

Can Commercials Combat Childhood Obesity? Congress Hopes So.

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I. INTRODUCTION

In 2009, Congress directed several governmental agencies to develop food marketing standards to advertising directed to children ages 17 years and younger and to determine the scope of the media to which its standards would apply.¹ An interagency Working Group composed of the Federal Trade Commission (“FTC”), Centers for Disease Control and Prevention, Food and Drug Administration and the U.S. Department of Agriculture developed these standards, which were released on December 15, 2009. The working group is seeking feedback from concerned parties before its deadline for submission to Congress on July 10, 2010. The Working Group developed three standards that food advertisers would be required to follow if Congress adopts the standards. This paper describes the Working Group’s proposed standards, past Congressional efforts to regulate food marketing and efforts targeted toward combating childhood obesity, stakeholders’ positions on the proposed standards, and ways Congress can best utilize the proposed standards.

II. FOOD MARKETING TO CHILDREN: THE INTERAGENCY WORKING GROUP’S PROPOSED STANDARDS

The Working Group proposed three standards that inform advertisers of proper food marketing targeted to children. First, foods that are part of a healthful diet may be marketed to children without meeting the other two standards.² Foods that fall under the first standard include 100% fruits, vegetables and juices, meaning no added nutritive or non-nutritive sweeteners or functional ingredients may be added to the foods, except flavoring for water, milk and yogurt.³ Under the proposed standards, foods that fail the first standard must meet both the second and third standards before they can be marketed to children.⁴ The second standard permits the food marketing of foods that provide a “meaningful contribution to a healthful diet”, and provides food marketers with two options they must meet. The food must contain either 50% of fat-free or low-fat milk or yogurt, fruit, vegetable, fish, extra lean meat or poultry, eggs,

¹ Federal Trade Commission, Centers for Disease Control and Prevention, Food and Drug Administration and the U.S. Department of Agriculture Interagency Working Group on Food Marketed to Children: Tentative Proposed Nutrition Standards, Dec. 15, 2009 (stating that the House of Representatives directed these agencies to propose standards for food marketing directed to children in the Fiscal Year 2009 Omnibus Appropriations Act (H.R. 1105)) [hereinafter Working Group].

² *Id.*

³ *Id.*

⁴ *Id.* Foods that meet both Standards II and III can be marketed to children. See also FTC Childhood Obesity Forum (1): Working Group Announces Tentative Proposed Nutritional Guidelines for Foods Marketed to Children, Consumer Advertising Law Blog, Dec. 18, 2009, available at <http://www.consumeradvertisinglawblog.com/2009/12/working-group-announces-tentative-proposed-nutritional-guidelines-for-foods-marketed-to-children-at.html>.

nuts and seeds, or beans or specific amounts of nutritional foods.⁵ The third standard regulates unfavorable dietary content, such as saturated fat, trans fat, sugar and sodium.⁶

III. CURRENT REGULATIONS

Never before has the U.S. Government regulated food marketing by restricting food marketing based on the intended consumer's age and the food's nutritional content. In fact, attempting to do so has proved to be a near deadly option for the FTC.⁷ In 1978, the FTC focused its efforts on banning all television advertising to children under eight, not because of obesity, but rather because of cavities.⁸ The resulting "KidVid" controversy led Congress to cut the FTC's funding and remove its authority to regulate advertising to children under the FTC Act's "unfair" prong; however, the FTC retains the power to regulate advertising to children under the "deceptive" prong.⁹ The deceptive claims over which the FTC retains power includes misrepresentations or practices that are likely to mislead the reasonable consumer and that are material (i.e., the claim affects the consumer's choice). However, many of the FTC's efforts protecting children against deceptive practices are focused on those activities in which parents cannot prevent their children from participating, such as making expensive 900 phone calls or from purchasing toys for their children that do not operate as advertised.¹⁰

The U.S. Government already regulates health claims on food labels that state a link between the food and a health condition or disease under the authority of the Nutrition Labeling and Education Act of 1990 ("Labeling Act").¹¹ Under the Labeling Act, the FDA analyzes

⁵ Working Group. If the food does not contain 50% of the above ingredients, then it must contain one or more of the following per Reference Amount Customarily Consumed ("RACC"): 0.5 cups fruit or fruit juice, 0.6 cups vegetables or vegetable juice, 0.75 ounces equivalent of 100% whole grain, 0.75 cups milk or yogurt or one ounce natural cheese or 1.5 ounces processed cheese, 1.4 ounces meat equivalent of fish or extra lean meat or poultry, 0.3 cups cooked dry beans, 0.7 ounces nuts or seeds, or one egg or egg equivalent. *Id.*

⁶ *Id.* The food's saturated fat content cannot exceed one gram per RACC and cannot compose more than 15% of the food's calories. Trans fat is not permitted. Added sugar cannot exceed 13 grams per RACC (Reference Amount Customarily Consumed). Sodium cannot exceed 200 milligrams per portion, but will be reduced to 140 milligrams over time.

⁷ J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, 12 GEO. MASON L. REV. 873, 879-80 (2004) (detailing the near-death of the FTC upon its investigation into food advertising directed to children: the FTC was shut down for a short period and Congress permitted FTC funding to lapse).

⁸ William C. MacLeod & Judith L. Oldham, *Kid-Vid Revisited: Important Lessons for the Childhood Obesity Debate*, 18 ANTITRUST 31, 32 (2004). The FTC also recommended a ban on sugared product advertising to children ages 8-12 and mandatory health disclosures in sugared product advertising when older children comprised a significant proportion of the audience. *Id.*

⁹ Jennifer L. Pomeranz & Lawrence O. Gostin, *Improving Laws and Legal Authorities for Obesity Prevention and Control*, 37 J.L. MED. & ETHICS 62, 63 (2009).

¹⁰ *See, e.g.*, J. Howard Beales, *supra* note 7 at 878. For example, the FTC has successfully sought consent orders for toys that did not perform as advertised; the performance could not be improved or controlled by parents. *Id.* at 874-75 (discussing the consent orders in *Lewis Galoob Toys, Inc.*, 114 F.T.C. 187 (1991); *Hasbro, Inc.*, 116 F.T.C. 657 (1993); and *Mattel, Inc.*, 79 F.T.C. 667 (1971)). Additionally, the FTC has brought several cases enforcing the Children's Online Privacy Protection Rule, which requires websites directed to children under age 13 to obtain parental consent before collecting personal information from children. *Id.* at 878. Parental consent for certain phone calls is required pursuant to the FTC's 900 Number Rule, which prohibits the advertising of 900 numbers to children under age 12 and requires parental permission from children ages 12 to 17. *Id.*

¹¹ Mara A. Michaels, Comment, *FDA Regulation of Health Claims Under the Nutrition Labeling and Education Act of 1990: A Proposal for a Less Restrictive Scientific Standard*, 44 EMORY L.J. 319, 319 (1995). However, a claim that a food is an excellent source of a vitamin or other nutrient, such as fiber, is not prohibited by the Labeling Act

health claims before they can be used in marketing schemes; however, critics denounce the FDA's evaluation as too inflexible and paternalistic.¹² When the Labeling Act was proposed, Senator Orrin Hatch optimistically announced that the legislation would encourage food companies to make healthier foods by permitting companies to present their foods' health benefits.¹³ Yet, another governmental agency, the FTC, criticized the FDA's strict standard. The FTC remarked that "withholding information from consumers where there is a substantial scientific basis for it . . . can also cause consumer harm . . ."¹⁴

IV. STAKEHOLDERS' POSITIONS AND CRITICISM OF THE FTC'S INVOLVEMENT IN THE PROMULGATION OF THE PROPOSED STANDARDS

Stakeholders, such as child advocacy groups and advertisers, weighed in on the proposed standards. Children Now, an advocacy group, released a study to the FTC claiming that industry self-regulation does not work and government standards should be implemented.¹⁵ In fact, the study states that the nutritional quality of foods marketed to children has not improved; food and beverages of poor nutritional quality predominate televised advertisements.¹⁶ Children Now petitions for regulatory intervention and "[b]old strides" to reduce the predominance of the advertising of unhealthy foods.¹⁷

However, the FTC's proposed standards have received criticism from the Association of National Advertisers ("ANA"), which contends that regulating advertising is not a solution to the childhood obesity epidemic in the United States.¹⁸ The ANA argues that this type of regulation violates food manufacturers' First Amendment rights because the proposals restrict advertising instead of implementing alternatives that do not impinge on First Amendment commercial speech rights.¹⁹ Furthermore, advertising dollars spent on television advertising by food and beverage marketers decreased even though obesity rates among children increased.²⁰ In its

because there is no link between the food and a health condition or disease. *Id.* at 323. Before the Labeling Act entered into force, claims such as these were viewed as characteristics of drugs and required safety tests and premarket approval. *Id.* at 319.

¹² *Id.* at 321. The FDA interprets the act's requirement that the health claim be supported by "significant scientific agreement" to mean that there exists significant agreement among experts that the claim is true, rather than the truth of the results of the studies. *Id.* at 321.

¹³ 136 Cong. Rec. S16, 610 (1990).

¹⁴ Comments of the Bureau of Consumer Protection and Economics of the Federal Trade Commission, submitted to the Food and Drug Administration, in Response to a Request for Comments on its Proposal to Amend the Rules Governing Food Labeling; Health Messages and Label Statements; Reproposed Rule, 55 Fed. Reg. 5176 (1990) (codified at 21 C.F.R. pt. 101).

¹⁵ See *The Impact of Industry Self-Regulation on the Nutritional Quality of Foods Advertised on Television to Children*, Children Now, Dec. 2009 (stating that "it is time for our nation's leaders to step forward and help ensure a healthy food advertising environment for our children.").

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 35.

¹⁸ Daniel L. Jaffe, Executive Vice President, Association of National Advertisers, Panel on "Advertising to Children and the First Amendment," FTC Public Forum on "Sizing Up Food Marketing and Childhood Obesity," Dec. 15, 2009, 5.

¹⁹ *Id.* at 5. See also John M. Blim, Comment, *Free Speech and Health Claims Under the Nutrition Labeling and Education Act of 1990: Applying a Rehabilitated Central Hudson Test for Commercial Speech*, 88 NW. U. L. REV. 733 (1994) (arguing that the Labeling Act is invalid under the First Amendment and the Supreme Court's commercial speech doctrine).

²⁰ Jaffe, *supra* note 18 at 7.

criticism, the ANA points to the little impact the high levels of advertising restrictions on food advertising have in places such as Sweden and Quebec.²¹

During the KidVid catastrophe in the late '70s, the *Washington Post* declared that the government was acting as a “National Nanny” and any FTC regulations would in fact make parents less responsible for their children rather than more responsible.²² Although the restrictions on advertising this time around are not drastic as the proposed restrictions introduced over thirty years ago, any new proposals will be criticized for blaming the childhood obesity epidemic on advertising instead of the complex factors that contribute to obesity.²³ One commentator remarks that an advertising ban would decrease incentive for businesses to invest in new products and provide consumers with less opportunity to learn about any new products.²⁴ Even David Clanton, the FTC Acting Chairman during the KidVid rulemaking termination, says that an ad ban, a more severe option than the proposed standards would require, cannot solve “the complex problem of obesity.”²⁵

V. CONGRESSIONAL IMPLEMENTATION OF THE PROPOSED STANDARDS

The ANA criticism should not be taken lightly in order to permit the U.S. Government to effectively work with food marketers to successfully implement a comprehensive plan to combat childhood obesity. In fact, private industry and the government should work together to combat childhood obesity. The World Health Organization and the FTC both recommend self-regulation as a key component of a regulatory scheme.²⁶ In fact, the food marketing industry already self-regulates in areas the government hopes to regulate. For example, the food marketing industry recently introduced an updated version of guidelines of the Children’s Advertising Review Unit, which is a review body that ensures food advertising compliance with its guidelines.²⁷

Currently-pending legislation can be enhanced by incorporating provisions to permit self-regulation by private industry stakeholders, such as advertisers and food manufacturers. Also, instead of creating strict advertising restrictions, Congress should reinstate the FTC’s power to regulate advertising to children under the “unfair” prong of the FTC Act.²⁸ Representative Tom Harkin has introduced legislation that would repeal this limitation.²⁹ Related legislation, introduced by Representative Jim Moran, would create the Office of Childhood Overweight and

²¹ *Id.* at 8.

²² *See Someone Does Need a Nanny*, WASH. POST, Mar. 16, 1979, at A18.

²³ *See MacLeod & Oldham, supra* note 8 at 34.

²⁴ *Id.*

²⁵ *Id.* at 35 (quoting David Clanton, “The simplistic notion that ad bans can solve the complex problem of obesity, or even make a dent, is wrongheaded and counterproductive.”).

²⁶ Corinna Hawkes, *Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006*, International Food Policy Research Institute, World Health Organization (2007); MacLeod & Oldham, *supra* note 8 at 34 (stating that when the FTC terminated the KidVid rulemaking procedure, the FTC staff commented, “voluntary initiatives may well be the most effective mechanism for addressing the concerns expressed in the proceeding.”) (internal quotations omitted). *But see supra* notes 15-17 and accompanying text.

²⁷ MacLeod & Oldham, *supra* note 8 at 3. Jaffe states that the Children’s Advertising Review Unit guidelines “were specifically updated in regard to food advertising issues to ensure that children’s food ads do not disparage healthy eating practices, do not portray children eating an excessive amount or more than the labeled serving size, and if foods are shown being consumed at meal time, they must be presented as part of a balanced meal.” Jaffe, *supra* note 18 at 3.

²⁸ Pomeranz & Gostin, *supra* note 9 at 63.

²⁹ *See Jaffe, supra* note 18 at 1.

Obesity Prevention and Treatment within the Department of Health and Human Services.³⁰ The Director of this Office would be tasked with evaluating the effectiveness of current policies and programs, identifying future needs, and implementing and carrying out a long-term, comprehensive national campaign to prevent childhood obesity and weight gain.³¹

Another House Member, Representative Dennis Kucinich, sent a “Dear Colleague” letter in October 2009 requesting support from other House Members for his proposal to “eliminate the tax deductibility of fast food and junk food advertising directed at children.”³² In his letter, Rep. Kucinich declared that eliminating this tax write-off would reduce obesity among children.³³

To be effective, the Working Group must consider all of the perspectives of the concerned parties, including advertisers, consumers and its own members. The FTC criticized the way in which the FDA analyzed health claims before the claims could be marketed under the Labeling Act; however, in the case of the regulation of food marketing directed to children, Congress ingeniously required the cooperation of the FTC and FDA, among other agencies, to create these new standards. The agencies should create standards that they can live with and that will not cause another KidVid controversy.

VI. CONCLUSION

The Working Group seeks feedback on its proposals; it announced that it is particularly interested in feedback about whether it should create separate standards for different age groups, whether it should include other food ingredients such as caffeine and non-sugar sweeteners, and whether it should also regulate the food served in chain restaurants.³⁴ The Working Group has a great deal of work to do before it can recommend effective marketing standards in the short time before July 2010. A more comprehensive approach is needed to combat childhood obesity.³⁵ The Working Group and the FTC cannot be responsible for this herculean task unless they play roles in a more holistic strategy. The FTC overhaul should be part of a comprehensive bill that gives responsibilities to different agencies. The agencies should create a committee (similar to the Office Rep. Moran recommends) with a reporting entity responsible for overseeing the implementation of legislation. The American childhood obesity epidemic needs to be addressed and combated, and needs to become a priority of not just the FTC, but all related governmental agencies.

³⁰ H.R. 4053. This legislation was referred to the House Energy and Commerce Committee’s Subcommittee on Healthy Families and Communities on January 4, 2010.

³¹ *Id.*

³² Letter from Dennis Kucinich, U.S. Representative, to all House of Representative Members, *available at* <http://ad-disclaimer.blogspot.com/>.

³³ *Id.*

³⁴ Consumer Advertising Law Blog, *supra* note 4.

³⁵ *See, e.g.,* Pomeranz & Gostin, *supra* note 9 at 64-65 (2009) (describing actions Congress should take to fill gaps in current laws to effectively combat childhood obesity, such as subsidizing domestic fruit and vegetable production for domestic consumption in the Farm Bill, requiring schools to stop relying on packaged foods and less healthy alternatives under the National School Breakfast and Lunch Programs legislation, requiring physical education under No Child Left Behind, and amending the Labeling Act to require nutrition disclosure in quick-service restaurants, among other actions).