



FOOD SECURITY
ISSUE BRIEF

The FTC Could Help Curb the Youth Obesity Epidemic by Cracking Down on the Deceptive Advertising of Unhealthy Foods During Children's Programming Hours


Introduction

Consumption of nutrient-poor food with high levels of sugar and saturated fats has led to an obesity epidemic among children in the United States, contributing to increased rates of chronic disease, early mortality risk, and negative effects on learning and development, with substantial economic and societal costs. Scientific literature is robust and consistent in finding that marketing plays a significant role in children's nutrition-related beliefs and behaviors, and that more than 80% of food and beverage advertising promotes fast food, sugary drinks, candy, and unhealthy snacks high in added sugar and fat.¹ It is time for the Federal Trade Commission to revisit its responsibility under the FTC Act to regulate the deceptive marketing of unhealthy food to children.

The Childhood Obesity Crisis in the United States

I. Childhood Obesity Statistics

Many American children consume energy-dense, nutrient-poor foods with high levels of sugar and saturated fats, leading to obesity.² Rates of childhood obesity in the United States have been steadily rising, almost tripling in the last quarter century.³ The prevalence of obesity is now 13.9% among 2- to 5-year-olds, and 18.4% among 6- to 11-year-olds.⁴ There are significant racial disparities in childhood obesity, reaching 25.8% among Hispanic children, 22.0% among Black children, 14.1% among White children, and 11.0% among Asian children.⁵ Childhood obesity rates also differ by income level: 18.9% of children in the lowest income group, 19.9% in the middle-income group, and 10.9% in



the highest income group.⁶ The likelihood of childhood obesity decreases with increasing level of education of the head of household.⁷

I. Public Health Concerns of High Sugar, High Fat Diets and Childhood Obesity

The association between obesity and other conditions makes obesity a serious public health concern. Obesity is linked to cardiovascular and digestive disease, hypertension, hyperlipidemia, diabetes, sleep apnea, poor self-esteem, and serious depression. Increased body fat also leads to an elevated risk of multiple cancers, such as breast, colon, esophageal, kidney, and pancreatic cancers.⁸

The roots of obesity-related chronic disease begin in childhood when eating preferences become ingrained. Twenty-five percent of obese children younger than 5, and 50% of obese children aged 6 to 9, are at risk of remaining obese as adults.⁹ The Centers for Disease Control and Prevention (CDC) projects that by 2050, 1 in 3 U.S. adults could have diabetes.¹⁰ Not only does childhood obesity increase the likelihood of chronic disease, morbidity, and early mortality, it has major effects on learning and development. Diets with high levels of saturated fats impair learning and memory.^{11,12}


Most popular children's food today is loaded with sugars, fat, chemicals, and sodium, often leaving children tired, unfocused, jittery—and frequently malnourished: even children consuming excess calories may not be taking in essential vitamins, nutrients, and minerals. Diets high in saturated fats and sugar, but low in essential vitamins and nutrients, have been linked to adverse psychological and psychosocial behavioral issues. For example, “[m]alnourished children ... have delays in vision, fine motors skills, language skills and personal-social skills.”¹³ Malnutrition can result in long-term neural issues in the brain, which may impact a child's emotional responses, reactions to stress, learning disabilities, and other health complications that impact a child's ability to learn.¹⁴

Childhood obesity and non-nutritious diets impose substantial economic and societal costs. Medical costs associated with diet-related disease are projected to rise between \$22 and \$48 billion per year by 2030, with a substantial portion paid for by Medicare and Medicaid.¹⁵

Advertising of Unhealthy Foods During Children's Programming Hours

I. Advertising Statistics

Food, beverage, and restaurant companies spend almost \$14 billion per year on advertising, more than 80% of which promotes fast food, sugary drinks, candy, and unhealthy snacks high in added sugar and fat: 34% for candy and snacks, 28% for cereal, 10% for fast food. They spend only 4% for dairy products, 1% for fruit juices, and less than 1% for fruits or vegetables.¹⁶ These companies target youth with more than \$1.6 billion in marketing. Food advertising represents 50% of all advertisement time on children's shows.¹⁷ The average child in the United States views 13 food ads on television each day; older children view 21 television food ads daily.¹⁸ Food companies disproportionately target



communities of color with their advertising. Black children see more than twice as many ads for sugary drinks than their White peers.¹⁹

These statistics are significant, as children are in a critical stage of development where they are establishing lifelong food habits and preferences. Nearly all foods featured in advertising targeted toward young people have high levels of calories, total fat, saturated fat, sugar, and/or sodium—*i.e.*, they are unhealthy, calorie-dense, nutrient-poor foods—and typically are nutritionally inferior to products marketed to adults.²⁰ In fact, almost three out of every four child-focused food ads are promoting unhealthy foods that contribute to the obesity epidemic.²¹

II. The Effect of Unhealthy Food Advertising on Children’s Eating Habits

Research demonstrates that food and beverage marketing influences children’s nutrition-related beliefs and behaviors. Television has been one of the highest consumed forms of media since 1998 and has the largest impact on an individual’s perception of reality and how they think. By guiding viewers through effective stimuli, television commercials can have a distinct influence on a person’s eating habits.²² For example, studies invariably show that children will choose advertised foods, and that purchase requests to parents for certain brands or categories of food reflect the frequency with which those foods are advertised.²³ Children have an exceptional ability to recall content from the advertisements they have been exposed to, and product preference occurs with as little as a single commercial exposure and strengthens with repeated exposures.²⁴

Food advertising has a broad adverse impact on children’s health as a result of increased consumption of snack foods, sugar sweetened beverages, and fast food.²⁵ Researchers have found strong associations between increases in advertising for non-nutritious foods and rates of higher body-mass indexes and childhood obesity.²⁶ In young children, for every one-hour increase in TV viewing per day, there are higher intakes of sugar-sweetened beverages, fast food, processed meat, and overall calories.²⁷ Children who watch over three hours of television a day are 50% more likely to be obese than children who watch less than two hours a day.²⁸ One study demonstrated that adolescents’ body fat percentage increased with exposure to fast food advertising on television.²⁹ Another study suggested that reduced advertising of unhealthy foods decreases average body mass index for adolescents.³⁰ More robust regulation of advertising of unhealthy foods during children’s programming hours could go a long way towards curbing the childhood obesity epidemic and related public health crisis.

The FTC Should Regulate Advertising of Unhealthy Food During Children’s Programming Hours Using a Deceptive Practices Standard

I. FTC Statutory Authority and Rulemaking and Previous Efforts

The primary role of the FTC is to protect consumers from unfair and deceptive acts and practices. To accomplish this, §18 of the FTC Act authorizes the FTC to prescribe “rules which define with



specificity acts or practices which are unfair **or** deceptive acts or practices in or affecting commerce.”

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The FTC attempted to use this power to restrict television advertising to children in 1976. The proposed rule—the “KidVid” regulation—was motivated by concerns about dental cavities in children and was based on the FTC’s determination that television advertising of sugary products to children was unfair *and* deceptive because of children’s inherent vulnerability to advertising.³² However, the food industry successfully lobbied Congress to force the FTC to abandon the KidVid rule by threatening the Agency’s funding. Soon after, Congress enacted the FTC Improvement Act of 1980, which provides that the FTC “shall not have any authority to promulgate any rule in children’s advertising . . . on the basis of a determination by the Commission that such advertising constitutes an *unfair* act or practice.”³³

Although the Agency abandoned efforts to secure a KidVid rule, the FTC made clear that the issue of advertising to children is one that should remain a public concern given the mounting scientific evidence documenting children’s distinctive vulnerability to advertising.³⁴ More than 40 years later, with childhood obesity at epidemic levels, it is time for the FTC to return to this issue and use its power to restrict ads marketing unhealthy foods to children as a deceptive practice.


II. The FTC Can Still Regulate Advertising to Children Under its “Deceptive Practices” Jurisdiction

Research on the dangers of unhealthy food advertising has exploded since FTC’s KidVid rulemaking attempt and it is time for the FTC to step back up. The FTC Improvement Act of 1980 is not a barrier to *all* regulation of children’s advertising because it only limits FTC’s ability to regulate such advertising as an “unfair practice.”³⁵ As noted above, Section 18 of the original FTC Act authorizes the FTC to prescribe “rules which define with specificity acts or practice which are unfair **or deceptive** acts or practices in or affecting commerce.”³⁶ Thus, the FTC still has authority to regulate advertising to children on the basis that it is “deceptive.” Rulemaking in the context of advertising during children’s programming hours fits well within the FTC’s deceptive practices authority.

III. Many Advertisements of Unhealthy Food Likely Meet the FTC’s Definition of a Deceptive Practice from the Perspective of a Child

The FTC’s Policy Statement on Deception lays out the Agency’s criteria for determining that a deceptive practice has occurred. Two elements must be satisfied. First, “there must be a representation, omission or practice that is likely to mislead a consumer,” analyzed from the perspective of a targeted consumer acting reasonably under the circumstances. Second, “the representation, omission or practice must be material.”³⁷

A strong case can be made that advertisements of unhealthy food viewed by children are likely to mislead them through “unconscious associations” and “subtle forms of priming or psychological



manipulation.”³⁸ Research demonstrates that children lack “the rational capacity to resist” the influence of “advertising for energy-dense, nutrient-poor food.”³⁹

The Institute of Medicine’s review of scientific literature led to the conclusion that most children do not effectively comprehend the persuasive intent of marketing messages.⁴⁰ Children “tend to accept commercial claims and appeals as truthful and accurate because they fail to comprehend the advertiser’s motive to exaggerate and embellish.”⁴¹ An analysis of 25 years of consumer socialization research on children found that an understanding of advertisers’ intent begins to emerge around seven to eight years of age.⁴² And even though older children begin to understand advertisers’ persuasive intent and to recognize bias in ads, that does not mean they are able to fend off the psychological manipulation contained in many advertisements.⁴³ Thus, modern advertising practices are likely to deceive children, satisfying the first element of the FTC’s test for whether a deceptive practice has occurred.

The deception inherent in many advertisements of unhealthy foods is also “material” from the perspective of a child. The FTC’s Policy Statement on Deception states that a material misrepresentation or act of deception is “one which is likely to affect a consumer’s conduct or decision with regard to a product or service.”⁴⁴ The marketing of unhealthy foods to children is obviously *intended* to convince them to either use their own allowance to purchase the advertised product, or to badger their parents to purchase the product—*i.e.*, to “affect” children’s conduct. And as discussed above, studies have confirmed that the advertising works. Indeed, why else would the food industry continue to spend billions in ads targeted to children?

Putting two and two together, the deceptive marketing of unhealthy products to children likely both “misleads” children and “affects” their conduct, satisfying the FTC’s criteria for identifying a deceptive practice that warrants action.

IV. FTC Regulation of Deceptive Advertising is Constitutional

Although advertising is a form of speech, the Supreme Court has ruled that speech proposing a commercial transaction is *not* protected by the First Amendment if it is false, deceptive, or misleading.⁴⁵ Speech that is “inherently” misleading can be banned outright. Speech that is “potentially” misleading can also be regulated by requiring the offending party, if feasible, to “remedy the misleading nature of the speech.”⁴⁶

There is a strong argument that the advertising of unhealthy food to children, because it targets persons who are unable to distinguish between puffery and fact, is inherently misleading. There is also a very strong fallback argument that advertising unhealthy food to children is, at a minimum, potentially misleading—and cannot be remedied by qualifying disclosures, written disclosures, or fine print, because studies make clear that young children do not comprehend the intended meaning of the most widely used disclaimers.⁴⁷



V. The FTC Should Initiate a Rulemaking Process to Gather Data Regarding the Need for Government Regulation of Deceptive Food Marketing to Children

Big Food has for decades successfully argued that the most sensible approach to the regulation of food advertising is industry self-regulation. But industry self-regulation has obviously failed: the “vast majority of food advertising seen by children continues to be for unhealthy products.”⁴⁸ In the absence of effective industry self-regulation, it is imperative for the government to step in.

The FTC should initiate a rulemaking process to gather data—starting with the studies cited in this article—regarding the need for government regulation of deceptive food marketing to children. As discussed in this article, research studies provide strong evidence that advertisements of unhealthy food are materially deceiving to children. If the Agency finds that the evidence supports government regulation of this type of advertising under the FTC Act, it should propose a rule. If the Agency determines that the current evidence is lacking in one or more ways, it should explain what those shortcomings are so that social scientists can try to fill in the gaps. What is clear is that the current system is not working. Children are being dangerously misled by the ubiquitous puffery in food advertisements, to the detriment of their health and of society.

Conclusion


Research is consistent in showing that the marketing of unhealthy food to children has a negative effect on their health and has contributed to the nation’s obesity epidemic. The FTC has an obligation under the FTC Act to prohibit deceptive marketing strategies. It is time for the agency to reconsider its hands-off approach to the regulation of food marketing to children.

SUPPORTERS



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