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## Food Advertising and Childhood Obesity: A Call to Action for Proactive Solutions

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### I. INTRODUCTION

What is advertising? At its most basic level, advertising is the dissemination of information to the general public, typically by means of a paid announcement.<sup>1</sup> The overall goal of advertising is to persuade the consumer to purchase a good or service.<sup>2</sup> The intent is to create a need or interest and to

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1. Pauline M. Ippolito, *What Can We Learn from Food Advertising Policy over the Last 25 Years?*, 12 GEO. MASON L. REV. 939, 940 (2004).

2. See THE HENRY J. KAISER FOUNDATION, ISSUE BRIEF: THE ROLE OF MEDIA IN CHILDHOOD OBESITY 8 (Feb. 2004), <http://www.kff.org/entmedia/upload/The-Role-Of-Media-in-Childhood-Obesity.pdf>.

motivate the consumer to purchase the advertised product.<sup>3</sup> Advertising has been recognized as a form of commercial speech and is therefore afforded considerable legal protection.<sup>4</sup> Despite these constitutional protections, regulation of food advertising has become a topic of significant debate over the past several decades. With obesity at an all-time high in the United States, especially in American youth, the driving force behind the debate over food advertising stems from the impact such advertisements are perceived to have on children.

Many theorists of childhood obesity posit that food advertising intentionally targets children who are too young and immature to distinguish advertising puffery from truth.<sup>5</sup> Such advertisements encourage children to consume high-calorie, junk foods on a regular basis.<sup>6</sup> Due to limited cognitive abilities, young children often assume that the food products advertised on television are part of a healthy diet.<sup>7</sup> Without governmental regulation or parental intervention, many children maintain these misconceptions and develop unhealthy eating patterns at an early age.<sup>8</sup> Children often carry poor dietary habits into adulthood, leaving them at risk of developing serious health complications and disease.<sup>9</sup> A number of studies and reports suggest a strong correlation between children's viewing food advertisements and their eating habits and overall nutritional awareness.<sup>10</sup> This article

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3. *See id.*

4. Ippolito, *supra* note 1, at 939.

5. *See* Dale Kunkel & Walter Gantz, *Children's Television Advertising in the Multichannel Environment*, 42 J. COMM. 134, 134-135 (1992); HENRY J. KAISER FOUNDATION, *supra* note 2.

6. *See* THE HENRY J. KAISER FOUNDATION, *supra* note 2, at 1.

7. *Id.* at 5-6.

8. *Id.* at 2, 4-6, 8.

9. *Id.* at 1 (stating that eighty percent of "overweight adolescents continue to be obese in adulthood"); *see also* CTR. FOR DISEASE CONTROL & PREVENTION, NATIONAL HEALTH AND NUTRITION EXAMINATION SURVEY: OVERWEIGHT AMONG U.S. CHILDREN AND ADOLESCENTS 1 (2002), *available at* <http://www.cdc.gov/nchs/data/nhanes/databriefs/overwght.pdf> (finding that "[o]lder children who are overweight are at greater risk of becoming overweight or obese adults" and discussing the adverse consequences of obesity on adults).

10. Richard Lowry et al., *Television Viewing and its Association with Overweight Sedentary Lifestyle, and Insufficient Consumption of Fruits and*

aims to analyze the relationship between food advertisements, specifically those broadcast on television, and childhood obesity and then to propose solutions that may assist in assuaging the impact of advertisements on children's health.

## II. CHILDHOOD OBESITY BY THE NUMBERS

The terms "obese," "overweight," and "at risk for being overweight" are commonly utilized in the public health realm. The terms "obese" and "overweight" are frequently used interchangeably.<sup>11</sup> These terms are typically defined by the Body Mass Index (BMI), which measures the ratio of weight to the square of height.<sup>12</sup> BMI is calculated as weight in kilograms divided by the square of height in meters.<sup>13</sup> To accommodate normal growth patterns, BMI definitions are age and gender specific for children and adolescents.<sup>14</sup> The Centers for Disease Control and Prevention consider children "overweight" or "obese" if they are above the ninety-fifth percentile for their age and sex and consider children "at risk of being overweight" if they are between the eighty-fifth and ninety-fifth percentile.<sup>15</sup> In recent years, the rapid increase in "obese" and "overweight" Americans, particularly in young children and caused alarm.<sup>16</sup> By way of illustration, from 1980 to 2004, the proportion of "overweight" American children, ages six to eleven, more than doubled, while the rate for adolescents, ages twelve to nineteen, tripled.<sup>17</sup> From 1963 through 1970, only 4.2% of all six to eleven year-olds and 4.6% of twelve to nineteen year-olds were considered "overweight."<sup>18</sup> Between 1976 and 1980, the

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*Vegetables Among US High School Students: Differences by Race, Ethnicity and Gender*, 72 J. SCH. HEALTH 413, 413 (2002); THE HENRY J. KAISER FOUNDATION, *supra* note 2, at 2.

11. Dennis M. Styne, *Childhood and Adolescent Obesity: Prevalence and Significance*, 48 PEDIATRIC CLINICS N. AM. 823, 825 (2001) (noting that the ninety-fifth percentile and above is considered overweight or obese, but further explaining that technically "obesity denotes excess body fat, whereas overweight might relate to fat or other tissue in excess with relation to height").

12. J.S. Garrow & Joan Webster, *Quetelet's Index ( $W/H^2$ ) as a Measure of Fatness*, 9 INT'L J. OBESITY 147, 147 (1985).

13. *See id.* at 149.

14. THE HENRY J. KAISER FOUNDATION, *supra* note 2, at 2.

15. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 9.

16. THE HENRY J. KAISER FOUNDATION, *supra* note 2, at 1.

17. *Id.*

18. *Id.*

percentage of overweight six to eleven year-olds increased to 6.5% while the rate for twelve to nineteen year-olds increased slightly to 5.0%.<sup>19</sup> From 1999 to 2000, these percentages jumped to 15.3% for children ages six to eleven and 15.5% for children ages twelve to nineteen.<sup>20</sup> In 2004, approximately ten percent of two to five year-olds and fifteen percent of six to nineteen year-olds were “overweight.”<sup>21</sup> When also considering the portion of children who are “at risk of being overweight, these 2004 percentages double to twenty percent for children ages two to five and thirty percent for children ages six to nineteen.<sup>22</sup> Among minority children, the 2004 rates are even higher. Forty percent of all Mexican American and African American children ages six to nineteen were either “overweight” or “at risk of being overweight.”<sup>23</sup>

Among the many health complications associated with being an overweight child, the most common include hypertension, type 2 diabetes, respiratory ailments, orthopedic problems, difficulty sleeping, and depression.<sup>24</sup> Although these medical complications are developed during childhood, eighty percent of overweight adolescents are also obese in adulthood.<sup>25</sup> Undeniably, the implications of childhood obesity on the health of the entire nation are staggering.<sup>26</sup> The Surgeon General has predicted that preventable disease and death caused by obesity could soon equal preventable disease and death caused by cigarette smoking.<sup>27</sup> Although experts have identified a number of factors contributing to this startling increase in childhood obesity, targeted advertising to children has received scant

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19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*; see also Cynthia L. Ogden et al., *Prevalence and Trends in Overweight Among US Children and Adolescents, 1999–2000*, 288 JAMA 1728, 1730 (2002) (providing statistics based on age, sex, and race).

24. Styne, *supra* note 11, at 835–36, 840–43.

25. THE HENRY J. KAISER FOUNDATION, *supra* note 2, at 1.

26. *Id.*

27. U.S. DEPT OF HEALTH & HUMAN SERV., THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY XIII (2001), *available at* <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

attention.

### III. DOES FOOD ADVERTISING CONTRIBUTE TO CHILDHOOD OBESITY?

Pediatricians, child development experts, and media researchers have theorized that food advertising contributes to childhood obesity in a number of ways, including: (1) time spent watching television detracts from time that could be spent engaged in physical activity; (2) food advertisements on television encourage children to make unhealthy food choices; (3) cross-promotion of food products and television/movie characters encourages children to buy and consume low-nutrient, high-calorie foods; and (4) children snack excessively while accessing various forms of media and eat less healthy when watching television specifically.<sup>28</sup> Although not definitively proven, research indicates that all of these theories may potentially contribute to childhood obesity. However, prior to discussing these theories, it is first vital to gain an understanding of exactly how the media bombards children with food advertisements.

Researchers hypothesize that food advertisements directed at children through various media outlets contribute to unhealthy food choices and weight gain.<sup>29</sup> Research indicates that the number of advertisements children watch has increased along with the childhood obesity rate.<sup>30</sup> For instance, in the 1970s, when the obesity rate for children ages six to nineteen was approximately 4.5%, researchers estimated that children viewed approximately 20,000 television commercials per year.<sup>31</sup> In the 1980s, when obesity rates ranged from five to six percent, the number of commercials viewed by children per year grew to 30,000.<sup>32</sup> These numbers continued to rise into the 1990s as an average American child viewed more than 3,000 advertisements per day on television, on the internet, and in magazines.<sup>33</sup> As of 2004, it was estimated that children view

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28. THE HENRY J. KAISER FOUNDATION, *supra* note 2, at 2.

29. *Id.*

30. *See id.* at 1.

31. *Id.* at 4.

32. *Id.*

33. Ellen Goodman, *Naming Rights – And Wrongs*, BOSTON GLOBE, Aug. 12, 2001, at D7 (referring to a child named Zane who “will be assaulted by some 3,000 ads a day”). This statistic has caused some consternation in the literature. *See* Michael J. Rosen, *eLetters: Serious Errors, Uncorroborated*

over 40,000 advertisements annually on television alone, many of which entice them to purchase junk food products.<sup>34</sup> Children are seemingly unable to avoid this influence due to the fact that a significant portion of all advertisements aimed at children are for various types of junk food.<sup>35</sup>

Sugared snacks and drinks, cereal, and fast food advertisements respectively comprise approximately thirty-two percent, thirty-one percent, and nine percent of all advertisements marketed specifically to children.<sup>36</sup> A study published in the *Journal of the American Dietetic Association* found that on Saturday mornings, the most popular hours for children's television, approximately eleven food related commercials are aired per hour.<sup>37</sup> The study further indicated that the average American child is exposed to one food commercial every five minutes on Saturday morning television.<sup>38</sup> As television pervades home and school life, so do food advertisements. Channel One, which is broadcast to children while they are in school, contains only two total minutes of advertising per viewing session.<sup>39</sup> Yet, these two minutes of advertising feature candy, gum, fast food, soda, or snack chips in approximately six out of ten commercials for brand name products.<sup>40</sup> These data indicate that children are overwhelmed with advertisements for unhealthy food

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*Statistics*, PEDIATRICS (Dec. 11, 2006), <http://pediatrics.aappublications.org/cgi/eletters/118/6/2563> (questioning the accuracy of the statistic). *But see* Victor Strasburger, *eLetters: The Statement Stands!*, PEDIATRICS (Dec. 12, 2006), <http://pediatrics.aappublications.org/cgi/eletters/118/6/2563> (defending the accuracy of the statistic).

34. THE HENRY J. KAISER FOUNDATION, *supra* note 2, at 4.

35. Jeffrey E. Brand & Bradley S. Greenberg, *Commercials in the Classroom: The Impact of Channel One Advertising*, 34 J. ADVERTISING RES. 18, 19 (1994); *see also* Krista Kotz & Mary Story, *Food Advertisements During Children's Saturday Morning Television Programming: Are They Consistent with Dietary Recommendations?*, 94 J. AM. DIETETIC ASS'N 1296, 1297-98 (1994) (including a graph with percentages of food items advertised).

36. Kunkel & Gantz, *supra* note 5, at 143. These percentages refer to advertisements on broadcast networks. *Id.*

37. Kotz & Story, *supra* note 35, at 1297.

38. *Id.*

39. Brand & Greenberg, *supra* note 35, at 18.

40. *Id.* at 19.

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regardless of where viewing occurs. Is it surprising to learn researchers suspect that an inordinate amount of time spent viewing food advertisements detracts from time that children could exercise?

A. USING AND WATCHING MEDIA DETRACTS FROM TIME FOR PHYSICAL EXERCISE

As the technological revolution of the twenty-first century continues to perpetuate a world of electronic progress, children and adolescents spend an increasing amount of time consuming media. Scholars reason that children who spend a considerable amount of time using media are more likely to develop a sedentary lifestyle, often resulting in obesity.<sup>41</sup> Although there is no definitive evidence linking length of time spent consuming media with children's dietary habits, there is a statistically significant relationship between hours of television viewed and levels of physical activity. A *National Youth Risk Behavior Study* found that for white, female high school students, a sedentary lifestyle was attributable to an inordinate amount of time spent watching television.<sup>42</sup> A national survey of parents of children ages four to six found that children who spend over two hours watching television a day spend a half hour less time playing outside than other children their age.<sup>43</sup>

Even though this research supports the common sense deduction that extensive television viewing contributes to an increasingly sedentary lifestyle, caution is warranted to avoid jumping to conclusions. For this theory to have any legitimacy, there would have to be sound evidence that children who watch moderate or minimal amounts of television choose physically vigorous activities to fill up their time, rather than some other type of sedentary activity such as reading, playing video games, texting, or talking on the phone. Whether there is sufficient credible evidence of the connection between watching "too

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41. Lowry et al., *supra* note 10, at 413, 418.

42. *Id.* at 418.

43. VICTORIA J. RIDEOUT ET AL., ZERO TO SIX: ELECTRONIC MEDIA IN THE LIVES OF INFANTS, TODDLERS AND PRESCHOOLERS 7 (2003), available at <http://www.kff.org/entmedia/upload/Zero-to-Six-Electronic-Media-in-the-Lives-of-Infants-Toddlers-and-Preschoolers-PDF.pdf>. But see Thomas N. Robinson & Joel D. Killen, *Ethnic and Gender Differences in the Relationships Between Television Viewing and Obesity, Physical Activity, and Dietary Fat Intake*, 26 J. HEALTH EDUC. S-91, S-95 (1995) (finding only a "weak inverse correlation[] between TV viewing and physical activity").

much” television and obesity remains debatable. While the above referenced studies failed to provide definitive proof of the relationship between television watching and weight gain, they do suggest that the nature of television viewing (what children watch and how they watch it) may be more important than the number of hours spent watching.

#### B. DOES THE MEDIA MANIPULATE CHILDREN’S FOOD CHOICES?

Studies conducted by marketing research firms suggest that television advertisements do significantly impact purchases by child consumers and their parents. The Federal Trade Commission (FTC) found that the largest players in the food industry, from manufacturers to distributors to fast food restaurants, spent more than \$1.6 billion in 2006 on advertisements directed specifically at children.<sup>44</sup> Although this may seem like an exorbitant amount, the emphasis on marketing to children should come as no surprise. Researchers estimated that children under age twelve spend approximately \$35 billion of their own money and influence over \$200 billion in household spending annually.<sup>45</sup> Given these statistics, it is clear that children have significant control over individual and household purchasing decisions. By emphasizing youth marketing, food manufacturers are able to reach the parents, siblings, relatives, and other adults involved in the lives of children.

Research has indeed revealed that the number of advertisements children view has a direct impact on their purchasing requests. One study established that as many as three out of four requests by children are for food products seen on television.<sup>46</sup> Another study of two groups of children

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44. FED. TRADE COMM’N, *MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION* ES-1 (2008), available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf>. In 2007 the FTC used its enforcement powers to compel the forty-four companies responsible for the vast majority of food advertising directed at children to report figures for spending on such advertising for the previous year. *Id.*

45. Courtney Kane, *TV and Movie Characters Sell Children Snacks*, N.Y. TIMES, Dec. 8, 2003, at C7.

46. THE HENRY J. KAISER FOUNDATION, *supra* note 2, at 5.

between the ages of two and six reached similar conclusions.<sup>47</sup> In this study, one group of children viewed a cartoon with embedded commercials while another group viewed the same cartoon without commercials.<sup>48</sup> Children who viewed the commercials were significantly more likely to choose the advertised products than children who did not.<sup>49</sup> Moreover, the study found that preferences were greatest for children who had viewed the advertisements twice as opposed to only once during the screening.<sup>50</sup> This trend of preferring advertised over non-advertised foods is even more prevalent within the context of fast food products. A study in the *International Journal of Obesity* documented that students in grades seven to twelve who consumed fast food at least three times per week spent extra time watching television compared to students who rarely consumed fast food.<sup>51</sup> A similar study of children in grades six to eight found that children who watch more television tend to consume a greater amount of soft drinks than other children their age.<sup>52</sup> Although these studies did not release specific numbers, the link between the amount of time children spend watching television and their decisions to purchase and consume fast food is remarkable. Perhaps what is more startling than the connection between food advertising and product requests by children is the total absence of health-conscious messages that stress the importance of fruit and vegetable consumption.

According to the *Dietary Guidelines for Americans* established by the United States Department of Agriculture (USDA), children should consume three to five servings of fruits and vegetables per day.<sup>53</sup> However, one study revealed

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47. D. Borzekowski & T. Robinson, *The 30 Second Effect: An Experiment Revealing the Impact of Television Commercials on Food Preferences of Preschoolers*, 101 J. Am. Dietetic Assoc. 42, 44 (2001).

48. *Id.* at 43.

49. *Id.* at 44.

50. *Id.* at 45.

51. SA French et al., *Fast Food Restaurant Use among Adolescents: Associations with Nutrient Intake, Food Choices and Behavioral and Psychosocial Variables*, 25 INT'L J. OBESITY 1823, 1829 tbl. 4 (2001).

52. Joyce Giammattei et al., *Television Watching and Soft Drink Consumption: Associations with Obesity in 11- to 13-Year-Old Schoolchildren*, 157 ARCHIVES PEDIATRICS & ADOLESCENT MED. 882, 884 (2003).

53. U.S. DEP'T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS app. 10 (7th ed. 2010), available at <http://www.health.gov/dietaryguidelines/dga2010/DietaryGuidelines2010.pdf>.

that only one in five children consumed five serving per day and approximately one-fourth of the vegetables consumed by these children were french fries.<sup>54</sup> The amount of time children spend watching television has been shown to correspond directly to fruit and vegetable intake, as demonstrated in a recent study of 500 middle school children.<sup>55</sup> Researchers concluded that with each hour of television viewed per day, the number of daily servings of fruits and vegetables decreased among adolescents.<sup>56</sup> Although there was no concrete proof that the lack of fruits and vegetables was directly attributable to children's television viewing habits, the influence of television advertisements can, at the very least, reasonably be considered as a contributing factor to children's food choices. Another potential factor contributing to children's food preferences may be misconceptions about which foods are healthy and which are not.

Many researchers contend that television advertisements contribute to confusion among youth regarding the health benefits of certain types of foods. An early study conducted in 1978 found that approximately seventy percent of African American six to eight year-olds believed that fast food was more nutritious than food prepared at home.<sup>57</sup> This misconception is arguably attributable to the junk food

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Recommended servings are based on daily caloric need, which is based on a number of factors including gender and physical activity. Adolescent children, especially males with active lifestyles, may have a daily caloric need which requires greater than five servings of fruits and vegetables per day. *See id.* apps. 6, 10.

54. Susan M. Krebs-Smith et al., *Fruit and Vegetable Intakes of Children and Adolescents in the United States*, 150 ARCHIVES PEDIATRICS & ADOLESCENT MED. 81, 83 (1996). Although the USDA considers french fries to be vegetables for purposes of commerce, they are not recognized as vegetables for nutritional purposes. *Batter-Coated French Fries Now a Vegetable on USDA List*, USA TODAY (Jun. 15, 2004, 12:02 PM), [http://www.usatoday.com/news/nation/2004-06-15-fries\\_x.htm](http://www.usatoday.com/news/nation/2004-06-15-fries_x.htm).

55. René Boynton-Jarrett et al., *Impact of Television Viewing Patterns on Fruit and Vegetable Consumption Among Adolescents*, 112 PEDIATRICS 1321, 1323 (2011) (discussing a nine month study of 500 middle school children).

56. *Id.*

57. Thomas R. Donohue et al., *Black and White Children: Perceptions of Television Commercials*, 42 J. MARKETING 34, 39 (1978). The study also found that only fifteen percent of Caucasian children believed fast food was more nutritious than food prepared at home.

advertisements viewed by children. Another study presented a series of paired food products (e.g., corn flakes and frosted flakes) to fourth and fifth grade children and asked them to choose what they believed to be the healthier item.<sup>58</sup> The study concluded that children who spent more time watching television were nearly twice as likely to incorrectly select the unhealthier food item as the healthier choice.<sup>59</sup> Thus, it is apparent that what children see in television advertisements influences unhealthy food selection and confuses them as to what foods are actually nutritional. Essentially, children are dictating food purchase decisions by relying on misleading advertisements. While adults may be more readily able to resist the urge of junk food advertising, research demonstrates that children are far more influenced by what they see on television.<sup>60</sup> This is particularly true when advertisements feature popular children's characters.<sup>61</sup>

### C. INFLUENCE OF CROSS PROMOTION BETWEEN FOOD PRODUCTS AND CHILDREN'S ENTERTAINMENT

Many theorists posit that one of the main reasons television advertisements are so effective at influencing children's food choices is that many such advertisements feature popular children's characters from movies and television. In the context of food advertising, cross-promotion refers to the use of licensed characters in advertisements for food products.<sup>62</sup> Cross-promotional advertisements permit the simultaneous marketing of both a given food product and the endorsing character. The prevalence of cross-promotional advertising between food products and children's characters is more popular now than ever.<sup>63</sup> Indeed, it is difficult to spend more than several minutes channel surfing without coming across an advertisement for SpongeBob SquarePants® crackers, Shrek® fruit snacks, or Dora the Explorer® ice cream. However, the tide may be shifting in corporate consciousness and accountability as some companies have

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58. Nancy Signorielli & Jessica Staples, *Television and Children's Conceptions of Nutrition*, 9 HEALTH COMM. 289, 294–95 (1997).

59. *Id.* at 297.

60. See Christina A. Roberto et al., *Influence of Licensed Characters on Children's Taste and Snack Preferences*, 126 PEDIATRICS 88, 89 (2010).

61. *Id.* at 91.

62. FED. TRADE COMM'N, *supra* note 44, at ES-1.

63. *Id.* at 3.

made efforts to curb these practices.<sup>64</sup> By way of illustration, the Walt Disney Company limits licensing of its characters to foods that meet established nutritional guidelines.<sup>65</sup> The efforts of the Disney Company are encouraging. Others who cross-promote junk food with children's characters should emulate this stance, given the impact such advertisements have on children.

A study conducted by Yale University's Rudd Center for Food Policy & Obesity concluded that children think foods taste better when packaging displays their favorite television or movie character.<sup>66</sup> In this study, forty children ranging from ages four to six were each given three pairs of identical snack foods: graham crackers, fruit snacks, and carrots.<sup>67</sup> One package of each food had a cartoon character, Scooby-Doo®, Dora the Explorer®, or Shrek® on the front, while the others did not.<sup>68</sup> Over two-thirds of the children involved in the study stated that they preferred the snack with the character on the package, while approximately one-half of the children thought the foods from packages with the cartoon characters tasted better.<sup>69</sup> This study demonstrates that the influence of such characters on children's food choices is powerful and unmistakable. To capitalize on this influence, many fast food companies also include toys or prizes with their meals.

Although toys distributed in "kid's meals" have become a staple of Americana akin to baseball and apple pie, the continued existence of the practice should be questioned in light of the powerful influence toys have on children's food choices. One study found that one in six food commercials targeting children promised a free toy with the food purchase.<sup>70</sup> These advertisements, which often feature a children's television or movie character promising the free toy, have been effective in aiding children's slogan recall and ability to identify

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64. *Id.* at ES-7.

65. Deborah Platt Majoras, *Food for Thought: The FTC and Market Influences on Consumer Health*, 62 FOOD & DRUG L.J. 433, 435 (2007).

66. Roberto, *supra* note 60, at 91.

67. *Id.* at 89, 90.

68. *Id.* at 90.

69. *Id.* at 91.

70. Kotz & Story, *supra* note 35, at 1298.

a particular product.<sup>71</sup> The advertisements lead children to associate fictional characters and toys with certain food products, conflating excitement over their favorite cartoon or toy with excitement for a food product. Fearing the impact of toy advertisements on children, Santa Clara County, California enacted a law prohibiting fast food restaurants from giving out toys with their meals unless the food meets specific nutritional standards.<sup>72</sup> Although the effectiveness of this ban has not yet been documented, it is hoped that when children eat at fast food restaurants they will choose low calorie meals for which toy promotions are permitted.<sup>73</sup> Given this information, it is evident that cross-promotion of food products with children's television and movie characters contributes to unhealthy food choices by youth consumers. Similarly, many researchers also contend that television and junk food are so closely associated that a majority of children snack on unhealthy foods while watching television.<sup>74</sup>

#### D. DO CHILDREN ENGAGE IN UNHEALTHY EATING WHILE WATCHING TELEVISION?

Stated differently, does advertising junk food on television increase automatic snacking on whatever foods are available to children and adolescents? In one experiment conducted at Yale, researchers screened cartoons with a group of children ages seven to eleven.<sup>75</sup> One group of children viewed a cartoon which featured several food commercials while another group viewed the same cartoon with no commercials.<sup>76</sup> The group who viewed the commercials ate forty-five percent more snack foods while watching the television program than did the group who viewed

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71. See Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 266 JAMA 3145, 3146-47 (1991).

72. Richard C. Paddock, *California County Bans Toys with Fast Food Meals*, AOL NEWS (Apr. 27, 2010, 6:26 PM), <http://www.aolnews.com/nation/article/santa-clara-county-bans-toys-with-fattening-meals/19456492>. The Santa Clara County Public Health Director noted that few children's meals offered by restaurants in the county at the time would fall below the calorie maximum for offering a toy. *Id.*

73. *Id.*

74. See generally Fischer et al., *supra* note 71; Kotz & Story, *supra* note 35, at 1298.

75. Jennifer L. Harris et al., *Priming Effects of Television Food Advertising on Eating Behavior*, 28 HEALTH PSYCHOL. 404, 406 (2009).

76. *Id.*

the non-commercial screening.<sup>77</sup> The researchers conducting the study concluded that from a single half-hour of television viewing each day, the increase in snacking caused by junk food advertising would lead to weight gain of approximately ten pounds per year in children viewers.<sup>78</sup> Of note is that the junk foods children consumed while watching the test cartoon were not those advertised during the screening.<sup>79</sup> This suggests that the mere depiction of junk food advertisements, or perhaps the mere act of television viewing itself, subliminally encourages children to consume unhealthy foods.

#### IV. ETHICAL IMPLICATIONS OF FOOD MARKETING DIRECTED AT CHILDREN

Is there a lack of corporate accountability and corporate consciousness over food advertising directed at children? Stated differently, should profits prevail even at the expense of public health and welfare? Those companies who choose to advertise food products are subject to provisions of the Federal Food, Drug, and Cosmetic Act (FDCA) and the FTC deceptive practices provisions. Additionally, the Secretary of Health and Human Services may take action against food companies who “misbrand” their food products, starting with a notice of the substance of the violation, the basis for the finding, and a description of the proposed enforcement action.<sup>80</sup> A food is “misbranded” if it is labeled in a false or misleading manner.<sup>81</sup>

The International Chamber of Commerce (ICC) has also developed and published guidelines that establish ethical standards for marketing practices aimed at children.<sup>82</sup> Television advertising in particular is covered by the *ICC International Code of Advertising Practice*, which states that

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77. *Id.* at 407.

78. *Id.*

79. *Id.* at 406.

80. 21 U.S.C. § 378(a) (2006).

81. 21 U.S.C. § 343(a) (2006).

82. INT'L CHAMBER OF COMMERCE, ADVERTISING AND MARKETING COMMUNICATION PRACTICE: CONSOLIDATED ICC CODE (2006), available at <http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/Statements/330%20Final%20version%20of%20the%20Consolidated%20Code%20with%20covers.pdf>.

advertisements should be legal, decent, honest and truthful, not contain any statement or visual presentation which may, directly or indirectly, mislead a consumer, and be clearly distinguishable as advertisements.<sup>83</sup> The “social values” section of the guidelines also states that an advertisement should not include any direct appeal to children to persuade adults to buy products for them or to confuse children as to the value or cost of a given product.<sup>84</sup> The goal of these rules is to protect children from advertising that exploits their naivety.<sup>85</sup> Although these industry-developed guidelines have been in place for quite some time, compliance is wanting.

As mentioned, food advertisers employ a plethora of marketing techniques to persuade children to buy their products. Advertisers use popular children’s characters, free toys, and audio and visual effects rather than price or nutritional value to attract children’s attention and focus to their products.<sup>86</sup> In doing so, companies hope to foster a relationship with children through their advertisements, emphasizing brand recognition and loyalty.<sup>87</sup> Essentially, food advertisers attempt to inundate children with auditory and visual stimuli in an effort to obfuscate the nutritional value of their food products, throwing all ethical considerations out the window in the process. These practices are not only immoral but also clearly violate established ICC guidelines.<sup>88</sup>

Although they are not always inherently deceptive, food advertisements that target young audiences have a deceiving effect because children do not possess the cognitive ability to fully comprehend such messages.<sup>89</sup> Absent parental intervention, children come to believe that such products are part of a normal diet.<sup>90</sup> Thus, even if it is not direct deception, food advertisements mislead children into buying products they believe are healthy, without regard to nutritional content.<sup>91</sup> Such deception is unethical and expressly prohibited by ICC regulations and should result in disciplinary action taken

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83. *Id.* at 13–15.

84. *Id.* at 17.

85. *Id.*

86. Harris et al., *supra* note 75.

87. *Id.*

88. INT’L CHAMBER OF COMMERCE, *supra* note 82, at 13–15.

89. THE HENRY J. KAISER FOUNDATION, *supra* note 2, at 8.

90. *Id.*

91. *Id.*

against the advertiser.<sup>92</sup> The ICC, however, rarely pursues enforcement actions against such violators.<sup>93</sup>

It is because of this lack of enforcement that producers of food advertisements do not feel compelled to change their marketing practices.<sup>94</sup> Obviously, the basic ethical notion that it is wrong to deceive children does not guide marketing decisions made by food advertisers.<sup>95</sup> These companies are willing to disregard the major impact their messages have on children in favor of turning a profit. If the ICC is unwilling to levy punishment against violators, there is essentially no stopping these companies from continuing to mislead children via their advertisements. To send the message that deceptive and unethical advertisements will not be tolerated, the ICC and regulatory agencies must attempt to not only enforce regulations more stringently, but with more consistency. Unfortunately, strict and consistent enforcement continues to be absent from the current food advertising landscape.

#### V. CURRENT STATUS OF FOOD ADVERTISING REGULATION

Regardless of whether food advertising is directly responsible for childhood obesity, the influence of the media on purchasing habits is undeniable. Producers of food products could make minor modifications to their advertisements that would likely have a positive impact on children's eating habits.<sup>96</sup> Although the ability of the media to positively impact children's dietary practices is obvious, most companies have not made any effort to produce advertisements that promote a healthy diet.

A University of Arkansas study revealed that one year

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92. INT'L CHAMBER OF COMMERCE, *supra* note 82, at 13.

93. Emily Lee, *The World Health Organization's Global Strategy on Diet, Physical Activity, and Health: Turning Strategy into Action*, 60 FOOD & DRUG L.J. 569, 577 (2005).

94. *Id.*

95. *Id.*

96. Some potentially minor changes for advertisers would include ceasing to air commercials during Saturday mornings, stressing the need for children to consult parents before requesting a certain product, or making nutritional content clear and visible.

after announcing new advertising policies to combat childhood obesity, major food companies have made no significant changes in television food advertisements that target children.<sup>97</sup> The study compared and analyzed television commercials recorded just prior to the industry self-regulation effort with commercials recorded a year after that industry initiative.<sup>98</sup> The comparison revealed that food product advertisements in both years used attention-getting devices such as animation, live-action visual effects, sound effects, and musical jingles, all of which are methods shown to appeal to young children and to suit their cognitive processing abilities.<sup>99</sup> Advertisements that offer an incentive, typically a free toy with purchase, also continue to saturate the market.<sup>100</sup> The one significant change the study noted was that advertisements now often carry nutritional claims, even when shown during children's programming.<sup>101</sup>

Although incorporating nutritional information is a step in the right direction, most children are unable to read until age six and, therefore, the inclusion of nutritional content is ineffective for many young viewers.<sup>102</sup> Even if children are able to read nutritional facts, there is no guarantee they would actually comprehend the information, especially in the face of the aforementioned attention-getting devices employed within the same advertisements.<sup>103</sup> Thus, it is apparent that food advertisers must take their role in the lives of children more seriously and alter their messages accordingly. To this end, the Council of the Better Business Bureaus established the Children's Food and Beverage Advertising Initiative (CFBAI).<sup>104</sup> The initiative is a voluntary self-regulation effort by thirteen of the largest food and beverage companies in the

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97. *Advertising and Childhood Obesity: Food Companies Changing Little, Study Finds*, SCIENCE DAILY (May 26, 2007), <http://www.sciencedaily.com/releases/2007/05/070525205437.htm>.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. For an overview of some companies that include at least some nutritional content, see FED. TRADE COMM'N, *supra* note 44, at E-2–E-12.

103. See *Advertising and Childhood Obesity: Food Companies Changing Little, Study Finds*, *supra* note 97 (citing a study that concluded that “only older children and adolescents might be prepared to critically evaluate [advertising] messages”).

104. FED. TRADE COMM'N, *supra* note 44, at 62.

nation, including Burger King, Campbell Soup, Coca-Cola, Kraft Foods, Mars, McDonalds, and Pepsi.<sup>105</sup> These manufacturers have pledged to:

- Devote at least half of their television, radio, print, and internet advertising directed at children to encouraging healthier choices and lifestyles;
- Limit products shown in interactive games;
- Not advertise food or beverage products in elementary schools;
- Not engage in food and beverage product placement in entertainment content; and
- Reduce the use of third-party licensed characters in advertising.<sup>106</sup>

Although the CFBAI has existed for several years, data is scant regarding whether these companies have complied with their self-imposed guidelines.

In addition to industry self-regulation efforts, there is also some indication that courts may begin to hold food advertisers responsible for the content of their messages. Although obesity lawsuits are rarely successful, recent litigation suggests that advertisers of food products who disseminate misleading information may face legal consequences. In *Pelman v. McDonald's Corp.*, the United States District Court for the Southern District of New York permitted a lawsuit to proceed against McDonald's that accused the company of deceptive advertising.<sup>107</sup> In *Pelman*, two teenage girls and their parents alleged that the restaurant used false advertising to mislead consumers into believing that fast food is healthier than it is and failed to warn of the dangers of eating their food, thereby causing the plaintiffs to gain excessive amounts of weight.<sup>108</sup> The court denied the defendant's motion to dismiss and allowed the case to proceed, reasoning that the plaintiffs presented enough evidence that the advertisements were materially deceptive and that the plaintiffs suffered injuries.<sup>109</sup>

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105. *Id.*

106. *Id.* at E-2-E-15.

107. *Pelman v. McDonald's Corp.*, 452 F. Supp. 2d 320 (S.D.N.Y. 2006).

108. *Id.* at 232.

109. *Id.* at 324-26.

Perhaps the allegations by the plaintiffs in *Pelman* support the aforementioned theory that fast food advertisements directed at children do not adequately convey nutritional facts and can lead to unhealthy eating habits. Although the outcome of this case is still pending, the fact that the plaintiff's claim was able to survive a motion to dismiss suggests that courts are recognizing the impact of food advertisements in terms of how the information is conveyed so as not to mislead and/or deceive consumers. The question remains whether this suit will send a cautionary message about the future of food advertising law.

#### VI. IS GOVERNMENT REGULATION THE SOLUTION?

Are alternatives to government regulation, such as industry self-regulation, a more appropriate means of remedying the impact of food advertisements on young viewers? Self-regulation provides accountability and could potentially serve as a precursor and preventative measure to federal, state, or local regulation.<sup>110</sup> Moreover, self-regulation reduces industry resistance to regulatory intervention.<sup>111</sup> Food companies that have taken strides toward self-regulation in recent years have received assistance from various state and federal boards and committees.

By way of illustration, the mission of the National Advertising Review Council (NARC) is to foster truth and accuracy in national advertising through voluntary self-regulation and to support advertiser compliance to minimize governmental involvement in advertising regulation.<sup>112</sup> In 1974, NARC established the Children's Advertising Review Unit (CARU) to promote responsible children's advertising.<sup>113</sup> CARU monitors and reviews advertising directed at children, initiates and receives complaints about advertising practices, and determines whether such practices violate the program's standards.<sup>114</sup> When CARU finds a violation, it attempts to secure the voluntary cooperation of the advertiser or internet

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110. Lee, *supra* note 93, at 577.

111. *Id.*

112. *Self-Regulatory Programs*, NATIONAL ADVERTISING REVIEW COUNCIL, <http://www.narcpartners.org/about/divisions.aspx> (last visited July 10, 2010).

113. Joan R. Rothberg, *In Search of the Silver Bullet: Regulatory Models to Address Childhood Obesity*, 65 FOOD & DRUG L.J. 185, 210 (2010).

114. CHILDREN'S ADVERTISING REVIEW UNIT, SELF-REGULATORY PROGRAM FOR CHILDREN'S ADVERTISING 3 (2009), available at <http://www.caru.org/guidelines/guidelines.pdf>.

website operator.<sup>115</sup> CARU also offers a general advisory service for advertisers and agencies which provides informational material to children, parents, and educators.<sup>116</sup> The National Advertising Division of CARU performs voluntary investigations of the advertising industry.<sup>117</sup> Ultimately, the intended effect is that an investigation will encourage non-misleading approaches in advertising to children.<sup>118</sup> Despite these potential benefits, self-regulation is not without its critics.

The Campaign for a Commercial-Free Childhood (CCFC) views self-regulation as a total failure, citing to the inability of advertisers to comport with established guidelines.<sup>119</sup> The CCFC attempts to mobilize parents, educators, and health care providers to prevent commercials from exploiting children's lack of knowledge, and to hold corporations liable for their inability to control the information they disseminate.<sup>120</sup> Particularly, CCFC opines that "we hold corporations accountable for their egregious marketing practices and, in doing so, highlight both the failures of self-regulation and the need for government policies limiting corporate marketers' access to children."<sup>121</sup> While few would argue that the CCFC is not justified in pointing the finger at corporations, there are those who contend that parents contribute to this dilemma. In a sense CCFC protects parents and children alike by "work[ing] for the rights of children to grow up—and the freedom for parents to raise them—without being undermined by commercial interests."<sup>122</sup> While the CCFC has commendable goals in attempting to end the childhood obesity epidemic, corporations and food manufacturers cannot be the only ones blamed for the childhood obesity epidemic.

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115. *Id.*

116. *Id.*

117. Rothberg, *supra* note 113, at 210.

118. *Id.*

119. *About CCFC*, CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD, <http://www.commercialfreechildhood.org/aboutus.htm> (last visited Mar. 13, 2011).

120. *Id.*

121. *Id.*

122. *Id.*

## A. ADVERTISING AND FREEDOM OF CHOICE

The Center for Consumer Freedom (CCF) was founded in 1996 as a nonprofit organization devoted to promoting personal responsibility and protecting consumer choice.<sup>123</sup> Consumer freedom is defined by the organization as “the right of adults and parents to choose how they live their lives, what they eat and drink, how they manage their finances, and how they enjoy themselves.”<sup>124</sup> The organization battles a “growing cabal of activists” who assert what is best for individuals.<sup>125</sup> To the organization, these activists erode our freedom of choice, the freedom to purchase what we want, eat what we want, drink what we want, and raise our children as we see fit.<sup>126</sup> The CCF argues that “only *you* know what’s best for you” and “[w]hen activists try to force you to live according to their vision of society, we don’t take it lying down.”<sup>127</sup>

It is imperative to consider whether activists have gone too far in their efforts to stop childhood obesity and, more importantly, how much responsibility falls on the consumer. When the FTC first proposed advertising regulation in the 1970’s, an article, titled *FTC as National Nanny* suggested:

The [FTC’s proposal to minimize advertising to children] . . . is designed to protect children from the weaknesses of their parents—and 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. The government has enough problems with television’s emphasis on violence and sex and its shortages of local programming, without getting into this business, too.<sup>128</sup>

Along these lines, there are individuals who staunchly defend the rights of individuals to purchase whatever products they choose. Such commentators argue that, with regard to children, parental authority alone should dictate what children eat and the government should have no role in such decisions. What these commentators seemingly ignore, however, is the fact that adults and children do not have the same capacity to

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123. *About Us: What is the Center for Consumer Freedom?*, THE CENTER FOR CONSUMER FREEDOM, <http://consumerfreedom.com/about.cfm> (last visited Mar. 13, 2011).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22.

make educated food product decisions.

While adults may be capable of making informed decisions on whether or not to buy certain food products, children lack the cognitive skills to discern actual nutritional information amidst a veil of attention grabbing marketing techniques. It is precisely because of this inability that governmental regulation of food advertisements directed at children is necessary. In essence, this is an issue of public protection.

#### VII. THE FUTURE OF FOOD ADVERTISING REGULATION: PROPOSED SOLUTIONS

Anti-obesity advocates are hopeful that, despite the reluctance of food manufacturers to alter their marketing practices, changes can still be fostered to minimize the influence of media in children's lives. To achieve this goal, some of the potential modifications that could be made include (1) banning fast food advertising on child-targeted television; (2) regulating food advertisements directed at children and the companies who produce them; (3) eliminating food advertising as ordinary business expenses that reduce taxable corporate income; and (4) increasing parental intervention. There is no guarantee that any or all of these solutions would lead to positive changes in children's eating habits and hence stave off diet related, life altering diseases and illnesses. Youth and adolescent food consumption in relation to the viewing of advertisements indicate that some attempt at regulation is needed immediately. Admittedly, some of these solutions will be met with well entrenched reluctance.

##### A. BAN TELEVISION FAST FOOD ADVERTISING

As the aforementioned surveys and studies indicated, fast food advertising is one of the most influential forms of advertising directed at children. A study published in the *University of Chicago Journal of Law and Economics* used longitudinal data to hypothesize what a ban on junk and fast food advertising could mean for American children.<sup>129</sup> The study concluded that a complete ban on fast food advertising on

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

television alone would reduce the number of overweight children ages three to eleven in a fixed population by eighteen percent.<sup>130</sup> This policy would also diminish the number of overweight children ages twelve to eighteen by fourteen percent.<sup>131</sup>

It is relevant to note that this study may potentially underestimate the impact of a complete ban on fast food advertisements on television because the computations formulated are based on local television advertisements and ignore network and cable television advertisements. Regardless of the margin for error,<sup>132</sup> an approximate reduction in childhood obesity of fourteen to eighteen percent remains significant and is worth striving for, given the increase childhood obesity. However, before such a ban can be enacted, it is essential to consider whether forbidding all junk food advertisements on television would be in accordance with basic constitutional principles.

#### 1. Constitutional Implications

Since the 1970s, the Supreme Court has recognized that truthful and non-deceptive advertisements are a form of commercial speech and, as such, are entitled to First Amendment protection. The 1976 case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* marked one of the first occasions in which the Supreme Court struck down a law prohibiting the advertising of prescription drugs.<sup>133</sup> The Court emphasized an individual's "right to receive information" in reaching their conclusion.<sup>134</sup> Four years later in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court articulated the test for evaluating commercial speech regulations that would apply to a potential ban on television-aired junk food advertisements.<sup>135</sup> The Court in *Central Hudson* stated that before the government can justify regulating commercial speech, it must determine whether: (1) the expression at least concerns lawful

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130. *Id.* at 599.

131. *Id.*

132. *Id.* at 607–608, 611.

133. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 747, 756 (1976).

134. *Id.* at 756–57.

135. *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561–66, 577 (1980).

activity and is not misleading; (2) the asserted governmental interest is substantial; (3) the regulation directly advances the asserted governmental interest; and (4) the regulation is not more extensive than necessary to serve that interest.<sup>136</sup>

Although it would be difficult to advance the argument that the government does not have a substantial interest in protecting American children from obesity and deceptive junk food advertisements, the *Central Hudson* test is not so easily satisfied. The test provides that government may only regulate advertisements that are false, misleading, or otherwise deceptive. While available evidence suggests that an overwhelming percentage of junk food advertisements are in fact deceptive, there is no data proving that all such communications are deceptive. Thus, it would be difficult to claim that junk food advertising is a form of commercial speech wholly outside of First Amendment protection and therefore subject to government regulation.

However, it could be argued that because such a disproportionate number of fast food advertisements on television are misleading, and since these advertisements directly target young, impressionable children, a complete ban, or perhaps a ban on all misleading and deceptive advertisements, would be the only method to assure that such communications do not unduly influence American youth. The fact remains, however, that not all junk food advertisements disseminated on television are deceptive and, therefore, a blanket ban is potentially unconstitutional. Although the ability to enact a total ban on junk food advertising is a murky issue from a constitutional standpoint, potential benefits exist in banning advertisements directed at young children.

The Kellogg Company (Kellogg) enacted internal policies under which it pledged not to direct junk food advertisements to children under age twelve.<sup>137</sup> Kellogg defined food products under the policy as those containing 200 calories, 2 grams of saturated fat, or 12 grams of sugar.<sup>138</sup> Kellogg also stated that

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136. *Id.* at 566.

137. Brook Barnes, *Limiting Ads of Junk Food to Children*, N.Y. TIMES, Jul. 18, 2007, at C1.

138. *Kellogg Revises Ads, Recipes for Under-12 Market*, NATIONAL PUBLIC

it would begin to add nutrition information to the front of their packages.<sup>139</sup> Unfortunately, Kellogg has had difficulty complying with these policies. In 2009, Kellogg agreed to settle charges that its print, television, and Internet advertising falsely claimed that a breakfast of “Frosted Mini-Wheats” was shown to clinically improve children’s attentiveness by nearly twenty percent when compared to children who ate no breakfast.<sup>140</sup> Although it is encouraging to see companies such as Kellogg devote resources to reshaping internal advertising policies, the impact of these policies cannot be felt if companies choose not to follow them. A potential solution, therefore, may be for the government or appropriate regulatory agency, to oversee and enforce the internal policies of food manufacturers.

#### B. REGULATE FOOD ADVERTISEMENTS AND INTERNAL POLICIES OF FOOD MANUFACTURERS

Policy suggestions to regulate or reduce the number of food advertisements that target children have come in many forms, ranging from voluntary action taken by media outlets and food corporations to governmental intervention. The American Academy of Pediatrics reviewed the available research and data on advertising in relation to childhood obesity and concluded that “advertising directed toward children is inherently deceptive and exploits children less than eight years of age.”<sup>141</sup> In addition to the aforementioned ICC guidelines, various other agencies, including the Federal Communications Commission and CARU, have published rules which suggest that advertising directed at children should not be misleading with respect to nutrition information and should encourage development of good nutritional practices. Unfortunately, compliance with these guidelines is wanting.

A recent study by the Center for Science in the Public Interest (CSPI) found that a majority of all food and beverage manufacturers do not have policies on marketing food to children or their policies have loop-holes that allow for such

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RADIO (June 25, 2007), <http://www.npr.org/templates/story/story.php?storyId=11350917>.

139. *Id.*

140. *Kellogg Settles FTC Charges That Ads for Frosted Mini-Wheats Were False*, FED. TRADE COMMISSION (Apr. 20, 2009), <http://www.ftc.gov/opa/2009/04/kellogg.shtm>.

141. Committee on Communications, *Children, Adolescents, and Advertising*, 95 PEDIATRICS 295, 295 (1995).

advertising. The study surveyed 128 food companies, entertainment companies, and restaurant chains, giving seventy-five percent of these companies an “F” grade for their food marketing policies.<sup>142</sup> Eighty-seven of the companies surveyed lacked an internal policy regarding marketing to children and eight companies had “very weak marketing policies.”<sup>143</sup> The CSPI study also found that, of the companies surveyed, only sixty-four percent of food and beverage manufacturers, twenty-four percent of restaurants, and twenty-two percent of entertainment companies have policies that govern marketing to children.<sup>144</sup> While the ultimate goal for regulation of food advertisements is for every single manufacturer to comply with existing guidelines, the first step would be for companies to enact an internal course of action that regulates the dissemination of advertisements directed at children.

The next step would be for regulatory agencies like the ICC, the FTC, and the Food and Drug Administration (FDA) to be more proactive in assuring that food companies comply with established rules. Companies that advertise their food and beverage products to children should have a written policy about non-deceptive marketing to young viewers and this policy should be available to the public with a redaction of confidential company information. Companies who routinely violate established agency guidelines should be required to join the Council of Better Business Bureau’s Food and Beverage Advertising Initiative (FBAI). FBAI publishes clearly identified member policies available for public viewing and also monitors member compliance.<sup>145</sup> This would not only facilitate compliance with existing regulations but would also reduce the overburdened regulatory agencies. If action to improve regulation in these ways is not taken then, at the very least, some effort should be made to discourage the marketing of junk food to children.

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142. Amber Healy, *96 Food Companies Receive Failing Grades for Marketing to Kids*, FOOD CHEM. NEWS, Mar. 15, 2010, at 2.

143. *Id.*

144. *Id.*

145. *Id.*

C. ELIMINATE FOOD ADVERTISING AS AN ORDINARY BUSINESS EXPENSE DEDUCTION AND PROVIDE TAX INCENTIVES FOR "HEALTHY FOOD SELECTION" MESSAGES

An alternative to directly regulating the marketing practices of the food industry would be to eliminate food advertising as an ordinary business expense that reduces overall taxable income. The corporate tax rate is currently thirty-five percent and eliminating the deductibility of food advertising expenses would be equivalent to increasing the price of advertising by approximately fifty-four percent.<sup>146</sup> It has been estimated that elimination of the tax deductibility of food advertising costs would reduce the number of fast food restaurant messages viewed on television by forty percent for children and thirty-three percent for adolescents.<sup>147</sup> The study also stated that eliminating deductibility would reduce the number of overweight children and adolescents by seven percent and five percent respectively.<sup>148</sup>

Although these declines are less significant than would be seen with a total advertising ban, a seven to eight percent reduction in the overall number of overweight youth is nonetheless noteworthy. The proposed tax policy would give corporations less incentive to saturate the media with advertisements for unhealthy foods.<sup>149</sup> Unlike a total ban on advertising, the tax proposal would permit the advertising of food products, and would presumably reduce the overall number of such communications. This may ultimately lead to a balance between advertisements for junk food and commercials that contain health conscious information, thereby providing individuals with an opportunity for education about unhealthy and healthy food choices alike. Further, tax incentives for food marketing of "healthy food selection" would benefit both the food marketer and the ultimate consumer. This would be especially beneficial to adults who take time to ensure that their children are learning the truth about the products they

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146. Chou et al., *supra* note 129, at 616.

147. *Id.*

148. *Id.*

149. Although this proposal would also be financially demanding on companies who promote healthy food, research has proven that little revenue is dedicated to advertisements for nutritious foods. *See* Kunkel & Gantz, *supra* note 5, at 143 (showing the percentage of broadcast food advertising that is on non-nutritious foods). Thus, any negative impact on health food advertisers would be minimal.

see advertised on a daily basis. Along these lines, it is essential to remember that parents possess significant influence over a child's awareness of proper nutritional habits.

#### D. CONGRESSIONAL ACTION

Congress directed the FTC in cooperation with the FDA, the Centers for Disease Control and Prevention, and the United States Department of Agriculture, to create an Interagency Working Group (Working Group) consisting of federal nutrition, health, and marketing specialists.<sup>150</sup> The Working Group found that in 2006, the food industry spent over \$1.6 billion in marketing "empty calorie foods";<sup>151</sup> that is, foods high in caloric value and low in nutritional content. Further, according to the Working Group, parents believe "TV ads promoting junk food" are a prime contributing factor in the childhood obesity problem.<sup>152</sup>

The Interagency Working Group issued a Proposal on Food Marketing to Children (Food Marketing Proposal) in Spring 2011.<sup>153</sup> The Food Marketing Proposal acknowledged that childhood obesity remains a serious health issue. Keeping this acknowledgment in the forefront, the Working Group developed principles to assist industry with voluntarily marketing "healthy message" specifically geared to children ages two to seventeen.<sup>154</sup> The principles are directed so that children are able to choose: healthy foods that contain limited amounts of saturated fat, trans fat, added sugars, and sodium. Specifically the Working Group Proposal delineated two sound principles as follows:

"Principle A: Meaningful Contribution to a Healthful

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150. See, e.g., William Zale, *Interagency Group Proposes Principles for Marketing Food to Children*, TRADE REG. TALK (May 4, 2011, 11:18 A.M.), <http://traderegulation.blogspot.com/2011/05/interagency-group-proposes-principles.html>.

151. *Food for Thought: Interagency Working Group Proposal on Food Marketing to Children*, FED. TRADE COMMISSION, <http://www.ftc.gov/os/2011/04/110428foodmarketfactsheet.pdf> (last accessed May 27, 2011).

152. *Id.*

153. *Id.*

154. *Id.*

Diet”<sup>155</sup> and “Principle B: Nutrients with Negative Impact on Health or Weight.”<sup>156</sup>

The Working Group Proposal considers 2016 as the date for these principles to fully become effective. Will the Interagency “Food Marketing Proposal” solve these issues? The answer is “it depends.” It depends on a concerted cooperative effort in the part of industry, the government and adults who care for children. Perhaps there are more questions raised by these principles. However, now it really is up to industry to step up to the plate.

#### E. INCREASE LEVELS OF ADULT INVOLVEMENT

When casting the blame for childhood obesity on producers of food advertisements and the regulatory agencies that govern them, it is important to remember that parents arguably have the most significant role in influencing their children’s eating habits. As one might expect, children of parents who consume junk food on a regular basis typically develop similar eating habits themselves. Children model parental behavior at a young, impressionable age and often carry childhood habits into adulthood. Research has revealed that children whose parents consume unhealthy foods on a regular basis are likely to establish poor habits of their own, typically resulting in consumption of excess amounts of sugar and fat.<sup>157</sup> Similarly, children whose parents have healthy eating habits also adopt these healthy eating habits.<sup>158</sup> Thus, it is imperative that parents or caregivers recognize the impact that leading by example has on children. Sometimes even seemingly minor

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155. The marketing messages should include foods from the following categories: Fruits, Vegetables, Whole grains, Fat-free or low-fat (1%) milk products, Fish, Extra lean meat or poultry, Eggs, Nuts and seeds, and Beans. *Id.*

156. The Working Group recommends that foods marketed to children should not contain more than the following amounts of saturated fat, trans fat, sugar, and sodium: (1) Saturated Fat: one gram or less per RACC (“reference amount customarily consumed” per eating occasion and is not necessarily the same as the labeled serving size) and fifteen percent or less of calories; (2) Trans Fat: zero grams per RACC; (3) Added Sugars: No more than thirteen grams of added sugars per RACC; (4) Sodium: No more than 210 milligrams per serving. *Id.*

157. Maureen M. Black & Kristen M. Hurley, *Helping Children Develop Healthy Eating Habits*, ENCYCLOPEDIA ON EARLY CHILDHOOD DEVELOPMENT (2007), available at [http://www.child-encyclopedia.com/pages/PDF/Black-HurleyANGxp\\_rev-Eating.pdf](http://www.child-encyclopedia.com/pages/PDF/Black-HurleyANGxp_rev-Eating.pdf).

158. *Id.*

dietary habits (e.g., drinking water and juice rather than soda or eating with the television off) can have a significant impact on a child's nutritional awareness.

Many websites, such as Kidnetic have adopted these simple yet effective strategies in taking a different approach to the childhood obesity problem.<sup>159</sup> Kidnetic promotes a non-commercial, healthy eating, and active living website for children and their families.<sup>160</sup> The website provides healthy family recipes that children can make with their parents and features interactive games such as fitness challenges and scavenger hunts.<sup>161</sup> This approach not only promotes physical activity and nutrition as a solution to reduce the obesity epidemic, but also encourages cooperation amongst families.

Along these lines, the House of Representatives recently introduced legislation which would amend the *National School Lunch Act* through the *Improving Nutrition for America's Children Act*, which emphasizes, in part, the roles of interactive media and parental involvement in children's nutritional education and awareness.<sup>162</sup> Section 221 of this proposed law provides that, in the context of wellness promotion, the Secretary of Agriculture is required to encourage adherence to age-appropriate electronic media use by children in regard to wellness promotion.<sup>163</sup> The focus on "age-appropriate" use suggests that young children are incapable of processing and understanding certain types of content they receive from electronic media. The proposed legislation also stresses the importance of parental involvement by requiring the Secretary to encourage parental engagements in nutrition and wellness initiatives for children.<sup>164</sup> The emphasis on parental involvement indicates that parents have more direct influence over a child's nutritional well-being than any state or federal entity. This legislative proposal demonstrates the meaningful

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159. KIDNETIC, <http://kidnetic.com> (last visited Feb. 16, 2011); see also Rothberg, *supra* note 113, at 213.

160. KIDNETIC, *supra* note 159.

161. KIDNETIC, *supra* note 159.

162. Improving Nutrition for America's Children Act, H.R. 5504, 111th Cong. (2010).

163. *Id.* at § 221(u)(B)(iii).

164. *Id.* at § 221(u)(B)(iv).

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impact that media can have on a child's food preferences and, more importantly, the role that parents can have in shaping their children's nutritional awareness. The question remains whether parents will recognize their ability to shape the dietary practices of their children.

Despite the growing concern over children's eating habits, some parents contribute to their children's unhealthy dietary practices by permitting television viewing during meals. One study found that approximately one-third of all households with children under age six eat dinner with the television on.<sup>165</sup> The study stated that families who eat while watching television consume fewer healthy foods like fruits and vegetables and more foods with minimal nutritional value such as chips, candy and soda.<sup>166</sup> The practice of eating junk food while watching television can transcend family mealtime and become a routine unhealthy habit for children. Given the role that parents and caregivers have in a child's decision to consume unhealthy foods while watching television, it is difficult to pin the blame for these habits solely on companies that advertise junk food products. However, the ability of television viewing to influence the amount of junk food consumed by children is practically indisputable, as is the lack of corporate accountability maintained by food advertisers. Since advertisers will not take responsibility for the messages they disseminate to children, parents and caregivers must step up as the last line of defense between their children and deceptive advertising.

#### VIII. CONCLUSION

Although research has not proven a definitive link between viewing food advertisements and childhood obesity, it is reasonable to infer that a strong correlation exists between advertisements and children's eating habits. The evidence, in the form of various studies and reports, overwhelmingly suggests that what children watch on television has a direct and immediate impact on their dietary practices. Children are more easily influenced by attention-getting marketing devices than adults and are less capable of comprehending the health consequences of junk food consumption. Whether it is through

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165. Fitzpatrick et al., *Positive Effects of Family Dinner Are Undone by Television Viewing*, 107 J. AM. DIETETIC ASS'N 666, 668 (2007).

166. *Id.*

the promise of a free toy, promotion by a cartoon character, or some other visual or auditory stimuli, advertisers of food products forge ahead to create brand name recognition among young viewers without considering the potential long term physical consequences. This type of brand association causes children to crave and demand certain food products without regard to nutritional content. Rather than attempting to promote healthy eating habits to a young, impressionable audience, food advertisers are taking advantage of children's cognitive limitations by encouraging junk food consumption as part of a normal lifestyle.

Although there are federal and even state enforcement rules in place that intend to regulate the dissemination of advertisements to children, these rules are rarely enforced, providing advertisers with free reign over the messages they communicate to American youth. Absent an emphasis on conformity with ethical standards and commercial rules, will food advertisers continue to bombard children with misleading and deceptive messages? Without consistent regulation of food advertising or adult intervention, children will continue to believe that products they see on television are part of a healthy diet. It is for this reason that the ICC, FTC, and other groups must strive to enforce existing advertising guidelines in a consistent and strict manner. These agencies have, however, failed to enforce established rules. It is clear that further governmental intervention is necessary.

However, it is important to remember that while changes in advertising may help quell the issues of nutritional disregard, parents and caregivers must proactively mold their children's eating habits and overall nutritional awareness. Manufacturers cannot be solely responsible for reclaiming a healthy nation, unless and until parents are willing to teach their children appropriate dietary practices. All of the key players must recognize the role they play in the lives of children and make every effort to properly educate the youth of America on proper nutritional habits and exercise. Without the concerted efforts of parents, caregivers, educators, community, and food advertisers, the need for governmental regulation of food advertisements directed at children will remain constant. Now is the time to act before it is simply too late.