

Advertising and Childhood Obesity: The Role of the Federal Government in Limiting Children’s Exposure to Unhealthy Food Advertisements

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I. INTRODUCTION

Children are inundated with advertising for foods of poor nutritional quality, watching approximately 4,000 food-related advertisements per year in the United States, ninety-eight percent of which feature products that are high in fat, sugar, or sodium.¹ Exposure to such advertisements has been shown to influence the food preferences, purchase requests, and dietary intake of children aged two to eleven.² One in seven children between the ages of two and eleven are currently obese.³ Obese children are more likely to develop serious health conditions, such as high blood pressure, asthma, cardiovascular disease, and type 2 diabetes.⁴ With hospitalizations of children for obesity-related illnesses on the rise, the annual direct cost of childhood obesity is reaching nearly \$14.3 billion.⁵ Despite these statistics, television advertisements for unhealthy foods continue to be aired during children's programming.

The federal government has recognized that childhood obesity is a problem that must be addressed. Although the Joint Task Force on Media and Childhood Obesity and the Interagency Working Group on Food Marketed to Children were launched with good intentions, they have not helped to reverse the trend in childhood obesity.⁶ Furthermore, industry

1. *The Facts on Junk Food Marketing and Kids*, PREVENTION INST., <http://preventioninstitute.org/focus-areas/supporting-healthy-food-a-activity/supporting-healthy-food-and-activity-environments-advocacy/get-involved-were-not-buying-it/735-were-not-buying-it-the-facts-on-junk-food-marketing-and-kids.html> (last visited Mar. 1, 2014).

2. COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN & YOUTH, *FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY?* 379 (J. Michael McGinnis et al. eds., 2006), available at http://www.nap.edu/openbook.php?record_id=11514&page=379.

3. CHERYL D. FRYAR ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, *PREVALENCE OF OBESITY AMONG CHILDREN AND ADOLESCENTS: UNITED STATES, TRENDS 1963–1965 THROUGH 2009–2010*, at 1 (Sept. 2012), available at http://www.cdc.gov/nchs/data/hestat/obesity_child_09_10/obesity_child_09_10.pdf.

4. ELLEN-MARIE WHELAN ET AL., CTR. FOR AM. PROGRESS, *CONFRONTING AMERICA'S CHILDHOOD OBESITY EPIDEMIC: HOW THE HEALTH CARE REFORM LAW WILL HELP PREVENT AND REDUCE OBESITY 1* (May 2010), available at http://www.americanprogress.org/wp-content/uploads/issues/2010/05/pdf/childhood_obesity.pdf; CTRS. FOR DISEASE CONTROL & PREVENTION, *OBESITY AT A GLANCE: HALTING THE EPIDEMIC BY MAKING HEALTH EASIER 2* (Feb. 2009), available at <http://www.cdc.gov/nccdphp/publications/AAG/pdf/obesity.pdf>.

5. WHELAN ET AL., *supra* note 4, at 1; Ross A. Hammond & Ruth Levine, *The Economic Impact of Obesity in the United States*, 3 *DIABETES, METABOLIC SYNDROME & OBESITY: TARGETS AND THERAPY*, 2010, at 285, 287.

6. *Watch What You Eat: Food Marketing to Kids: Joint Hearing Before the Subcomm. on Labor, Health & Human Servs., Educ., & Related Agencies and the Subcomm. on Fin. Servs. & Gen. Gov't. of the Comm. on Appropriations*, 110th Cong. 15 (2008) [hereinafter *Watch What You Eat*], available at <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg47517/pdf/CHRG-110shrg47517.pdf>; *Food Industry Braces for New Study on Marketing to Kids*, ABC NEWS (Sept. 24, 2012, 1:51 PM), <http://abcnews.go.com/blogs/business/2012/09/food-industry-braces-for-new-study-on-marketing-to-kids/> [hereinafter ABC NEWS].

self-regulation has been ineffective at adequately reducing the number of television advertisements featuring nutritionally poor foods.⁷ Children continue to be exposed to a large volume of commercials that advertise products containing high amounts of saturated fat, sugar, and sodium.⁸

The federal government must reevaluate its efforts to decrease the prevalence of childhood obesity. Congress should provide explicit direction to the Federal Communications Commission (“FCC”) to restrict the advertisement of unhealthy foods during children’s programming, defined in the regulations issued by the FCC pursuant to the Children’s Television Act of 1990 (“CTA”)⁹ as programs “originally produced and broadcast primarily for an audience of children 12 years old and younger.”¹⁰ Further, Congress should delegate to the Food and Drug Administration (“FDA”) the task of determining and adopting nutritional standards identifying which foods are unhealthy for consumption by children in this age group.

Part II of this Note examines the various initiatives that have been launched by the federal government in an effort to combat childhood obesity. Although the government has attempted to play a role in reducing the prevalence of childhood obesity, it must become more involved in order to make any significant progress. Part III of this Note then discusses the Children’s Food and Beverage Advertising Initiative, an attempt at industry-self regulation that has failed to considerably reduce children’s exposure to unhealthy food advertisements. Part IV of this Note surveys the measures taken by numerous European countries to reduce children’s exposure to televised advertisements of unhealthy food and then provides a closer examination of the efforts made by the governments of the United Kingdom and Québec, Canada, to achieve this goal. The success of these foreign efforts should prompt the United States government to undertake a more active role in the nation’s fight against childhood obesity.

Part V of this Note provides a brief overview of the CTA and the requirements that it imposes on broadcasters and the FCC. Following the summary of the CTA, Part VI proposes a regulation restricting the advertisement of certain food products during children’s programming as a possible solution to the childhood obesity problem. Part VII of this Note then outlines the development of the commercial speech doctrine and examines the *Central Hudson* test, the modern-day analysis used by the courts to determine whether a regulation on commercial speech is

7. DALE KUNKEL ET AL., CHILDREN NOW, THE IMPACT OF INDUSTRY SELF-REGULATION ON THE NUTRITIONAL QUALITY OF FOODS ADVERTISED ON TELEVISION TO CHILDREN 7 (Dec. 2009), available at http://www.childrennow.org/uploads/documents/adstudy_2009.pdf.

8. Lisa M. Powell et al., *Trends in the Nutritional Content of TV Food Advertisements Seen by Children in the US: Analyses by Age, Food Categories and Companies*, 165 ARCH. PEDIATR. ADOLESC. MED. 1078, 1083 (2011).

9. Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified in scattered sections of 47 U.S.C.).

10. 47 C.F.R. § 73.670 (2013).

constitutional. Finally, this Note applies the four-part *Central Hudson* test to the proposed legislation and determines that the courts will likely uphold such a regulation.¹¹

II. THE ROLE OF THE FEDERAL GOVERNMENT IN CURBING CHILDHOOD OBESITY

The federal government has acknowledged that the high incidence of childhood obesity across the nation is a problem that must be resolved. In 2006, the Joint Task Force on Media and Childhood Obesity (“Task Force”) was created to bring together the food and beverage industry, advertisers, media companies, and government officials to evaluate the effect of media on childhood obesity and to establish voluntary industry standards to reduce advertising that is directed specifically at children.¹²

Following the first meeting of the Task Force, then-Congressman Ed Markey, former Chairman of the House Subcommittee on Telecommunications and the Internet,¹³ sent a letter to FCC Chairman Kevin Martin and Commissioners Deborah Taylor Tate and Michael Copps.¹⁴ In this letter, then-Congressman Markey conveyed his concern that the Task Force and industry self-regulation may not succeed in reducing the volume of advertisements of unhealthy food products targeted at children.¹⁵ Citing to the CTA, then-Congressman Markey stated that the FCC has an “affirmative obligation and the statutory authority to examine whether placing limitations on certain food advertising to children would further the public interest.”¹⁶ According to then-Congressman Markey, the FCC should establish limits on this kind of advertising unless the Task Force and industry self-regulation result in “dramatic and swift elimination

11. Others have applied the *Central Hudson* analysis to the regulation of junk food advertising during children’s programming. However, there, the link between exposure to unhealthy food advertisements and consumption of this kind of food was largely unsubstantiated. Accordingly, the argument that a regulation restricting the advertising of junk food during children’s programming would directly advance the government’s interest in reducing childhood obesity was tenuous. See Nicki Kennedy, *Stop in the Name of Public Policy: Limiting “Junk Food” Advertisements During Children’s Programming*, 16 COMMLAW CONSPECTUS 503 (2008). This Note addresses these shortcomings below.

12. WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION 29 (May 2010), available at http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf.

13. *About Ed*, ED MARKEY, <http://www.markey.senate.gov/about> (last visited Mar. 1, 2014).

14. Letter from Edward Markey, Chairman, Subcomm. on Telecomms. & the Internet, to Kevin Martin, FCC Chairman, and Michael Copps and Deborah Taylor Tate, FCC Comm’rs 1 (Apr. 16, 2007), available at <http://www.ana.net/content/show/id/1744>.

15. *Id.* at 3.

16. *Id.*

of advertisements for junk food during children's programming." 17 Specifically, then-Congressman Markey recommended that the FCC prohibit stations from broadcasting any programming containing advertisements for unhealthy foods among its core educational programming requirements and enforce limits on the overall amount of advertisements that can be aired during children's programming.¹⁸

As then-Congressman Markey predicted in his letter, achieving the goals set by the Task Force proved to be difficult.¹⁹ While some voluntary commitments were made, ultimately the Task Force did not come to an agreement on two fundamental issues. First, the Task Force was unable to agree on uniform nutritional standards that could be used to distinguish healthy foods from unhealthy foods.²⁰ Second, no agreement was reached on the willingness of media companies to set a limit on their advertising of unhealthy foods during children's programming.²¹ Although the Task Force was not entirely successful in accomplishing its stated objectives, the fact that it was convened in the first place is significant. The establishment of this Task Force reflects acknowledgement by the federal government, media companies, and the food and beverage industry that the role of the media in contributing to childhood obesity must be addressed.

In addition to the Task Force, the Interagency Working Group on Food Marketed to Children ("Working Group") was formed pursuant to a provision of the 2009 Omnibus Appropriations Act²² to help reduce the incidence of childhood obesity.²³ The Working Group, consisting of representatives from the FDA, Center for Disease Control ("CDC"), U.S. Department of Agriculture, and the Federal Trade Commission ("FTC"), was responsible for developing recommendations for uniform nutrition standards for foods marketed to children aged two to seventeen and for determining the scope of media to which such standards should apply.²⁴ In April 2011, the Working Group released for public comment tentative voluntary standards to guide industry self-regulatory efforts in improving the nutritional content of foods that are most heavily advertised to children.²⁵ Among the Working Group's proposed restrictions were targets

17. *Id.* at 4.

18. *Id.* at 4–5.

19. *See Watch What You Eat*, *supra* note 6.

20. *Id.*

21. *Id.*

22. *See* INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, FED. TRADE COMM'N PROJECT NO. P094513, PRELIMINARY PROPOSED NUTRITION PRINCIPLES TO GUIDE INDUSTRY SELF-REGULATORY EFFORTS 1 (2011), *available at* http://www.ftc.gov/sites/default/files/documents/public_events/food-marketed-children-forum-interagency-working-group-proposal/110428foodmarketproposedguide.pdf.

23. *Id.* at 3.

24. *Id.* at 1–2.

25. *See* Press Release, Fed. Trade Comm'n, FTC Testifies About the Interagency Working Group on Food Marketed to Children (Oct. 12, 2011) [hereinafter FTC Testifies], *available at* <http://www.ftc.gov/opa/2011/10/foodmarketing.shtm>.

for limiting the amount of sodium, saturated fat, trans fat, and added sugar.²⁶ The Working Group recommended that the food industry, through self-regulatory efforts, ensure that all food products within the categories of food most heavily marketed to children meet these standards by 2016.²⁷ These limitations would apply to advertisements on television during programs where children between the ages of two and eleven years old constitute thirty percent of the audience and where adolescents from twelve to seventeen years old constitute twenty percent of the audience.²⁸

On October 12, 2011, the FTC testified about the Working Group and its own efforts to help address childhood obesity before the U.S. House of Representatives.²⁹ The FTC testified that the Working Group was considering the many comments it received and was contemplating making significant revisions to its initial proposed principals before submitting final recommendations to Congress.³⁰ However, Congress was concerned that companies would find it difficult to follow the proposed guidelines, which in its view were overly restrictive and unrealistic.³¹ Ultimately, the final guidelines were never released because the Working Group dissolved following Congress's comments.³² Nevertheless, the fact that the federal government established the Working Group as an effort to reduce the occurrence of childhood obesity is evidence of a broader sentiment that mounting childhood obesity figures constitute a national concern and that media is one of the key factors driving this trend. It is also important to note that both the Joint Task Force and the Working Group proposed industry self-regulation measures rather than government-mandated restrictions as a way of promulgating new nutritional standards for products advertised to children.³³ Both efforts eventually encountered dead ends as a result of this approach, which prompted disagreement about whether the standards were too strict and whether companies would follow them.

Yet another attempt to raise public and government awareness of the increase in childhood obesity is First Lady Michelle Obama's nationwide *Let's Move!* initiative. Launched in February 2010, this movement is dedicated to solving the problem of childhood obesity within a generation by supporting healthy food in schools, making healthy foods accessible and

26. INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, *supra* note 22, at 11–14. Drawing from the 2010 Dietary Guidelines for Americans, the Working Group suggested that individual foods marketed to children should have at most only one gram of saturated fat, zero grams of trans fat, no more than thirteen grams of added sugars, and not more than 140 milligrams of sodium. *Id.*

27. *Id.* at 14–15. Foods most heavily marketed to children include breakfast cereals, carbonated beverages, restaurant foods, and snack foods. *Id.*

28. *Id.* at 18.

29. FTC Testifies, *supra* note 25.

30. *Id.*

31. ABC NEWS, *supra* note 6.

32. *Id.*

33. *Watch What You Eat*, *supra* note 6; INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, *supra* note 22, at 14–15.

affordable, and increasing children's physical activity.³⁴ President Barack Obama established the White House Task Force on Childhood Obesity ("White House Task Force") in 2010 as part of the *Let's Move!* effort.³⁵ The objective of the White House Task Force was to develop an inter-agency plan outlining the steps that should be taken and the key benchmarks that need to be achieved in order to reduce childhood obesity figures.³⁶ In 2010, the FCC joined the White House Task Force and worked closely with the FTC, FDA, and U.S. Department of Health and Human Services ("HHS") to delineate this plan in a May 2010 Report to the President.³⁷ The goal is to reduce the childhood obesity rate to 5% by 2030,³⁸ marking a return to the rate of the late 1970s, before the incidence of childhood obesity began to steadily increase.³⁹ According to the CDC, obesity among children aged two to five increased from 5.0% to 12.1% between 1976–1980 and 2009–2010.⁴⁰ The increase in obesity has been even more significant among children aged six to eleven; within the same time periods, obesity in this age group increased from 6.5% to 18.0%.⁴¹

The proposed recommendations of the White House Task Force focus on improving the quality of school meals, increasing the availability of healthy and affordable foods in underserved urban and rural communities, and improving health care services to prevent, control, and treat childhood obesity.⁴² The report also suggests that increased "screen time," including television viewing, is a problem that has to be addressed because it is directly associated with childhood and adult obesity.⁴³ The report recommends that guidelines of the American Academy of Pediatrics ("AAP") for television viewing be made more accessible to parents because of studies that link television viewing with dietary intake and studies that correlate television exposure with fast-food consumption in preschool-aged children.⁴⁴ The AAP recommends that children and teens "engage with entertainment media for no more than one or two hours per

34. *Accomplishments*, LET'S MOVE!, <http://www.letsmove.gov/accomplishments> (last visited Mar. 1, 2014).

35. *Presidential Memorandum – Establishing a Task Force on Childhood Obesity*, WHITE HOUSE (Feb. 9, 2010), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-establishing-a-task-force-childhood-obesity>.

36. *Id.*

37. *Media and Childhood Obesity*, FCC, <http://www.fcc.gov/guides/media-childhood-obesity> (last visited Mar. 1, 2014).

38. WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, *supra* note 12, at 10.

39. *Id.*

40. FRYAR ET AL., *supra* note 3, at 1.

41. *Id.*

42. WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, *supra* note 12, at 35, 39, 53.

43. *Id.* at 7.

44. *Id.* at 18.

day.”⁴⁵ Furthermore, parents are encouraged by the AAP to create “electronic media-free” environments in their children’s rooms, to avoid using media as an “electronic babysitter,” and to discuss viewed content with their children.⁴⁶ Echoing the advice provided by the AAP, the White House Task Force also suggests that children should be encouraged to spend less time using digital media.⁴⁷

High levels of “screen time” are also a cause for concern given that advertising can have a strong influence on children’s food preferences.⁴⁸ The report proposes recommendations on how to improve industry self-regulatory programs created to advertise healthier foods to children.⁴⁹ However, it also states that the federal government plays a key role in improving the media environment for children with respect to the marketing of foods and beverages.⁵⁰ According to the White House Task Force, the federal government’s role can and should include “[p]romulgating laws and regulations when other methods prove insufficient,” without violating the First Amendment right to free speech.⁵¹ This designation of responsibility suggests that the federal government should play a more active and direct role in curbing childhood obesity rates. One of the benchmarks of success set by the White House Task Force is to ensure that, within three years, the majority of food and beverage advertisements directed at children promote healthy foods.⁵² In 2011, the average two to eleven year old saw thirteen food and beverage ads per day that almost exclusively promoted categories of products with little or no nutritional value.⁵³ This evidence indicates that the benchmarks set by the White House Task Force may not be achieved without concrete action by the federal government.

The Joint Task Force on Media and Childhood Obesity, the Interagency Working Group on Food Marketed to Children, and the *Let’s Move!* campaign that inspired the creation of the White House Task Force on Childhood Obesity, have all attempted to address the growing rates of childhood obesity in the United States. These efforts demonstrate not only

45. *Media and Children*, AM. ACAD. OF PEDIATRICS, <http://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/Pages/Media-and-Children.aspx> (last visited Mar. 1, 2014).

46. Am. Acad. of Pediatrics, *Policy Statement—Media Education*, 126 PEDIATRICS, no. 5, Nov. 2010, at 1, 3, available at <http://pediatrics.aappublications.org/content/early/2010/09/27/peds.2010-1636.full.pdf+html>.

47. WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, *supra* note 12, at 18 .

48. *Id.* at 28.

49. *Id.* at 32.

50. *Id.*

51. *Id.*

52. *Id.* at 33.

53. YALE RUDD CTR. FOR FOOD POLICY & OBESITY, TRENDS IN TELEVISION FOOD ADVERTISING TO YOUNG PEOPLE: 2011 UPDATE 6 (May 2012), available at http://www.yale Ruddcenter.org/resources/upload/docs/what/reports/RuddReport_TVFoodAdvertising_5.12.pdf.

that childhood obesity is a nationwide problem that merits attention, but also that the federal government acknowledges that standards must be established for foods marketed to children. Unfortunately, these recent endeavors have revolved around the ability of the food and beverage industry to self-regulate. The federal government must reconsider the level of its current involvement because industry self-regulation has thus far been largely ineffective at substantially reducing the volume of televised unhealthy food advertisements targeting children.⁵⁴

III. THE INADEQUACY OF SELF-REGULATION

An example of an attempt at industry self-regulation that highlights the need for government involvement is the Children's Food and Beverage Advertising Initiative ("CFBAI"), launched in November 2006 by the Council of Better Business Bureaus in collaboration with ten food and beverage companies.⁵⁵ The CFBAI's objective is to encourage children aged two to eleven to make healthier dietary choices by advertising "better-for-you" food products.⁵⁶ Before a new uniform nutrition criteria went into effect on December 31, 2013,⁵⁷ each of the eighteen companies⁵⁸ that participates in the CFBAI had its own nutrition criteria for the products it advertises to children aged two to eleven on traditional media (*i.e.* television) and on emerging media (*i.e.* video games).⁵⁹ Although the companies had varying criteria for the amount of fat, sodium, and sugar contained in their products, the CFBAI considered all advertised foods that complied with these criteria to be "better-for-you."⁶⁰ While this was technically true, these products still had poor nutritional value.

In fact, the majority of foods that complied with the nutrition standards set by these companies are not considered healthy by the HHS.⁶¹ For example, 68.5% of all food products advertised in 2009 by participating companies are classified as "Whoa" products, which have the poorest nutritional quality under the "Go-Slow-Whoa" food rating system used by the HHS.⁶² "Whoa" products should only be consumed in small

54. KUNKEL ET AL., *supra* note 7, at 7.

55. *About the Initiative*, COUNCIL OF BETTER BUS. BUREAUS, <http://www.bbb.org/council/the-national-partner-program/national-advertising-review-services/childrens-food-and-beverage-advertising-initiative/about-the-initiative/> (last visited Mar. 9, 2014).

56. *Id.*

57. *Id.*

58. *Welcome to the Children's Food and Beverage Advertising Initiative*, COUNCIL OF BETTER BUS. BUREAUS, <http://www.bbb.org/council/the-national-partner-program/national-advertising-review-services/childrens-food-and-beverage-advertising-initiative/> (last visited Mar. 1, 2014).

59. *About the Initiative*, *supra* note 55.

60. *Id.*; KUNKEL ET AL., *supra* note 7, at 32.

61. KUNKEL ET AL., *supra* note 7, at 26.

62. *Id.* at 6. "Whoa" products are low in nutrients and highest in calories, sugar, and added fat. *See id.*

portions and “only once in a while or on special occasions.”⁶³ The 68.5% figure represents only a marginal degree of improvement from the number of “Whoa” product advertisements aired by the same companies in 2005.⁶⁴ Furthermore, advertising of healthy foods to children under the “Go-Slow-Whoa” food rating system remains “virtually invisible,” that is, almost non-existent.⁶⁵ Only 0.5% of the advertisements aired by participating companies in 2009 were for truly healthy “Go” products that are low in fat and sugar, such as whole grain breads, fruits, vegetables, and other items that can be consumed “anytime.”⁶⁶ This percentage has remained extremely low even after the launch of the CFBAI.⁶⁷

The shortfalls of the CFBAI have been analyzed using nutritional recommendations from the National Academy of Sciences.⁶⁸ A 2011 study concluded that 86% of televised food and beverage advertisements were for products high in saturated fat, sugar, and sodium.⁶⁹ This percentage was even higher among self-regulating companies.⁷⁰ The study found that 88% of CFBAI company advertisements targeting children in 2009 continued to be for products high in saturated fat, sugar, and sodium.⁷¹ Despite the pledges made by CFBAI companies to limit television advertisements featuring unhealthy items, the majority of the advertisements from all but two of the CFBAI companies were for products of poor nutritional quality.⁷² Furthermore, exposure to fast-food advertising between 2003 and 2009 increased among six to eleven year olds by 30.8%.⁷³ The increase in children’s exposure to CFBAI fast-food television advertisements was nearly as high as the increase in their exposure to non-CFBAI fast-food television advertisements.⁷⁴ Although only two fast-food restaurants—McDonald’s and Burger King—participate in the CFBAI, they account for almost half of the total fast-foods advertisements seen by children aged two to twelve.⁷⁵ The study found these results concerning in light of recent research that has revealed the poor nutritional content of fast food advertised to children.⁷⁶

Proponents of industry self-regulation argue that it is an effective alternative to governmental regulation in achieving the significant reforms

63. *Id.* at 14.

64. *Id.* at 26.

65. *Id.* at 34.

66. *Id.* at 6.

67. *Id.*

68. Powell et al., *supra* note 8, at 1080.

69. *Id.* at 1082.

70. *Id.* at 1083.

71. *Id.*

72. *Id.*

73. *Id.* at 1080.

74. *Id.* at 1082.

75. *Id.* at 1084.

76. *Id.*

needed in food advertising targeting younger children.⁷⁷ However, the credibility of these arguments is undermined by the inability of industry self-regulation efforts such as the CFBAI to significantly improve the overall nutritional quality of food and beverages in television advertisements targeting children.⁷⁸ Critics argue that any minimal improvement in the nutritional quality of these products is “occurring at a pace that does not reflect the urgency of the public health crisis the nation faces involving childhood obesity.”⁷⁹ Notably, the Institute of Medicine issued a recommendation in 2006 that endorses congressional action if voluntary industry efforts are unsuccessful in “shifting emphasis away from high-calorie and low-nutrient foods and beverages to the advertising of healthful foods and beverages.”⁸⁰

Thus far, CFBAI has not adequately reduced the number of advertisements directed at children that feature unhealthy food and beverage products.⁸¹ On December 31, 2013, however, new CFBAI-developed uniform nutrition criteria went into effect, thereby replacing the company-specific nutrition standards.⁸² These new criteria apply to ten different food groups and contain specific limitations on calories, total sugar, sodium, and saturated fat for each of the food categories.⁸³ However, approximately two-thirds of the products advertised to children by CFBAI companies in accordance with their own nutrition criteria already meet the recently established uniform criteria.⁸⁴ Although better than the prior standards, the new uniform standards will not significantly improve the nutritional quality of the products that are currently advertised during children’s programming.⁸⁵

More importantly, even though all of the member companies have pledged to comply with the uniform nutrition criteria, it remains to be seen whether they will actually implement these new standards. The CFBAI requires participating companies to submit compliance reports about covered activities, which is the sole enforcement mechanism employed by

77. KUNKEL ET AL., *supra* note 7, at 34.

78. *Id.* at 7.

79. *Id.* at 22.

80. COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN & YOUTH, *supra* note 2, at 14–15.

81. KUNKEL ET AL., *supra* note 7, at 6; Powell et al., *supra* note 8, at 1083.

82. *About the Initiative*, *supra* note 55.

83. FED. TRADE COMM’N, A REVIEW OF FOOD MARKETING TO CHILDREN AND ADOLESCENTS: FOLLOW-UP REPORT 95 (Dec. 2012), available at <http://www.ftc.gov/sites/default/files/documents/reports/review-food-marketing-children-and-adolescents-follow-report/121221foodmarketingreport.pdf>.

84. *Id.* at 96.

85. As noted above, 68.5% of all food products advertised in 2009 by participating companies were products of the poorest nutritional quality. See KUNKEL ET AL., *supra* note 7, at 6. A 2011 study found that 88% of CFBAI company advertisements targeting children in 2009 continued to be for products high in saturated fat, sugar, and sodium. See Powell et al., *supra* note 8, at 1083.

the CFBAI to ensure that the participating companies are meeting the terms of their pledges.⁸⁶ If a company does not comply with its commitments under the CFBAI after receiving notice and having an opportunity to bring its conduct into compliance, it will face expulsion from the CFBAI.⁸⁷ Expulsion from the CFBAI appears to be the only consequence of non-compliance and may not be a strong enough incentive for companies to fully adopt the new criteria, considering that participation in the CFBAI is completely voluntary. Accordingly, because of the limited progress made by the CFBAI, the federal government should take action to implement the Institute of Medicine's recommendation to decrease the prevalence of advertisements that promote unhealthy food products during children's programming. To do this successfully, the federal government should consider the programs that have been established in other countries to achieve comparable objectives.

IV. INTERNATIONAL PERSPECTIVES

A. *Overview of Efforts to Limit Unhealthy Food Advertisements in Europe*

The correlation between childhood obesity and televised advertisements for unhealthy food has also been acknowledged throughout Europe, where the governments of many countries have taken regulatory measures to either limit children's exposure to such advertisements or to decrease their effect.⁸⁸ Notably, the prevalence of childhood obesity is significantly lower than it is in the United States in countries that have taken these regulatory measures.⁸⁹ Although some of the regulations enforced in European countries are broader than the regulatory approach proposed in this Note, they signify the effectiveness of government efforts

86. *Id.*

87. ELAINE D. KOLISH ET AL., COUNCIL OF BETTER BUS. BUREAUS, THE CHILDREN'S FOOD & BEVERAGE ADVERTISING INITIATIVE IN ACTION: A REPORT ON COMPLIANCE AND IMPLEMENTATION DURING 2010 AND A FIVE YEAR RETROSPECTIVE: 2006–2011, at 37 (Dec. 2011), available at <http://www.bbb.org/us/storage/16/documents/cfbai/cfbai-2010-progress-report.pdf>.

88. See generally MARY WESTCOTT, QUEENSLAND PARLIAMENTARY LIBRARY, JUNK FOOD ADVERTISING ON CHILDREN'S TELEVISION (2009), available at <http://www.parliament.qld.gov.au/documents/explore/ResearchPublications/ResearchBriefs/2009/RBR200907.pdf>; WORLD HEALTH ORG., REGIONAL OFFICE FOR EUROPE, MARKETING OF FOOD HIGH IN FAT, SALT AND SUGAR TO CHILDREN: UPDATE 2012-2013 (2013) [hereinafter MARKETING OF FOOD HIGH IN FAT], available at http://www.euro.who.int/__data/assets/pdf_file/0019/191125/e96859.pdf.

89. See ORG. FOR ECON. CO-OPERATION AND DEV., OBESITY UPDATE 2012, at 7 (2012), available at <http://www.oecd.org/health/49716427.pdf> (finding that the percentage of overweight and obese children in the United States is much higher than in countries such as Norway, France, and Sweden, where governments have been actively involved in limiting children's exposure to unhealthy food television advertisements).

to combat the childhood obesity epidemic and thus serve as useful examples for the United States.

For instance, under Norway's Broadcasting Act, "[a]dvertisements may not be broadcast in connection with children's programmes, nor may advertisements be specifically directed at children."⁹⁰ Regulations issued by the Norwegian government further elaborate on this provision by stipulating that advertisements cannot be broadcast ten minutes "directly before or after children's programmes."⁹¹ Similarly, television advertisements directed at children who are under twelve years old have been banned in Sweden since 1991.⁹² Regulations targeting unhealthy food advertisements specifically have been adopted in countries such as Ireland, where candy and fast food television commercials are banned.⁹³ Furthermore, rising levels of childhood obesity motivated the French government to take action against unhealthy food advertisements in 2004, mandating that advertisements on television and radio "for beverages containing added sugar, salt or artificial sweeteners" must contain health information.⁹⁴ In 2007, the French government issued a decree that defined the kind of health information that must be included in these messages; four short messages, including "for your health, exercise regularly" and "for your health, avoid eating too many foods that are high in fat, sugar, or salt," are shown on horizontal bands during television advertisements of foods containing added sugar, salt or artificial sweeteners.⁹⁵ To ensure that companies include these public health warnings in such television advertisements, the government requires noncompliant companies to pay a fine of 1.5% of their total advertising budget.⁹⁶

The considerable efforts made by many European countries to decrease children's exposure to unhealthy food advertisements demonstrate their commitment to battling childhood obesity. In June 2013, the World Health Organization Regional Office for Europe ("WHO/Europe") called on *all* member states in the European region to adopt stricter controls on

90. *Act No. 127 of 4 December 1992 Relating to Broadcasting*, KULTURDEPARTEMENTET § 3-1 (Sept. 2005), available at http://www.regjeringen.no/nb/dep/kud/dok/lover_regler/reglement/2005/broadcasting-act-.html?id=420612.

91. SISSEL L. BECKMANN, NORWEGIAN MINISTRY OF HEALTH AND CARE SERVS., REGULATION ON FOOD MARKETING AND ADVERTISING TO CHILDREN: REGULATIONS IN NORWAY 7 (June 17, 2010), available at http://www.naos.aesan.msssi.gob.es/naos/ficheros/estrategia/IV_Convencion/Sissel_Beckmann.pdf.

92. WESTCOTT, *supra* note 88, at 22.

93. Marian Burros, *Eating Well: It'd Be Easier if SpongeBob Were Hawking Broccoli*, N.Y. TIMES (Jan. 12, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9A05EFDD1638F931A25752C0A9639C8B63>.

94. Rhonda Jolly, *Marketing Obesity? Junk Food, Advertising and Kids* 39 (Parliament of Austl., Parliamentary Library, Social Policy Section, Research Paper No. 9, Jan. 12, 2011), available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1011/11rp09#_ftnref163.

95. *Id.*

96. *Id.*

the marketing to children of foods that are high in saturated and trans fats, sugar and salt.⁹⁷ In its report, entitled *Marketing of Foods High in Fat, Salt and Sugar to Children: Update 2012-2013*, WHO/Europe states that the advertisement of unhealthy food and beverage products “is now widely recognized in Europe as a significant risk factor for child obesity and for the development of diet-related noncommunicable diseases.”⁹⁸ WHO/Europe’s push for more government action to institute specific advertising regulations restricting the marketing of unhealthy food to children signifies not only that eliminating childhood obesity is a global challenge, but also that industry self-regulation is not a viable option.

B. A Closer Look: The United Kingdom and Québec

The United Kingdom and Québec have also implemented government regulations restricting the advertisement of certain food products to children. The results of the efforts in the United Kingdom and Québec demonstrate that such governmental regulation has the potential to be effective in helping to decrease the incidence of childhood obesity in the United States—directly contradicting the recent efforts at industry self-regulation that have had little benefit. Childhood obesity is a global concern and examining the success of other countries in reducing the prevalence of this problem may strengthen support for government regulation in the United States.

1. United Kingdom

The Office of Communications (“Ofcom”) is the regulator of radio, television, wireless communications, and telecommunications services in the United Kingdom.⁹⁹ In 2004, after conducting extensive research, Ofcom concluded that television advertising had a direct effect on children’s food choices.¹⁰⁰ Consequently, Ofcom recommended that rules for broadcast advertising be implemented to address childhood obesity.¹⁰¹ Following an additional period of analysis, Ofcom announced a ban on advertisements featuring products high in fat, salt, or sugar during programs whose target audience includes a twenty percent over-representation of children and

97. *Lax Marketing Regulations Contribute to Obesity Crisis in Children*, WORLD HEALTH ORG. REGIONAL OFFICE FOR EUROPE (June 18, 2013), <http://www.euro.who.int/en/what-we-publish/information-for-the-media/sections/latest-press-releases/lax-marketing-regulations-contribute-to-obesity-crisis-in-children>.

98. MARKETING OF FOOD HIGH IN FAT, *supra* note 88, at 1.

99. OFFICE OF COMMUNICATIONS, TELEVISION ADVERTISING OF FOOD AND DRINK PRODUCTS TO CHILDREN: FINAL STATEMENT 1 (Feb. 22, 2007), *available at* http://stakeholders.ofcom.org.uk/binaries/consultations/foodads_new/statement/statement.pdf.

100. *Id.* at 2.

101. *Id.*

adolescents aged four to fifteen.¹⁰² Additionally, this ban is effective during children's airtime, defined as specific periods of time on children's channels and children's slots on other channels.¹⁰³ The UK's Food Standards Agency developed a nutrient profiling model, which is used by broadcasters to assess whether a certain product is considered to be high in fat, salt, or sugar.¹⁰⁴

In its 2010 review of the effectiveness of its restrictions on food advertising, Ofcom reported considerable reductions in children's exposure to advertisements of foods high in fat, salt, or sugar. Overall, the regulations decreased children's exposure to these products by 37% from 2005 to 2009.¹⁰⁵ The results were particularly encouraging in regards to younger children aged four to nine, who saw 52% less advertising for these foods in 2009 as compared to 2005.¹⁰⁶ Another notable result of the advertising restrictions was that they contributed to a "significant shift" from advertising unhealthy foods to advertisements featuring food and beverages low in fat, salt, or sugar.¹⁰⁷ For instance, only 22.5% of all advertising spots in 2005 were for products low in fat, salt, or sugar.¹⁰⁸ By 2009, this figure had grown to 33.1%.¹⁰⁹ Due to the progress achieved in just a few years, Ofcom decided to maintain these restrictions on television advertisements indefinitely.¹¹⁰

2. Québec

The Québec government, also concerned about the harmful influence of advertising on children's consumption decisions, introduced the Québec Consumer Protection Act in 1978.¹¹¹ Two years later, the law came into effect.¹¹² Under this law, advertisements directed partly at adults and partly at children may not be broadcast during programs whose percentage of viewers aged two to eleven represents more than fifteen percent of the total viewing audience.¹¹³ Furthermore, advertisements targeting only children may not be broadcast during any program whose percentage of viewers

102. OFFICE OF COMM'NS, HFSS ADVERTISING RESTRICTIONS: FINAL REVIEW 1, 9 n.24 (July 26, 2010), available at <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/hfss-review-final.pdf>.

103. *Id.* at 1, 3.

104. *Id.* at 1.

105. *Id.* at 5.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Tirtha Dhar & Kathy Baylis, *Fast-Food Consumption and the Ban on Advertising Targeting Children: The Quebec Experience*, 48 J. MKTG. RESEARCH 799, 801 (2011).

112. *Id.*

113. *Id.*

aged two to eleven is more than five percent of the viewing audience.¹¹⁴ Although this law applies to both traditional and electronic media, its enforcement has mostly focused on television.¹¹⁵

The impact of the Québec Consumer Protection Act was recently evaluated in a study that used the fast food product category to measure the law's effect on household consumption.¹¹⁶ The study found that the advertising ban imposed by the Act had a "statistically significant effect on fast food consumption at the household level."¹¹⁷ The ban decreased the probability of fast food purchase incidence by thirteen percent per week.¹¹⁸ Annually, this amounted to a considerable reduction in fast food calories consumed in French-speaking Québec households with children; between 13.4 and 18.4 billion fewer fast-food calories were estimated to have been consumed in these households due to the drop in fast food purchases.¹¹⁹ Furthermore, during the study period, French-speaking households with children were "significantly less likely" to purchase fast food if they lived in Québec than if they lived in Ontario, which does not have a similar advertising ban.¹²⁰ The study also indicated that the Act might continue to affect purchasing behavior as children become adults.¹²¹ Specifically, a French-speaking young adult living in Québec was thirty-eight percent less likely to purchase fast food in a given week than if she lived in Ontario.¹²² Considering these results, the ultimate conclusion of the study was that a ban on advertising targeting children such as the one enacted in Québec "can be effective in lowering or moderating consumption."¹²³

The success of these foreign regulations should motivate the United States government to reconsider its approach in combating the childhood obesity epidemic. Unlike industry self-regulation, which has been ineffective in adequately reducing children's exposure to unhealthy food advertisements, government regulation has proven to be successful internationally.¹²⁴ In addition to the United Kingdom and Québec, the

114. *Id.*

115. *Id.* Finally, The criteria used for determining when an advertisement targets children consists of three factors: (1) the "nature and intended purpose" of the advertisement, which is established by evaluating whether the product is consumed primarily by children; (2) the aspects of the advertisement, such as whether it uses fantasy, magic, or children-specific adventure are considered; and (3) the time the advertisement is shown and the place in which it is shown. *Id.*

116. *See generally id.*

117. *Id.* at 810.

118. *Id.*

119. *Id.*

120. *Id.* at 809–10. It is primarily French-speaking children who are affected by the Québec ban, while English-speaking children—who have greater access to media from the neighboring U.S. states and Canadian provinces—are less affected. *Id.*

121. *Id.*

122. *Id.* at 809.

123. *Id.* at 811. Notably, Québec has one of the lowest childhood obesity rates in Canada despite the fact that its children have very sedentary lifestyles. *Id.*

124. *See discussion supra* Part IV.

governments of countries such as Norway, Sweden, Ireland, and France have also placed restrictions on food advertising to children.¹²⁵ As childhood obesity rates continue to increase and more children are diagnosed with serious illnesses, the United States government should consider joining these countries in enacting legislation with the goal of reducing the prevalence of childhood obesity.

V. THE CHILDREN'S TELEVISION ACT

The United States government demonstrated a willingness to regulate some aspects of advertising during children's programming by enacting the Children's Television Act in 1990 to increase the amount of informational and educational programming available on television for children.¹²⁶ The CTA imposes requirements on broadcasters and cable operators and instructs the FCC to enforce these requirements. Broadcasters and cable operators must limit the duration of advertising during children's programming to no more than 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays.¹²⁷ Although the CTA contains these specific limitations on the length of advertising during children's programming, it does not impose any content restrictions on the commercials that are aired. It does instruct the FCC to "prescribe standards applicable to commercial television broadcast licensees with respect to the time devoted to commercial matter in conjunction with children's television programming."¹²⁸ This is a positive grant of authority to the FCC to "enforce the obligation of broadcasters to meet the educational and informational needs of the child audience."¹²⁹

The FCC subsequently issued regulations pertaining to commercial limits in children's programming¹³⁰ and educational and information programming for children.¹³¹ However, the FCC's regulations do not impose any restrictions on the content of television advertisements shown during children's programming, defined by the FCC as "programs originally produced and broadcast primarily for an audience of children 12 years old and younger."¹³² While this definition of children's programming is currently used in the context of FCC regulations restricting the duration of advertisements, in the future it should also be used by the FCC to

125. *Id.*

126. *See Children's Educational Television*, FCC, <http://www.fcc.gov/guides/childrens-educational-television> (last visited Mar. 1, 2014).

127. 47 U.S.C. § 303a(b) (2006); 47 C.F.R. § 76.225(a) (2013); 47 C.F.R. § 73.670(a) (2013).

128. 47 U.S.C. § 303a(a) (2006).

129. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990).

130. 47 C.F.R. § 73.670 (2013); 47 C.F.R. § 76.225 (2013).

131. 47 C.F.R. § 73.671 (2013).

132. 47 C.F.R. § 73.670 (2013).

enforce limits on the content of advertisements during this kind of programming.

VI. PROPOSED SOLUTION

In spite of attempts by the federal government and the food and beverage industry to help resolve the problem of childhood obesity, obesity rates among children aged two to nineteen have been steadily increasing since the 1970s.¹³³ The most significant increase in obesity has been among children aged six to eleven; between 1976–1980 and 2009–2010, obesity increased from 6.5% to 18.0% in this age group.¹³⁴ This upward trend in obesity rates has also been observed in younger children aged two to five.¹³⁵ Specifically, obesity within this age group increased from 5.0% to 12.1% during the same time frame.¹³⁶

Rather than relying on voluntary commitments made by food and beverage companies, the federal government should be more assertive in trying to decrease the incidence of childhood obesity.¹³⁷ The fact that the governments of other countries are actively involved in reducing commercial advertisements that increase childhood obesity should send a strong message to the United States that its government should commit to doing the same. While the federal government does not have to replicate the measures taken by the governments of the United Kingdom and Québec, the regulations adopted by these governments may serve as useful guidelines.

First, Congress should provide explicit direction to the FCC to restrict the advertisement of unhealthy foods during children's programming. The CTA as well as the FCC regulations promulgated in accordance with the CTA already impose limits on the amount of commercial matter that can be aired during children's programming.¹³⁸ However, neither the CTA nor the FCC regulations contain any restrictions on the content of the advertisements shown during children's programming, defined by the FCC as programs "originally produced and broadcast primarily for an audience of children 12 years old and younger."¹³⁹ Following Congress's mandate, the FCC should use its own definition of children's programming as the standard in restricting the advertisement of unhealthy foods. The role of the FCC is comparable to

133. WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, *supra* note 12, at 4.

134. FRYAR ET AL., *supra* note 3, at 1.

135. *Id.*

136. *Id.*

137. Voluntary self-regulation has proven to be largely ineffective in reducing children's exposure to unhealthy food advertisements. *See* discussion *supra* Part III.

138. 47 U.S.C. § 303a(b) (2006); 47 C.F.R. § 756.225 (2013); 47 C.F.R. § 73.670(a) (2013).

139. *See* 47 C.F.R. § 73.670 (2013).

that of Ofcom, which issued rules for broadcast advertising to address childhood obesity in the United Kingdom.¹⁴⁰

Second, Congress should delegate to the FDA the task of adopting nutritional standards identifying which foods are unhealthy for consumption by children between the ages of two and eleven. The Food Standards Agency in the United Kingdom was responsible for developing nutritional guidelines that are now used by broadcasters to determine whether a specific food product is high in sugar, fat, or salt.¹⁴¹ As its sister agency in the United States, the FDA should have the same responsibility to determine what constitutes unhealthy food advertisements. Therefore, Congress should require the FDA to conduct an inquiry or a rulemaking to determine the criteria that should be used for classifying healthy and unhealthy foods.

Based on the experiences of countries such as the United Kingdom,¹⁴² collaboration between the FCC and the FDA is likely to be successful in helping to address the problem of childhood obesity. Thus far, the federal government has played a passive role in reducing the prevalence of childhood obesity.¹⁴³ Likewise, voluntary self-regulation efforts have not significantly decreased children's exposure to food advertisements featuring food products of poor nutritional quality.¹⁴⁴ Therefore, the federal government must consider other alternatives. The legislation proposed above is one viable option. Because it will most likely be challenged on First Amendment grounds, the next sections analyze the suggested legislation's constitutionality under the commercial speech doctrine.

VII. THE FIRST AMENDMENT AND REGULATIONS LIMITING COMMERCIAL SPEECH AS THEY RELATE TO RESTRICTIONS ON ADVERTISING

It is beyond dispute that advertising is a form of commercial speech—an “expression related solely to the economic interests of the speaker and its audience.”¹⁴⁵ Accordingly, any potential FCC restrictions on television advertisements for unhealthy food products implicate the relationship between commercial speech regulation and the protection of First Amendment rights. Prior to 1975, the Supreme Court held that commercial speech was not protected under the First Amendment.¹⁴⁶ However, the Court has since recognized advertisements to be a form of

140. OFFICE OF COMMC'NS, *supra* note 99, at 2, para. 1.6.

141. OFFICE OF COMMC'NS, *supra* note 102, at 48, § (b)(vi).

142. *See* discussion *supra* Part IV.B.

143. *See* discussion *supra* Part II.

144. KUNKEL ET AL., *supra* note 7, at 7.

145. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561, 563 (1980).

146. *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942).

speech with “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”¹⁴⁷ As the Court gradually developed the commercial speech doctrine, it also introduced an analytical framework for assessing whether certain regulations on commercial speech are constitutional.

A. *The Applicable Standard*

One of the most significant Supreme Court cases regarding commercial speech is *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁴⁸ In this case, Central Hudson challenged New York’s ban on promotional advertising by electrical utilities.¹⁴⁹ The ban required all electric utilities in the state to cease all advertisements promoting electricity use because there was not enough fuel to satisfy demand.¹⁵⁰ Although the New York Court of Appeals upheld the prohibition on advertising, the Supreme Court reversed the Court of Appeals’ decision and outlined a four-part analysis to be used in commercial speech cases.¹⁵¹

The first determination that must be made in a commercial speech case is whether the First Amendment protects the speech.¹⁵² To satisfy this initial test, the speech “must concern lawful activity and not be misleading.”¹⁵³ Next, the government’s interest in regulating the speech must be substantial.¹⁵⁴ If these two inquiries are satisfied, the third question is whether the regulation directly advances the governmental interest asserted.¹⁵⁵ The final part of *Central Hudson* asks whether the particular regulation is more extensive than is necessary to serve the government’s interest.¹⁵⁶

In *Central Hudson*, the speech was protected by the First Amendment because it satisfied the first part of the test, as the promotional advertising did not promote unlawful activity and was not inaccurate.¹⁵⁷ Satisfying the second step, the Court found that the government had a substantial interest in regulating promotional advertising of electric utilities.¹⁵⁸ With respect to the third part of the analysis, the Court held that

147. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

148. 447 U.S. 557 (1980).

149. *Id.* at 560.

150. *Id.* at 559.

151. *Id.* at 561, 566.

152. *Id.* at 566.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 566–67.

158. *Id.* at 568–69. The Commission offered two government interests as justifications for the ban, and the Court found that both were substantial. First, the Commission was concerned about energy conservation. *See id.* Second, the Commission was concerned that

the Commission's interest in energy conservation was directly advanced by the ban on promotional advertising because there was an "immediate connection between advertising and demand for electricity."¹⁵⁹

Finally, the Court examined whether the Commission's ban was no more extensive than necessary to further its interest in energy conservation.¹⁶⁰ The ban prohibited all promotional advertising, including information about electric devices or services that would not cause an increase in total energy consumption.¹⁶¹ The complete suppression of all promotional advertising was excessive and the Court held that the ban violated the First and Fourteenth Amendments.¹⁶² Based on the Court's reasoning in *Central Hudson* and in subsequent cases of commercial speech regulation, the last two prongs of the analysis tend to be the most contentious.¹⁶³

The Court further clarified the last element of the four-part examination in *Board of Trustees of the State University of New York v. Fox*, a case in which police arrested a sales representative for hosting a "Tupperware party" in a dormitory.¹⁶⁴ The State University of New York established a regulation that prohibited private commercial enterprises from operating on campus.¹⁶⁵ The Supreme Court acknowledged that *Central Hudson* and other decisions suggested that regulators must demonstrate that a particular regulation is the least restrictive means to advance their interest.¹⁶⁶ However, the Court clarified that it does not intend to impose such a high burden.¹⁶⁷ Instead, the Court requires a "fit that is not necessarily perfect, but reasonable" between the government's interest and the measures it takes to further this interest.¹⁶⁸ The government does not have to necessarily use the least restrictive means, so long as they are "narrowly tailored" to achieve its objective.¹⁶⁹ By refusing to enforce a least-restrictive means requirement, the Supreme Court granted more latitude to the government in commercial speech regulation.¹⁷⁰

The Supreme Court considered the four-step *Central Hudson* analysis most recently in *Lorillard Tobacco Co. v. Reilly*, where Massachusetts adopted regulations governing the advertisement of tobacco

the promotional advertising would negatively impact the fairness of the utilities' rates. *See id.*

159. *Id.* at 569.

160. *Id.* at 569–70.

161. *Id.* at 570.

162. *Id.* at 572.

163. M. Neil Browne et al., *Advertising to Children and the Commercial Speech Doctrine: Political and Constitutional Limitations*, 58 *DRAKE L. REV.* 67, 107–10 (2009).

164. 492 U.S. 469, 472 (1989).

165. *Id.* at 471–72.

166. *Id.* at 476.

167. *Id.* at 477.

168. *Id.* at 480.

169. *Id.*

170. Browne et al., *supra* note 163, at 101.

products.¹⁷¹ Only the last two parts of *Central Hudson's* analysis were at issue in that case.¹⁷² In reference to the third requirement of the test, the Court asserted that speech restrictions can be justified based solely on references to studies, history, consensus, and common sense.¹⁷³ In this case, the Court considered multiple studies and reports issued by the FDA, the Surgeon General, and the Institute of Medicine.¹⁷⁴ These materials showed rampant underage use of tobacco products and provided evidence that limiting youth exposure to advertisements featuring these products would decrease underage usage.¹⁷⁵ Consequently, the Court concluded that the state's interest in reducing the prevalence of tobacco usage by minors was directly advanced by its regulation of outdoor tobacco advertising.¹⁷⁶

Next, the Court examined whether the outdoor advertising regulation satisfied the final step of the *Central Hudson* analysis—the reasonable fit test.¹⁷⁷ The Court was primarily concerned that this regulation would, in some geographical areas, constitute “nearly a complete ban” on advertising tobacco products to adults.¹⁷⁸ The broad sweep of the regulation was problematic because use of tobacco products by adults is a legal activity and tobacco retailers have an interest in conveying information about their products to them.¹⁷⁹ Ultimately, the Court concluded that the regulation did not satisfy the fourth step of the *Central Hudson* analysis.¹⁸⁰

The commercial speech doctrine evolved significantly before and after *Central Hudson*. The first two prongs of the *Central Hudson* inquiry are easily satisfied in most cases, but the third and fourth parts of the test present challenging constitutional hurdles.¹⁸¹ Similar to the regulations previously considered by the Supreme Court, the constitutionality of a regulation restricting advertising of unhealthy foods directed at children would also be determined using the *Central Hudson* test.

B. Regulation of Unhealthy Advertisements Directed at Children as a Valid Restriction on Commercial Speech

The rising incidence of childhood obesity across the nation is alarming and has been acknowledged by the federal government as a problem that must be resolved. An FCC regulation that restricts the advertisement of unhealthy foods during children's programming would be

171. 533 U.S. 525, 533 (2001).

172. *Id.* at 555.

173. *Id.* at 555.

174. *Id.* at 559.

175. *Id.*

176. *Id.* at 561.

177. *Id.*

178. *Id.* at 562.

179. *Id.* at 564.

180. *Id.* at 561.

181. Browne et al., *supra* note 163, at 107.

subject to review under the *Central Hudson* test.¹⁸² Based on the Supreme Court's reasoning in cases where restrictions on commercial speech were at issue, it is likely that the proposed regulation will satisfy all of the requirements of the *Central Hudson* analysis.

1. Constitutionally Protected Speech and Substantial Government Interest

The analysis of the first two parts of the *Central Hudson* test rarely presents contentious legal issues. The first step of the analysis is satisfied in the present case because advertisements of unhealthy food that are directed specifically at children do not concern an illegal activity and are not misleading.¹⁸³ Unhealthy food advertisements constitute a form of commercial speech that warrants First Amendment protection.¹⁸⁴ The second step is satisfied because the federal government has a substantial interest in regulating the advertisement of unhealthy food to children.¹⁸⁵ Ensuring that children are healthy is a substantial governmental interest that is comparable to the interests asserted by state governments in *Board of Trustees, Liquormart*, and *Lorillard Tobacco*. In those cases, facilitating an educational rather than a commercial atmosphere on a university campus, promoting temperance, and combating the use of tobacco by minors were all considered to be substantial governmental interests.¹⁸⁶

Childhood obesity is a growing problem that affects children's ability to develop into healthy adults and that creates a burden on the healthcare system.¹⁸⁷ Therefore, it is in the federal government's interest to take measures to help reverse the current trend in childhood obesity rates. Overweight children are considerably more likely to become overweight adults and to suffer from poor health.¹⁸⁸ Furthermore, the annual direct cost of childhood obesity in the United States is approximately \$14.3 billion.¹⁸⁹ Therefore, in addition to maintaining a healthy population of children, the

182. 47 C.F.R. § 73.670 (2013).

183. Kennedy, *supra* note 11, at 517.

184. *Id.*

185. *Id.* at 518.

186. *See Bd. of Trs.*, 429 U.S. at 475; *see also* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996); *Lorillard Tobacco*, 533 U.S. at 555.

187. The CDC has traced an upward trend in obesity rates among children aged two to eleven. Among children aged two to five, obesity increased from 5.0% to 12.1% between 1976–1980 and 2009–2010. The increase was even more significant among children aged six to eleven. In this age group, obesity increased from 6.5% to 18.0% within the same time periods. FRYAR ET AL., *supra* note 3, at 1; WHELAN ET AL., *supra* note 4, at 3. The increase in childhood obesity rates is concerning because obesity has been linked to various illnesses. *See supra* Part II.

188. WHELAN ET AL., *supra* note 4, at 3; *see generally* AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, OBESITY IN CHILDREN AND TEENS (Mar. 2011), *available at* http://www.aacap.org/galleries/FactsForFamilies/79_obesity_in_children_and_teens.pdf.

189. Hammond & Levine, *supra* note 5, at 287.

federal government also has a substantial interest in reducing the costs associated with childhood obesity. Based on the types of governmental interests found to be substantial in *Liquormart*,¹⁹⁰ *Lorillard Tobacco*,¹⁹¹ and *Board of Trustees*,¹⁹² it is likely that maintaining a healthy population of children and reducing the costs associated with childhood obesity also constitute substantial governmental interests.

2. Regulation Directly Advances the Government Interest

Under the third prong of the *Central Hudson* analysis, the government's substantial interest must be directly advanced by the regulation. It is likely that the courts would find that the proposal discussed above directly advances the federal government's interest in helping to reduce the incidence of childhood obesity. In *Lorillard Tobacco*, the Court held that the third part of the *Central Hudson* test was satisfied because the decision to regulate advertising of tobacco products with the goal of reducing the use of these products by minors was not based on "mere 'speculation and conjecture.'"¹⁹³ Central to this conclusion were the studies relied upon by the Attorney General in defending the regulation of tobacco product advertisements.¹⁹⁴ The cited studies showed that advertising affects demand for tobacco products and plays a contributory role in a young person's decision to use cigarettes.¹⁹⁵

The Committee on Food Marketing and the Diets of Children and Youth found strong evidence that exposure to television advertising of unhealthy foods, defined by the Committee as products with high amounts of calories and low amounts of nutrients, is associated with body fatness ("adiposity") in children aged two to eleven.¹⁹⁶ Significantly, the association between advertisements of unhealthy foods and adiposity in children remains even after taking into account alternative explanations such as gender, race/ethnicity, and parent adiposity.¹⁹⁷ The study found that television advertising influences children in this age group to prefer and request unhealthy foods and beverages.¹⁹⁸ Furthermore, television advertising affects children's short-term consumption as well as usual dietary intake of such food products.¹⁹⁹

190. See 44 *Liquormart*, 517 U.S. at 490, 529.

191. See *Lorillard Tobacco*, 533 U.S. at 527–28.

192. See *Bd. of Trs.*, 429 U.S. at 475.

193. *Lorillard Tobacco*, 533 U.S. at 528.

194. *Id.*

195. *Id.*

196. COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN & YOUTH, *supra* note 2, at 187, 379.

197. *Id.* at 286, 379.

198. *Id.*

199. *Id.*

The findings of the Committee on Food Marketing and the Diets of Children and Youth have been confirmed by other organizations and studies. For example, the American Heart Association has concluded that advertising of high-calorie, low-nutrient foods is an “important causative factor in the obesity epidemic” because it contributes to a higher consumption of these foods by children.²⁰⁰ Multiple studies also have shown that reducing children’s exposure to televised advertisements of unhealthy food products would have a considerable impact on the incidence of childhood obesity.²⁰¹ A study that examined whether limiting television advertisements of unhealthy foods can reduce childhood obesity concluded that up to one in three obese U.S. children might not be obese if they were not exposed to such advertising.²⁰² Furthermore, a study focusing specifically on the effects of fast-food advertising on childhood obesity rates concluded that the number of overweight children aged three to eleven would be reduced by eighteen percent if fast-food television advertisements were completely banned.²⁰³

Another study challenged the common presumption that children gain weight because watching television is a sedentary activity.²⁰⁴ This study concluded that viewing programs with advertising content was associated with childhood obesity even when confounding variables were taken into account.²⁰⁵ Importantly, these results remained unchanged even when the researchers controlled for the child’s physical activity, the child’s amount of sleep, the mother’s body mass index, and the mother’s educational level.²⁰⁶ By contrast, viewing noncommercial television, such as educational television without in-program commercials, had “no statistically significant association with subsequent or concurrent obesity.”²⁰⁷ Therefore, the study suggested that children’s viewing of television advertisements for foods of low nutritional quality, rather than the act of watching television per se, leads to childhood obesity.²⁰⁸ Accordingly, restricting children’s exposure to television advertisements of

200. AM. HEART ASS’N, UNDERSTANDING CHILDHOOD OBESITY: 2011 STATISTICAL SOURCEBOOK 12 (2011), available at http://www.heart.org/idc/groups/heart-public/@wcm/@fc/documents/downloadable/ucm_428180.pdf.

201. J. Lennert Veerman et al., *By How Much Would Limiting TV Food Advertising Reduce Childhood Obesity?*, 19 EUR. J. PUB. HEALTH 365, 367 (2009); Shin-Yi Chou et al., *Fast-Food Restaurant Advertising on Television and Its Influence on Childhood Obesity*, 51 J. L. & ECON. 599, 615–16 (2008).

202. Veerman et al., *supra* note 201, at 367.

203. Chou et al., *supra* note 201, at 616.

204. Frederick J. Zimmerman & Janice F. Bell, *Associations of Television Content Type and Obesity in Children*, 100 AM. J. PUB. HEALTH 334, 336 (2010).

205. *Id.*

206. *Id.* “[T]he mother’s BMI was a proxy for both the diet and physical activity patterns in the household, as well as genetic factors that might influence the child’s BMI.” *Id.*

207. *Id.*

208. *Id.*

unhealthy foods is more likely to achieve a reduction in childhood obesity than is restricting how much television children view.²⁰⁹

Based on the numerous studies that have established the link between exposure to television advertisements of unhealthy foods and children's consumption habits, it is likely that reviewing courts would conclude that a proposed regulation limiting the exposure of children to such ads meets the third prong of the *Central Hudson* test. As in *Lorillard Tobacco*, the government's decision to regulate unhealthy food advertisements targeting children aged two to eleven would not be based on "mere speculation and conjecture."²¹⁰ The studies discussed above show that the federal government's interest in reducing the prevalence of childhood obesity would be directly advanced by a regulation limiting children's exposure to unhealthy food advertisements during children's programming.

3. Narrowly Tailored Standard

Reviewing courts also would likely find that the last part of the *Central Hudson* analysis—whether there is a reasonable fit between the regulation and what the government seeks to accomplish—is satisfied in the present case. Unlike the regulations at issue in *Liquormart* and *Lorillard Tobacco*, the regulation proposed above is not overly broad and would therefore satisfy the final prong of the *Central Hudson* test. As an initial matter, a number of the companies that would be subject to the regulation have already voluntarily committed to advertising "better-for-you" foods to children by participating in the CFBAI.²¹¹ Moreover, the proposed regulation is narrowly tailored because it will only apply to children's programming. Children above the age of twelve and adults would still be able to view advertisements featuring foods not in compliance with the FDA's nutritional standards during programs targeted to them. By contrast, the Court found the regulation of tobacco product advertisements in *Lorillard Tobacco* to have an unacceptably broad effect.²¹² In that case, the Court was concerned that the regulations hindered the ability of adults to view the advertisements for tobacco products and consequently found that the fourth part of the *Central Hudson* test was not satisfied.²¹³ Based on the Court's reasoning in *Lorillard Tobacco*, it is unlikely that it would find that the proposed regulation presents a similar problem, because it would not restrict food advertisements aired during general audience programming.

209. *Id.* at 337.

210. *Lorillard Tobacco*, 533 U.S. at 528.

211. *About the Initiative*, *supra* note 55.

212. *Lorillard Tobacco*, 533 U.S. at 565–66.

213. *Id.* at 561–62.

The Court in *Liquormart* also found the existence of viable alternatives to be dispositive in its analysis of the fit between the state's regulations and the governmental interest of promoting temperance.²¹⁴ After offering examples of alternate forms of regulation that could have facilitated temperance without restricting speech, the Court held that the state did not establish a "reasonable fit" and that the fourth prong of the *Central Hudson* analysis was not fulfilled.²¹⁵ The Court would likely reach the opposite conclusion in regards to a narrowly tailored regulation of unhealthy food advertisements targeting children aged two to eleven. The most likely alternative to the proposed regulation is the continuation of industry self-regulation through programs such as the CFBAI. Industry self-regulation has been touted as an effective alternative to governmental regulation in reducing the prevalence of unhealthy food advertising targeting children in this age group.²¹⁶ However, self-regulation programs such as the CFBAI have proven to be ineffective in reducing young children's exposure to televised advertisements of unhealthy food products.²¹⁷ Therefore, it is doubtful that the Court will view self-regulation as a viable alternative to achieving the federal government's objective.

Under the Court's reasoning in *Liquormart* and *Lorillard Tobacco*, the regulations proposed in this Note satisfy the fourth part of the *Central Hudson* test. As clarified in *Board of Trustees*, the means used by the government to advance its interest do not have to be the least restrictive.²¹⁸ However, there must be a "reasonable fit" between the means used by the government and the ends it seeks to achieve.²¹⁹ A regulation that restricts the advertisement of unhealthy foods during children's programming is narrowly tailored to support the federal government's effort in combating childhood obesity by reducing children's exposure to this type of advertising. Considering these factors, it is likely that the Court would find that the last part of the *Central Hudson* analysis is satisfied in the present case.

In short, based on the Court's application of the *Central Hudson* analysis in *Board of Trustees*, *Liquormart*, and *Lorillard Tobacco*, the regulation in the instant case does not abridge speech in violation of the First Amendment. The federal government has a substantial interest in regulating children's exposure to this type of advertising to reverse the current trend in childhood obesity rates, and a regulation restricting unhealthy food advertisements during children's programming directly advances this substantial governmental interest. Finally, the proposed regulation is narrowly tailored to achieve the federal government's

214. 44 *Liquormart*, 517 U.S. at 507.

215. *Id.* at 516.

216. KUNKELE ET AL., *supra* note 7, at 34.

217. *Id.* at 7, 26; Powell et al., *supra* note 8, at 1083.

218. *Bd. of Trs.*, 429 U.S. at 480.

219. *Id.* at 470.

objective. The proposed regulation will only affect the content of advertisements aired during children's programming, defined by the FCC as programs "originally produced and broadcast primarily for an audience of children 12 years old and younger."²²⁰ Children above the age of twelve and adults will still be able to view commercials featuring unhealthy foods when watching other television programs. For these reasons, the courts are likely to uphold the proposed regulations restricting the advertisement of unhealthy foods during children's programming.

VIII. CONCLUSION

Children are being inundated with unhealthy food advertisements,²²¹ which have been shown to influence young children's consumption of these products.²²² Meanwhile, childhood obesity rates in the United States are steadily increasing for children between the ages of two and eleven.²²³ Obese children are developing serious obesity-related illnesses that impede their ability to grow into healthy adults.²²⁴ The federal government and companies in the food and beverage industry have launched several initiatives to reduce children's exposure to such advertisements.²²⁵ However, these efforts at self-regulation have not led to any significant changes.²²⁶ Children are still viewing advertisements featuring unhealthy foods, and childhood obesity rates continue to climb.²²⁷ The federal government must reconsider its role in decreasing the prevalence of childhood obesity. Specifically, Congress should direct the FCC to use nutritional standards adopted by the FDA to restrict the advertisement of unhealthy foods during children's programming. Because the effect of such a regulation will be to constrain commercial speech, the constitutionality of the regulation must be assessed using the *Central Hudson* four-step analysis. The regulation proposed in this Note would pass the *Central Hudson* test. The government has a substantial interest in reducing the prevalence of childhood obesity in the United States considering the serious consequences of obesity on children's health and the direct annual cost of childhood obesity on the health care system. This substantial interest would be directly advanced by the proposed regulation because studies have shown that there is a link between exposure to unhealthy food

220. 47 C.F.R. § 73.670 n.2 (2013).

221. See *The Facts On Junk Food Marketing and Kids*, *supra* note 1.

222. COMM. ON FOOD MKTG. & THE DIETS OF CHILDREN & YOUTH, *supra* note 2; AM. HEART ASS'N, *supra* note 200.

223. FRYAR ET AL., *supra* note 3.

224. WHELAN ET AL., *supra* note 4.

225. WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, *supra* note 12; INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, *supra* note 22 at 1–2; *About the Initiative*, *supra* note 55.

226. See KUNKEL ET AL., *supra* note 7, at 6, 7, 26, 32, 34–35.

227. *Id.* at 6; Powell et al., *supra* note 8, at 1083; FRYAR ET AL., *supra* note 3.

advertisements, consumption, and adiposity. Finally, the proposed regulation is narrowly tailored because it will only restrict advertisements of unhealthy foods during children's programming.