the food and beverage industry’s ability to advertise to adults).

### 3. The Future of the IWG's Plan

If the IWG's PPNPs were to be finalized and adopted by the food and beverage industry, it would represent another important step forward in the battle against childhood obesity. However, it appears unlikely that the PPNPs will be finalized and adopted in any form. Soon after the IWG's PPNPs were released, it became clear that the food and beverage industry would do everything it could to keep them from moving forward in their original form.<sup>163</sup> On July 14, 2011, the CFBAI submitted a formal comment in response to the PPNPs<sup>164</sup> that argued vigorously against the new proposal and emphasized that industry self-regulation was sufficient.<sup>165</sup>

Mere months after releasing its PPNPs, the IWG caved to industry pressure and agreed to weaken its proposal.<sup>166</sup> Not satisfied, the food and beverage industry worked hard to get the PPNPs entirely thrown out.<sup>167</sup> After a few months of lobbying, the food and beverage industry was able to get Congress to pass a provision that requires the IWG to do a cost-benefit analysis of its proposed guidelines before releasing its final nutritional principles.<sup>168</sup> Commentators have noted that this move by Congress significantly delays, if not eliminates, the release of the already watered-down PPNPs.<sup>169</sup>

With the PPNPs in a precarious position and childhood obesity becoming a significant problem, the US government must push forward and build off the momentum that the PPNPs established. Because the FCC and FTC have failed in the past and are unlikely now to act on their own, it is imperative that Congress consider potential paths to success. Congress should ultimately pass an amendment to the FTC Act

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163. See William Neuman, *Ad Rules Stall, Keeping Cereal a Cartoon Staple*, N.Y. TIMES, July 24, 2012, at A1.

164. COUNCIL OF BETTER BUS. BUREAUS, GENERAL COMMENTS AND COMMENTS ON THE PROPOSED NUTRITION PRINCIPLES AND MARKETING DEFINITIONS (2011), available at [http://www.bbb.org/us/storage/0/Shared%20 Documents/CFBAI%20IWG%20Comment%207-14-2011.pdf](http://www.bbb.org/us/storage/0/Shared%20Documents/CFBAI%20IWG%20Comment%207-14-2011.pdf).

165. *Id.* at 13–37.

166. Molly Peterson, *Foodmakers Win Scaled Back Guidelines for Kids' Snack Foods*, BLOOMBERG BUSINESSWEEK (Oct. 12, 2011, 6:16 PM), <http://www.businessweek.com/news/2011-10-12/foodmakers-win-scaled-back-guidelines-for-kids-snack-foods.html>.

167. *U.S. Food Lobby Fighting Hard to Defend Kids Ads*, FOX NEWS (Nov. 6, 2011), <http://www.foxnews.com/health/2011/11/08/us-food-lobby-fighting-hard-to-defend-kid-ads>.

168. Margo G. Wootan, *Congress Again Puts Food Industry Ahead of Children*, CTR. FOR SCI. IN THE PUB. INTEREST (Dec. 16, 2011), <http://www.cspinet.org/new/201112161.html>.

169. *Id.*

that empowers and instructs the agency to effectively restrict the food and beverage industry's ability to advertise to children.

### III. TOBACCO REGULATION: A COMPELLING PRECEDENT

More than thirty countries have national laws that limit child-directed television advertisements in some fashion.<sup>170</sup> When considering the content of a potential law, Congress could follow David A. Darwin's suggestion and look to the recent regulatory efforts that the United Kingdom has undertaken to restrict child-directed advertising.<sup>171</sup> Norway, Sweden, and the Canadian province of Quebec have each taken stricter measures by banning all child-directed food and beverage television advertisements.<sup>172</sup> However, the United States need not look any further than its own borders for a useful precedent to construct a law that sets mandatory restrictions on child-directed advertisements.

#### *A. Child-Directed Tobacco Advertisement Regulation in the United States*

The Federal Cigarette Labeling and Advertising Act (FCLAA), passed in 1965, was the first major law in the United States that restricted the way that tobacco companies could advertise.<sup>173</sup> The FCLAA changed tobacco advertisements in two key ways. First, the FCLAA required tobacco companies to put warning labels on all cigarette packages, advertisements, and billboards.<sup>174</sup> Second, the FCLAA made it unlawful to advertise cigarettes on television or radio.<sup>175</sup>

In 1996, the Food and Drug Administration (FDA) attempted to set further restrictions "on the sale, distribution, and use of cigarettes and smokeless tobacco in order to reduce the number of children and adolescents" who use the products.<sup>176</sup> However, the Supreme Court struck down the FDA's regulations in 2000.<sup>177</sup> In *FDA v. Brown & Williamson Tobacco Corp.*, the Court found that the FDA lacked

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170. CTR. FOR SCI. IN THE PUB. INTEREST, *FOOD MARKETING IN OTHER COUNTRIES* (2007), available at [http://www.cspinet.org/nutritionpolicy/foodmarketing\\_abroad.pdf](http://www.cspinet.org/nutritionpolicy/foodmarketing_abroad.pdf).

171. See generally Darwin, *supra* note 101, at 317 (proposing that the United States use the United Kingdom's regulatory model to improve childhood obesity rates).

172. CTR. FOR SCI. IN THE PUB. INTEREST, *supra* note 170.

173. Randy James & Scott Olstad, *Cigarette Advertising*, TIME.COM (June 15, 2009), <http://www.time.com/time/magazine/article/0,9171,1905530,00.html>.

174. Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333 (2006).

175. *Id.* at § 1335.

176. Cigarettes and Smokeless Tobacco, 61 Fed. Reg. 44,615, 44,616 (Aug. 28, 1996).

177. James & Olstad, *supra* note 173.

authority to regulate tobacco under the Food, Drug, and Cosmetic Act.<sup>178</sup> This adverse decision did not deter Congress from ensuring that the FDA's overruled regulations were codified as law.

On June 22, 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act (FSPTCA).<sup>179</sup> Among other things, the FSPTCA reinstated the FDA regulations from 1996.<sup>180</sup> In doing so, the FSPTCA additionally limited tobacco advertising and marketing to children in a few key ways.<sup>181</sup> First, the FSPTCA prevented tobacco companies from sponsoring any type of entertainment event or sporting team.<sup>182</sup> Second, the FSPTCA made it illegal for tobacco companies to distribute free product samples.<sup>183</sup> Finally, the FSPTCA specified that any advertising must only be done using "black text on a white background."<sup>184</sup> The significance of this restriction is demonstrated by a new Cornell University study, which concluded that children prefer a wider variety of colors than adults.<sup>185</sup> Specifically, the study found that children are happiest experiencing six different colors at a time.<sup>186</sup> Adults, on the other hand, prefer to only see three colors at once.<sup>187</sup>

*B. Lessons from Eliminating Child-Directed Tobacco Advertisements*

The United States should be proud of the fact that, through the FCLAA and the FSPTCA, it has essentially eliminated all child-directed tobacco advertisements. There are two reasons why Congress would be wise to consider a similar path with respect to child-directed food and beverage television advertisements.

First, the adverse health effects of childhood obesity, which have a close relationship to child-directed advertising,<sup>188</sup> are nearly, if not just

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178. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

179. FOOD AND DRUG ADMIN., OVERVIEW OF THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT 1, [http://www.fda.gov/downloads/Tobacco Products/GuidanceComplianceRegulatoryInformation/UCM336940.pdf](http://www.fda.gov/downloads/Tobacco%20Products/GuidanceComplianceRegulatoryInformation/UCM336940.pdf) (last visited Sept. 2, 2013) [hereinafter OVERVIEW OF FSPTCA].

180. Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. § 387a-1(2) (2006).

181. OVERVIEW OF FSPTCA, *supra* note 179, at 1.

182. Cigarettes and Smokeless Tobacco, 61 Fed. Reg. 44,615, 44,618 (Aug. 28, 1996).

183. *Id.* at 44,617.

184. *Id.*

185. See Susan S. Lang, *Kids Prefer Lots of Choices and Colors on Their Plates*, CORNELL CHRON. ONLINE (Jan. 5, 2012), <http://www.news.cornell.edu/stories/Jan12/ColorfulPlates.html>.

186. *See id.*

187. *See id.*

188. *See supra* Part I.B.

as, severe as the adverse health effects that can arise from tobacco use. The adverse health effects associated with cigarette smoking include an increased risk of coronary heart disease, stroke, lung cancer, and other lung diseases.<sup>189</sup>

While the adverse health effects associated with smoking may overall be more severe than the adverse health effects of childhood obesity, recent research indicates that childhood obesity is quickly closing the gap. A 2009 study by the Harvard School of Public Health concluded that smoking was the leading cause of preventable deaths in the United States. The same study listed obesity at number three.<sup>190</sup> More recently, a 2010 online study found that obesity had overtaken smoking as the foremost cause of preventable deaths.<sup>191</sup> A national poll conducted by the University of Michigan in 2010 illustrated the most pressing health concerns of parents for children in the United States.<sup>192</sup> It found that childhood obesity, at 38 percent, was the number one health concern.<sup>193</sup> The poll listed smoking as the third health concern, at 29 percent.<sup>194</sup>

Second, the recently-passed FSPTCA should remind Congress that it does not have to let government agency failures or pressure from large companies dictate the nation's health policies. Just as Congress successfully stepped in to save the FDA's tobacco regulations, Congress has the ability to save the IWG's nutrition principles and improve them in the process. Thus, Congress should learn from its success in regulating child-directed tobacco advertisements and follow a similar path in regulating child-directed food and beverage television advertisements.

#### IV. THE CONSTITUTIONAL BAR

Congress must ensure that any law that restricts the food and beverage industry's ability to advertise its products to children does not

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189. *Health Effects of Cigarette Smoking*, CTRS. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/health\\_effects/effects\\_cig\\_smoking](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking) (last updated Jan. 10, 2012).

190. *Smoking, High Blood Pressure and Being Overweight Top Three Preventable Causes of Death in the U.S.*, HARVARD SCH. OF PUB. HEALTH (Apr. 27, 2009), <http://www.hsph.harvard.edu/news/press-releases/2009-releases/smoking-high-blood-pressure-overweight-preventable-causes-death-us.html>.

191. Hank Lacey, *Research Confirms Obesity is Now Leading Cause of Preventable Death in U.S.*, EXAMINER.COM (Jan. 7, 2010), <http://www.examiner.com/science-news-in-denver/research-confirms-obesity-is-now-leading-cause-of-preventable-death-u-s>.

192. *Top 10 Health Concerns for Kids; Obesity, Stress, Teen Pregnancy Worsening*, UNIV. OF MICH. HEALTH SYS. (Aug. 16, 2010), <http://www2.med.umich.edu/prmc/media/newsroom/details.cfm?ID=1682>.

193. *Id.*

194. *Id.*

violate the First Amendment's protection of commercial speech.<sup>195</sup> The First Amendment to the US Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . ."<sup>196</sup> Commercial speech does not receive the full amount of protection the First Amendment affords to most forms of speech.<sup>197</sup> Instead, in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, the Supreme Court developed a test, still used today, that assures commercial speech partial protection under the First Amendment.<sup>198</sup>

A. *The Central Hudson Test*

The dispute in *Central Hudson* began when the Public Service Commission of New York ruled that, due to a state-wide fuel shortage, state utility companies had to halt all forms of advertising that encouraged the consumption of electricity.<sup>199</sup> A few years later, when fuel shortage was no longer a concern, the Public Service Commission extended the duration of the electricity advertisement ban.<sup>200</sup> Shortly thereafter, Central Hudson challenged the prohibition as being in violation of its First and Fourteenth Amendment rights.<sup>201</sup> In ruling for Central Hudson, the Supreme Court articulated a four-part test that serves as a barrier to the regulation of commercial speech.<sup>202</sup>

The *Central Hudson* test asks two preliminary questions.<sup>203</sup> The first question is whether the expression at issue is entitled to First Amendment protection.<sup>204</sup> For expression to have First Amendment

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195. See generally *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (illustrating the Supreme Court's power to strike down laws that fall within commercial speech protection).

196. U.S. CONST. amend. I.

197. *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980); see also ROGER A. SHINER, FREEDOM OF COMMERCIAL EXPRESSION 55 (2003) (supporting the notion that commercial speech receives less protection under the First Amendment than other forms of speech).

198. SHINER, *supra* note 197, at 53.

199. *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 558–59.

200. *Id.* at 559.

201. *Id.* at 560.

202. *Id.* at 566; see also SHINER, *supra* note 197, at 55 (articulating the doctrinal importance of the *Central Hudson* test).

203. *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 566; see also Amanda L. Willette, *Where Have All the Parents Gone?: Do Efforts to Regulate Food Advertising to Curb Childhood Obesity Pass Constitutional Muster?*, 28 J. LEGAL MED. 561, 569 (2007) (explaining of the structure of the *Central Hudson* test).

204. *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 560.

protection, it must “concern lawful activity and not be misleading.”<sup>205</sup> The government may prohibit “forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.”<sup>206</sup> However, as long as the expression at issue is both lawful and not misleading, the government’s ability to restrict commercial speech is more limited.<sup>207</sup> The second requirement under *Central Hudson* is that the government’s asserted interest is “substantial.”<sup>208</sup> Thus, the Court found that the government’s interest in regulating speech that encouraged power companies to use electricity qualified as a “substantial” interest.<sup>209</sup> If the first two questions are answered affirmatively, the Court will apply a second set of two questions.<sup>210</sup>

The third part of the test asks “whether the regulation directly advances the governmental interest asserted . . . .”<sup>211</sup> In *Central Hudson*, the Court found that the government’s restriction on electricity advertising directly advanced its interest in conserving energy.<sup>212</sup> The final part of the test inquires as to whether the government’s regulation is “more extensive than is necessary to serve” its asserted interest.<sup>213</sup> In other words, the government “cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.”<sup>214</sup>

In recent years, the Supreme Court has decided many cases that shed light on how *Central Hudson* is interpreted in various commercial speech contexts. In 2001, the Supreme Court decided *Lorillard v. Reilly*,<sup>215</sup> the first Supreme Court decision to apply the *Central Hudson* test to tobacco advertisements.<sup>216</sup> Besides its connection to tobacco, a health issue that is as severe as childhood obesity,<sup>217</sup> *Lorillard* is

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205. *Id.* at 557.

206. *Id.* at 563–64.

207. *Id.* at 564.

208. *Id.* at 566.

209. *Id.* at 568.

210. *Id.* at 569; *see also* Willette, *supra* note 203, at 569 (explaining that the first two prongs of the *Central Hudson* test must be answered in the affirmative before moving on to the next two prongs).

211. *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 566.

212. *Id.* at 569.

213. *Id.* at 566.

214. *Id.* at 565.

215. *Lorillard Tobacco Co. v. Reilly*, 553 U.S. 525, 525 (2001).

216. SHINER, *supra* note 197, at 65.

217. *See supra* Part IV.B.

important for two reasons. First, *Lorillard* illustrates how the Supreme Court applies the *Central Hudson* test when the protection of children is at stake.<sup>218</sup> Second, *Lorillard* provides more guidance on how the Supreme Court handles both the third and fourth prongs of *Central Hudson*.<sup>219</sup>

*B. Applying Central Hudson to Children*

The issue in *Lorillard* centered on tobacco regulations put forth in 1999 by the Massachusetts Attorney General.<sup>220</sup> The regulations addressed the “sale and advertisement of cigarettes, smokeless tobacco, and cigars.”<sup>221</sup> The main purpose of the regulations was “to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age . . . [and] to prevent access to such products by underage consumers.”<sup>222</sup> In response, numerous cigarette, smokeless tobacco, and cigar companies claimed, among other things, that the regulations violated their right to free speech.<sup>223</sup>

While the Supreme Court analyzed multiple sections of the Attorney General’s regulations under *Central Hudson*,<sup>224</sup> the Court’s analysis of the outdoor advertisement section<sup>225</sup> provides the most insight for a potential federal law aimed at restricting food and beverage companies’ ability to produce child-directed television advertisements. The outdoor advertisement section was enacted to prohibit “smokeless tobacco or cigar advertising within a 1,000-foot radius of a school or playground.”<sup>226</sup>

The Supreme Court began its analysis of the outdoor advertisement section by clarifying the third prong of *Central Hudson*.<sup>227</sup> The Court stated that the requirement for the government’s regulation to directly advance its asserted interest “is not satisfied by mere speculation or conjecture.”<sup>228</sup> Instead, the government “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”<sup>229</sup> After reviewing the evidence, the Court

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218. See SHINER, *supra* note 197, at 65–66.

219. *Lorillard Tobacco Co.*, 553 U.S. at 555–56.

220. *Id.* at 533.

221. *Id.*

222. *Id.* (citing 940 Code of Mass. Regs. § 21.01 (2000)).

223. *Id.* at 537.

224. *Id.* at 556–66.

225. *Id.* at 556.

226. *Id.* (citing 940 Code of Mass. Regs. §§ 21.04(5)(a), 22.06(5)(a) (2000)).

227. *Id.* at 555.

228. *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

229. *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

found that the Attorney General's restriction on outdoor smokeless tobacco and cigar advertisements directly advanced its interest in preventing children from using both smokeless tobacco and cigars.<sup>230</sup> In particular, a number of official studies that illustrated the connection between advertisements and the underage use of both smokeless tobacco and cigars were the key to satisfying the third prong.<sup>231</sup> The Court also noted that "product advertising stimulates demand for products, while suppressed advertising may have the opposite effect."<sup>232</sup>

The Supreme Court then moved to the fourth prong, looking to whether the government's regulation was overly extensive. Under this prong, the Court explained "that 'the least restrictive means' is not the standard."<sup>233</sup> Instead, a mere "reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends'" is required.<sup>234</sup> The Court found that the Attorney General's regulations did not pass this prong chiefly because the geographical reach of the advertisement restriction was too broad.<sup>235</sup>

The geographical reach of the regulations was impermissibly broad because the prohibition would have prevented tobacco ads in 87–91 percent of the major cities in Massachusetts.<sup>236</sup> The Court framed this fact as constituting "nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers."<sup>237</sup> The Court explained that "tobacco 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."<sup>238</sup> Finally, the Court stated, perhaps most importantly, that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."<sup>239</sup>

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230. *Id.* at 561.

231. *Id.* at 559–61.

232. *Id.* at 557.

233. *Id.* at 556 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995)).

234. *Id.* (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995)).

235. *Id.* at 562–63.

236. *Id.* at 562.

237. *Id.*

238. *Id.* at 564.

239. *Id.* (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 875 (1997)).

C. *A Guide for Future Congressional Action*

Together, *Central Hudson* and *Lorillard* provide a constitutional framework for future legislation that would regulate child-directed food and beverage television advertisements. Congress need not worry about the first prong of *Central Hudson* because it merely looks at whether child-directed advertisements are entitled to First Amendment protection. The second prong concerns whether the government's interest in regulating certain types of child-directed food and beverage advertisements is substantial. In *Lorillard*, this prong was conceded by the tobacco industry.<sup>240</sup> Congress should be able to get past this prong by using a two-step illustration. First, Congress must demonstrate the likely connection between child-directed food and beverage television advertisements and childhood obesity. Second, Congress must show that childhood obesity just as big of a problem as underage tobacco use.

The third prong asks whether the government's regulation directly advances its asserted interest. Here, Congress would need to draft a law that, if enacted, would clearly advance the fight against childhood obesity. Finally, the fourth prong requires that the government's regulation not be more extensive than is necessary to advance its interest. Under this prong, *Lorillard* makes it clear that any congressional action to regulate child-directed food and beverage television advertisements would have to be narrow enough to avoid restricting adults' access to the advertisements.<sup>241</sup> Thus, Congress would have to make sure that a potential law did not restrict both the food and beverage industry's ability to advertise to adults and adults' ability to access advertising from the food and beverage industry.

V. PROPOSAL

The growing problem of childhood obesity coupled with the impact of child-directed advertisements and the ineffectiveness of the food and beverage industry's self-regulation have made it clear that Congress must pass legislation restricting the food and beverage industry's ability to advertise to children. Although any law that restricts child-directed advertisements is both likely to be challenged as a First Amendment violation and has the potential to be either partially or fully overturned, a law would nevertheless accomplish two important objectives.

First, federal legislation would be the next logical step in the fight against childhood obesity. The industry has already self-regulated, and Congress has already attempted to regulate through a set of voluntary principles. A stronger message is necessary to take a meaningful step forward in the fight against childhood obesity. Second, federal legislation would show that the United States is just as serious about childhood

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240. *Lorillard Tobacco Co.*, 533 U.S. at 555.

241. *Id.* at 564; see also Darwin, *supra* note 101, at 348.

obesity as it is about underage tobacco use. Recent studies have indicated that childhood obesity is just as big of a problem as underage tobacco use. Thus, the United States should pass legislation to combat childhood obesity that mirrors the recently passed Family Smoking Prevention and Tobacco Control Act.

The legislation must include three basic provisions that serve as its backbone. First, it should include an amendment to the FTC Act that restores the FTC's authority to regulate child-directed advertising techniques that are "unfair." This restoration of power would affirm Congress' faith in the FTC and give the FTC full capabilities to make a ruling about child-directed advertisements. Second, the legislation should instruct the FTC to engage in rulemaking, consistent with the final basic provision and the specific guidelines below, based on a finding that certain child-directed television advertisements are either "unfair" or "deceptive."

Finally, the law's restrictions on child-directed advertisements should be limited to television programs that have either of the following characteristics: (1) the programs are shown on children's cable networks, or (2) the programs have a child audience share of 80 percent or greater. Children's cable networks should be defined as any cable network that solely broadcasts programming directed towards individuals under the age of eighteen. The audience share characteristic should be calculated using Nielsen Ratings. Nielsen Ratings is an already-existing company that has the ability to illustrate both the channels that are watched and who watches the channels when.<sup>242</sup> By both limiting the advertising restrictions to children and not infringing on the food and beverage industry's ability to advertise to adults, this requirement would make it likely that the law would be narrowly tailored enough to pass the fourth prong of the *Central Hudson* test.

Beyond these basic requirements, the law should contain a series of more specific guidelines that serve to restrict child-directed food and beverage television advertisements. The specific guidelines should be based on the three ways that the food and beverage industry advertises to children. Congress should, however, make these guidelines as moderately restrictive as possible. To satisfy the third prong of the *Central Hudson* test, which will likely require a demonstration that the law is directly fighting childhood obesity, the specific guidelines should be coupled with studies showing that child-directed advertisements and childhood obesity are closely related. Each of those steps, patterned after the guidance given by *Lorillard*, will both help the legislation pass through Congress and survive judicial scrutiny. These guidelines should turn the ways that the food and beverage industry advertises to children into three principles. The three principles should be: (1) The Nutritional

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242. *TV Measurement*, NIELSEN, <http://www.nielsen.com/us/en/measurement/television-measurement.html> (last visited March 19, 2012).

Content Principle, (2) The Advertising Techniques Principle, and (3) The Money Spent Principle.

*A. The Nutritional Content Principle*

The food and beverage industry should be allowed to keep the nutritional content of its current products exactly the same as they are today. In exchange, two restrictions would be placed on each manufacturer of children's food and beverage products. First, only 50 percent of each manufacturers' child-directed television advertisements can market foods or beverages that fall into one of the following food groups from the IWG's PPNPs: (1) breakfast cereals, (2) snack foods, (3) carbonated beverages, (4) frozen and chilled desserts, and (5) restaurant food.<sup>243</sup> This rule would allow food and beverage companies to keep their best-selling products intact. However, it would also mean that companies would either have to advertise healthier foods the rest of the time or come up with new products to advertise that fall within healthier food groups.

Second, the manufacturers would have to stop advertising to children under seven years old. A combination of two methods should be used to accomplish this restriction. First, food and beverage advertisements should be banned from all shows that have an under-seven child audience share of 80 percent or greater according to the Nielsen Ratings. Any advertisements aimed at children under the age of seven will be illegal. While there is clearly no way to guarantee that this restriction would prevent children under the age of seven from viewing food and beverage advertisements, it would both put the food and beverage industry on notice and dramatically improve the current situation.

*B. The Advertising Techniques Principle*

This principle would allow food and beverage companies to continue to use company-owned "animated spokescharacters," contests, celebrities, and other gimmicks to persuade children to purchase their products. In return, food and beverage companies would have to make their spokescharacters or celebrities articulate a message at the end of each of their advertisements for products that fell into the five food groups listed in the Nutritional Content Principle.<sup>244</sup> This message would consist of the spokescharacters or celebrities telling children: "Eating this product in small amounts and exercising every day will lead to a healthful life." Further, the spokescharacter or celebrity would have to deliver the message in the same voice that they used for the rest of the advertisement. This principle would allow food and beverage companies to maintain the goodwill that they have spent years developing while conveying the message to children that eating too much of certain food groups is unhealthy.

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243. See *supra* Part II.B.1.

244. See *supra* Part V.A.

*C. The Money Spent Principle*

This principle would allow food and beverage companies to continue to spend as much money as they want on child-directed food and beverage television advertisements. In return, food and beverage companies would have to fund a two-pronged education program, managed by the FTC.

The first prong of the education program would consist of print, television, and radio advertisements that will be created by the FTC. These advertisements would educate the public about the current child obesity epidemic and the dangers of eating too much from the five food groups listed in the Nutritional Content Principle. Some of the advertisements would be specifically directed towards children while other advertisements would be directed towards adults. For the child-directed advertisements, the government would create its own animated spokescharacters to convey the benefits of eating in healthy ways. The creation of such spokescharacters would enable the government to educate children in an appealing way. The adult-directed advertisements would seek to inform adults of the childhood obesity epidemic and assist them in making smart food choices for their children.

The second prong of the education program would include a multimedia program that is sent to public schools across the country. This program would constitute a more detailed, ongoing educational initiative than the commercials would provide. Further, the program would have multiple versions geared toward children of a certain age group in order to more effectively convey the dangers associated with eating too much from certain food groups.

CONCLUSION

Childhood obesity has become a serious problem that deserves immediate attention. While child-directed food and beverage television advertisements are not the only reason that children have gradually become more obese, there is plenty of evidence demonstrating that it is a contributing factor. Recent self-regulation by the industry is a good start to solving the problem. However, more substantial measures must be taken in order to meaningfully slow childhood obesity.

With the IWG's PPNPs unlikely to have much impact, Congress must step in and use its legislative powers to promulgate a law that effectively restricts child-directed television advertisement techniques. If Congress looks to its own tobacco laws for a compelling precedent and carefully tailors legislation to avoid the First Amendment's commercial speech protection, it can construct restrictions that will ensure the future health of our children.