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**Health Matrix: The Journal of Law-
Medicine**

Volume 21 | Issue 2

2012

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Recommended Citation

Jennifer L. Pomeranz JD, MPH, *Federal Trade Commission's Authority to Regulate Marketing to Children: Deceptive vs. Unfair Rulemaking*, 21 Health Matrix 521 (2011)

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FEDERAL TRADE COMMISSION'S AUTHORITY TO REGULATE MARKETING TO CHILDREN: DECEPTIVE VS. UNFAIR RULEMAKING

Jennifer L. Pomeranz, JD, MPH[†]

ABSTRACT

Food and beverage marketing directed at children is of increasing concern to the public health and legal communities. The new administration at the Federal Trade Commission and abundant science on the topic make it a particularly opportune time for the government to reconsider regulating marketing directed at youth. This Article analyzes the Commission's authority to regulate food and beverage marketing directed at children under its jurisdiction over unfair and deceptive acts and practices to determine which avenue is most viable.

The author finds that the Federal Trade Commission has the authority to regulate deceptive marketing practices directed at vulnerable populations. Although the Commission can issue individual orders, its remedial power to initiate rules would better address the pervasiveness of modern marketing practices. The Commission does not currently have the power to regulate unfair marketing to children; however, even if Congress reinstated this authority, the Commission's authority over deceptive marketing may be preferable to regulate the-

[†] Funding for this analysis was provided by the Rudd Foundation and Public Health Law & Policy, a program of the Public Health Institute, to the Rudd Center for Food Policy and Obesity at Yale University through a Robert Wood Johnson Foundation grant.

The author earned her degrees at Cornell Law School and the Harvard School of Public Health. The author acknowledges and thanks Ted Mermin, Samantha Graff, and Angela Campbell for their valuable comments on previous drafts.

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se practices. Deceptive communications are not protected by the First Amendment and the deceptive standard matches the science associated with marketing to children. The Federal Trade Commission has the authority to initiate rulemaking in the realm of food and beverage marketing to children as deceptive communications in interstate commerce, in violation of the Federal Trade Commission Act. However, to effectuate this process, Congress would need to grant the Commission the authority to do so under the Administrative Procedures Act.

INTRODUCTION

Food and beverage marketing pervades all aspects of modern life in the United States. The extent of that directed at children is of increasing concern because of the modern childhood obesity epidemic, privacy issues and exploitive marketing practices.¹ In an effort to address this issue, the new administration added a clause to the American Recovery and Reinvestment Act which created an Interagency Working Group on Food Marketing to Children (“Working Group”).² The Working Group was directed to conduct a study and develop recommendations for food marketing standards related to children seventeen years old and younger.³ The Working Group recommended nutritional guidelines for food marketed to children aged two to seventeen are voluntary for industry to adopt.⁴ However, research in this area reveals that past efforts of food industry self regulation have not led to recognizable change.⁵ The time may be appropriate for government regulation of food marketing directed at children.

Prior to the creation of the Working Group, Congress directed the Federal Trade Commission (FTC) to report on the food and beverage

¹ See generally COMM. ON FOOD MARKETING AND THE DIETS OF CHILDREN AND YOUTH, INST. OF MED., *FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY?* (2006) [hereinafter *FOOD MARKETING*] (summarizing the Institute of Medicine’s (IOM) views on the issues that arise as a result of food and beverage marketing directed at children).

² See Omnibus Appropriations Act, Pub. L. No. 111-8, 123 Stat. 524 (2009).

³ INTERAGENCY WORKING GROUP ON FOOD MARKETED TO CHILDREN, TENTATIVE PROPOSED NUTRITION STANDARDS (2009), available at http://ftc.gov/bcp/workshops/sizingup/SNAC_PAC.pdf.

⁴ *Id.*

⁵ DALE KUNKEL ET AL., *THE IMPACT OF INDUSTRY SELF-REGULATION ON THE NUTRITIONAL QUALITY OF FOODS ADVERTISED ON TELEVISION TO CHILDREN 7* (2009), available at http://www.childrennow.org/uploads/documents/adstudy_2009.pdf (“Under self-regulation, overall improvement in the nutritional quality of foods marketed on television to children is negligible. . . . The advertising environment targeting children continues to expose them to nutritionally poor food products, contributing to the current childhood obesity epidemic.”).

marketing practices directed at youth.⁶ In response, the FTC subpoenaed forty-four food and beverage companies to gain insight into their marketing practices directed at both children and adolescents.⁷ The FTC defined children as between the ages of two and eleven and adolescents as ages twelve to seventeen.⁸ The FTC's report found that in 2006, approximately \$870 million was spent on child-directed marketing and \$1 billion on marketing to adolescents, with roughly \$300 million overlapping between the two age groups.⁹ Forty-six percent of this marketing occurred on television through commercials and product placements. Carbonated beverages, quick service restaurants and breakfast cereals "accounted for \$1.02 billion of the \$1.6 billion, or 63% of the total amount spent on marketing to youth" with other beverages, snack foods and candy making up the majority of the remaining 35%.¹⁰ The vast majority of food and beverages marketed to those under eighteen are of poor nutritional quality¹¹ and conflict with the United States Department of Agriculture's nutritional guidelines.¹²

Food and beverage (hereinafter "food") marketing frequently portrays unhealthy eating behaviors and positive outcomes from consuming unhealthy food.¹³ Although food marketing influences all ages,

⁶ Food Industry Marketing to Children Report, Orders to File Special Report, FTC Matter No. P064504, available at http://www.ftc.gov/os/6b_orders/foodmktg6b/index.shtm (last modified Aug. 7, 2007).

⁷ *Id.*

⁸ FTC, Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation ES-1 (2008) [hereinafter FTC Report], available at <http://www.ftc.gov/os/2008/07/P064504foodmktgreport.pdf>.

⁹ *Id.* at ES-1, -2.

¹⁰ *Id.* at ES-2.

¹¹ See, e.g., Marlene B. Schwartz et al., *Examining the Nutritional Quality of Breakfast Cereals Marketed to Children*, 108 J. AM. DIETETIC ASS'N 702, 702 (2008); see also Shanthy A. Bowman et al., *Effects of Fast-food Consumption on Energy Intake and Diet Quality Among Children in a National Household Survey*, 113 PEDIATRICS 112, 112-13 (2004); see generally Vasanti S. Malik et al., *Intake of Sugar-sweetened Beverages and Weight Gain: A Systematic Review*, 84 AM. J. CLINICAL NUTRITION 274 (2006) (finding that sugar-sweetened beverages are correlated with weight gain in children through study of MEDLINE publications); S. Stender et al., *Fast Food: Unfriendly and Unhealthy*, 31 INT'L J. OBESITY 887 (2007) (studying the nutritional value of fast food in thirty-five countries and finding that fast food in most countries have powerful negative effects on the human body).

¹² Ameena Batada et al., *Nine Out of 10 Food Advertisements Shown During Saturday Morning Children's Television Programming are for Foods High in Fat, Sodium, or Added Sugars, or Low in Nutrients*, 108 J. AM. DIETETIC ASS'N 673, 673 (2008).

¹³ Jennifer L. Harris, Jennifer L. Pomeranz, Tim Lobstein, & Kelly D. Brownell, *A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can Be Done*, 30 ANN. REV. PUB. HEALTH 211, 213 (2009).

marketing directed at youth is especially problematic because food preferences,¹⁴ norms,¹⁵ tastes,¹⁶ behaviors,¹⁷ and preferred portion sizes¹⁸ are established during childhood and adolescence and are very difficult to change.¹⁹

Section 5 of the FTC Act makes unlawful any unfair or deceptive act or practice in or affecting interstate commerce.²⁰ The FTC has jurisdiction over unfair and deceptive advertising that violates the Act.²¹ Due to a combination of politics, understaffing, and underfunding, the FTC has been limited to prosecuting only the most egregious violations.²² In the past, the FTC brought complaints regarding improper marketing to children against companies that advertised toys that did not perform as depicted in the commercial,²³ used cartoon characters to promote cigarettes,²⁴ induced children to call toll (i.e., 900) numbers to hear fictional characters speak,²⁵ and made unsubstantiated claims (lacking competent and reliable scientific evidence) that a food product increased the efficacy of children's minds and gave them greater recall capability.²⁶ The Commission's ability to bring these individual cases is an important tool in rectifying unfair, deceptive, false and misleading marketing practices. However, case-by-case complaints brought by the FTC to address specific practices cannot address the current overwhelming food marketing environment

¹⁴ FOOD MARKETING, *supra* note 1, at 73.

¹⁵ David S. Ludwig & Steven L. Gortmaker, *Programming Obesity in Childhood*, THE LANCET, July 17-23, 2004, at 226.

¹⁶ Thomas N. Robinson et al., *Effects of Fast Food Branding on Young Children's Taste Preferences*, 161 ARCHIVES PEDIATRIC ADOLESCENT MED. 792, 792 (2007).

¹⁷ FOOD MARKETING, *supra* note 1, at 96; *see also* Ludwig & Gortmaker, *supra* note 15.

¹⁸ Cynthia K. Colapinto et al., *Children's Preference for Large Portions: Prevalence, Determinants, and Consequences*, 107 J. AM. DIETETIC ASS'N 1183, 1188 (2007).

¹⁹ Harris et al., *supra* note 13, at 211-25.

²⁰ 15 U.S.C. § 45(a)(1) (2006).

²¹ § 45(b).

²² Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1952 n.69 (2000).

²³ *E.g.*, Ideal Toy Corp., 64 F.T.C. 297, 300 (1964).

²⁴ *See* Complaint at 50, R.J. Reynolds Tobacco Co., 127 F.T.C. 49 (1997) (No. 9285) ("The ads and promotions have as their central theme a cartoon camel sometimes referred to as "Old Joe," "Smooth Character" or as "Joe Camel". . . and other similar cartoon characters.").

²⁵ *See, e.g.*, Complaint at 426-27, Fone Telecommunications, Inc., 116 F.T.C. 126 (1993) (No. C-3432).

²⁶ *See, e.g.*, Complaint at 702-04, Campbell Mithun LLC, 133 F.T.C. 702 (2002) (No. C-4043) (describing complaint against Wonder Bread for false and misleading advertising).

that encourages children to adopt unhealthy food related beliefs and behaviors.

The FTC first attempted to restrict the advertisement of sugared products on television in the 1970s to address the public health concern of dental cavities through a rulemaking procedure termed “KidVid.”²⁷ The Commission was concerned by “young children’s limited ability to comprehend the nature and purpose of advertising,”²⁸ and the concomitant realization that children cannot balance their desire for sweets with the health effects of eating them.²⁹ Thus, the concern over both the appropriateness and impact of food marketing to which younger children were exposed led the FTC to initiate rulemaking to determine how advertising to “young children [c]ould be restricted or banned as a protective measure.”³⁰ The FTC initiated rulemaking under its authority to regulate deceptive and unfair acts and practices as provided in the FTC Act,³¹ but political circumstances led Congress to intervene. Congress withdrew the FTC’s authority to regulate advertising to children as “unfair” and the proposed rulemaking was terminated without action in 1981.³² Congress likely withdrew the FTC’s authority under the unfair prong (and not the deceptive prong) because at the time, actions could be brought based on public policy without a showing of consumer injury which is the case now.³³ Since then, the scientific evidence has grown significantly to

²⁷ Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 *LOY. L.A. L. REV.* 79, 79 (2006).

²⁸ *FOOD MARKETING*, *supra* note 1, at 5.

²⁹ Westen, *supra* note 27, at 79.

³⁰ *FOOD MARKETING*, *supra* note 1, at 5.

³¹ *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 969 n.11 (D.C. Cir. 1985) (quoting Children’s Advertising, Notice of Proposed Rulemaking, 43 *Fed. Reg.* 17,967, 17,969 (Apr. 27, 1978)) (“The trade regulation rule proposed by the FTC staff was an attempt to deal comprehensively with the entire area of television advertising to children. The proposed rule included three elements: (a) Ban all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising; (b) Ban televised advertising for sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which products poses the most serious dental health risks; (c) Require televised advertising for sugared food products not included in Paragraph (b), which is directed to, or seen by, audiences composed of a significant proportion of older children, to be balanced by nutritional and/or health disclosures funded by advertisers. In addition, the Commission requested comments on a number of broad remedial measures, including requiring advertisers of highly carcinogenic products to fund separate advertisements disclosing the products risks and nutritional value.”) (citation omitted).

³² See 15 U.S.C. § 45(n) (1994).

³³ See *id.* (codifying the limited role for actions based on public policy).

confirm that young children do not comprehend the persuasive intent of marketing,³⁴ food marketing to children results in poor nutrition-related beliefs and behaviors,³⁵ and food marketing is associated with an increase in childhood obesity.³⁶

The Obama administration and current leadership at the Commission have indicated their interest in addressing food marketing to children, making the time potentially ripe for renewed action. The FTC currently has the authority to proceed with rulemaking under its jurisdiction to regulate deceptive marketing practices as provided in Section 18 of the FTC Act.³⁷ In addition, Congress can address marketing directed at youth by: (1) legislating restrictions on such practices,³⁸ (2) directing the FTC to regulate via rulemaking under the Administrative Procedures Act (APA),³⁹ or (3) restoring the FTC's ability to make rules in this area under an authority to regulate unfair marketing practices.⁴⁰

This Article analyzes the FTC's authority to regulate food marketing directed at children under the FTC Act and compares its remedial power under its unfair and deceptive jurisdiction. Additionally, the article examines judicial review of all levels of FTC action in this realm. Although the theories may apply to all marketing directed at youth, the paper relies on the science of food marketing to support restrictions on this specific avenue of communication.

³⁴ BRIAN L. WILCOX ET AL., REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN 20-54 (2004), available at <http://www.apa.org/pi/families/resources/advertising-children.pdf>; Deborah Roedder John, *Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research*, 26 J. CONSUMER RES. 183, 185 (1999).

³⁵ Harris et al., *supra* note 13, at 213.

³⁶ Ludwig & Gortmaker, *supra* note 15, at 226 ("Exposure to food advertisements increases children's total energy intake significantly. Food advertisements have also been linked to overconsumption of fast food, sugar-sweetened soft drinks, and sweet and salty snacks, and to underconsumption of fruits and vegetables."); see FOOD MARKETING, *supra* note 1, at 8-9 (outlining the evidence addressing marketing influences on childhood obesity).

³⁷ 15 U.S.C. § 57a (2006); *Am. Fin. Servs. Ass'n*, 767 F.2d at 967.

³⁸ The scope of marketing extends beyond media. Congress could restrict marketing in specific venues including day care facilities, public schools, and playgrounds. For example, in Quebec where all marketing to children under thirteen is banned, marketers were fined for targeting children in day care facilities. See *Junk Food Marketing to Kids Leads to \$24,000 Fine for Quebec Firm*, CANADIAN PRESS, <http://www.cbc.ca/money/story/2009/01/26/mtl-saputo-cp-0127.html> (last updated Jan. 27, 2009, 7:59 AM).

³⁹ See, e.g., H.R. 4173, 111th Cong. § 4901 (as passed by House of Representatives, Dec. 11, 2009).

⁴⁰ 15 U.S.C. § 45 (2006).

I. THE FEDERAL TRADE COMMISSION ACT

In 1914, Congress created the FTC and “delegated to it the power to determine and prevent ‘unfair methods of competition’.”⁴¹ A little more than two decades later, Congress expanded the FTC’s authority to prevent unfair and deceptive acts or practices in commerce.⁴² During this time period, the FTC relied on cease and desist orders for enforcement of the Act. In 1975, Congress responded to the FTC’s growing need for greater enforcement authority by enacting the Magnuson-Moss Act, which granted the Commission the authority to prescribe rules with respect to unfair and deceptive acts or practices.⁴³

The current Section 5 of the FTC Act makes unlawful any unfair or deceptive act or practice in or affecting interstate commerce.⁴⁴ Section 12 of the FTC Act makes the dissemination of false advertisements an unfair or deceptive act or practice;⁴⁵ however, this section is beyond the scope of the following analysis which is based on unfair and deceptive practices associated with marketing food to children.

The standard for judicial review of the Commission’s findings of fact under Section 5 is codified in the Act itself: “The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.”⁴⁶ The Supreme Court explained that this is equivalent to the “‘substantial evidence’ standard,” under which courts “must accept the Commission’s findings of fact if they are supported by ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”⁴⁷ Courts rely on this standard,⁴⁸ and therefore, will not review *de novo* the weight of the evidence presented to, and analyzed by, the Commission.⁴⁹

⁴¹ *Am. Fin. Servs. Ass’n*, 767 F.2d at 965.

⁴² Act of Mar. 21, 1938, ch. 49, § 5(a), 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1) (2006)).

⁴³ *Am. Fin. Servs. Ass’n*, 767 F.2d at 967.

⁴⁴ 15 U.S.C. § 45(a)(1) (2006).

⁴⁵ § 52(b).

⁴⁶ § 45(c).

⁴⁷ *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986).

⁴⁸ *See, e.g., Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 422 (5th Cir. 2008) (“This court reviews the Commission’s factual determinations under the substantial evidence standard . . . ‘Substantial evidence is evidence that provides a substantial basis of fact from which the fact in issue can be reasonably inferred.’” (quoting *Diamond Drilling Co. v. Marshall*, 577 F.2d 1003, 1006 (5th Cir. 1978))); *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 934 (7th Cir. 2000) (“[W]e must accept its findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” (citing *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986))).

⁴⁹ *See, e.g., Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1149 (9th Cir. 1984).

On the other hand, the “legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are, by contrast, for the courts to resolve”⁵⁰ Therefore, courts apply plenary or “*de novo*” review of legal issues in FTC enforcement cases, including the FTC’s determination that an act or practice is unfair or deceptive.⁵¹ Beyond these basic standards of judicial review, courts’ interpretation and deference to FTC actions differ based on whether the Commission proceeded under its unfair or deceptive practice jurisdiction.

A. Construction of the FTC’s Unfairness Authority

FTC activity under its unfairness jurisdiction has a long and attenuated history.⁵² In its heyday, the FTC brought a series of cases under the unfair prong of the Act, challenging a wide variety of practices.⁵³ In 1964, the Commission issued a statement that systematically analyzed its unfairness authority.⁵⁴ The Supreme Court cited this statement with apparent approval, which “emboldened the Commission to challenge practices as ‘unfair’”⁵⁵ As a result, the FTC moved in the direction of using its unfairness authority in the context of rulemaking, and the concept of KidVid was born. The former general counsel to the FTC, Stephen Calkins, explained the events leading up to Congressional intervention into KidVid as follows:

The Commission redirected its efforts away from case-by-case adjudication to the crafting of sweeping rules with the force of law. Before long, the agency devoted more than half

⁵⁰ *Indiana Fed’n of Dentists*, 476 U.S. at 454; see also, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (“[W]hile informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis the words ‘deceptive practices’ set forth a legal standard and they must get their final meaning from judicial construction.”).

⁵¹ See, e.g., *Chicago Bridge*, 534 F.3d at 422 (“We review *de novo* all legal questions pertaining to Commission orders.”) (emphasis in original) (citing *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986)); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1063 (11th Cir. 2005) (“[W]e review issues of law *de novo*.”); *Toys “R” Us, Inc.*, 221 F.3d at 934 (“We review the Commission’s legal conclusions *de novo*”); *Ticor Title Ins. Co. v. FTC.*, 998 F.2d 1129, 1133 (3rd Cir. 1993) (“The FTC’s legal conclusions are subject to plenary review.”).

⁵² See *FTC v. IFC Credit Corp.*, 543 F.Supp. 2d 925, 934-41 (N.D. Ill. 2008).

⁵³ See Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1952 n.69 (2000).

⁵⁴ Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (June 22, 1964) (codified at 16 C.F.R. pt. 408).

⁵⁵ Calkins, *supra* note 53, at 1953.

of its consumer protection resources to rule-making. The combination of unfairness and rule-making was deadly: . . . the press and business interests pilloried the agency as the ‘National Nanny’ after it proposed a rule regulating advertising to children; Congress passed legislation cutting back on the FTC’s jurisdiction over . . . ‘unfairness’-based regulation of commercial advertising, and the Commission strategically (and hastily) retreated.⁵⁶

Congress passed the Federal Trade Commission Improvements Act of 1980, withdrawing the FTC’s rulemaking power to address allegedly “unfair” children’s advertising.⁵⁷ This was codified in the FTC Act and remains in force today.⁵⁸ At the time of KidVid, unfairness cases could be brought pursuant to public policy considerations. This is no longer the case, but it is likely one reason that Congress targeted the FTC’s unfairness authority at that time.

In response to the restraints inherent in the FTC Improvements Act of 1980, the FTC took a step back and reviewed its jurisdiction over unfair acts. The FTC sought to explain its revised understanding of its unfairness jurisdiction and issued a statement attached to the 1984 case, *In the Matter of International Harvester Co.*⁵⁹ This FTC Policy Statement on Unfairness stated that an unfair act or practice must be one that causes significant consumer injury that is: (1) substantial, (2) “not outweighed by any offsetting consumer or competitive benefits that the sales practice . . . produces,” and (3) “one which consumers could not reasonably have avoided.”⁶⁰

Despite this policy statement, courts still found the law of the FTC unfairness authority unclear and imprecise. The Supreme Court explained that the “standard of ‘unfairness’ under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.”⁶¹ This led the Court to verbalize a less deferential standard of deference under the unfair prong than it later did under the deceptive prong.

In the 1986 case, *FTC v. Indiana Federation of Dentists*, the Supreme Court analyzed an FTC unfairness action and stated that

⁵⁶ *Id.* at 1953-54.

⁵⁷ Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 11, 94 Stat. 374, 398 (1980).

⁵⁸ 15 U.S.C. § 57(h) (2006).

⁵⁹ *Int’l Harvester Co.*, 104 F.T.C. 949, 1072-76 (1984).

⁶⁰ *Id.* at 1073-74.

⁶¹ *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (citation omitted).

“courts are to give some deference to the Commission’s informed judgment that a particular commercial practice is to be condemned as ‘unfair.’”⁶² Note the Court’s use of the phrase “some deference.” The combination of this announcement of a less deferential standard, even if merely in dicta, and the fact that the unfair standard was especially challenging for courts to apply, led to a more entrenched divergence in consideration of unfair and deceptive cases. In cases subsequent to *Indiana Federation of Dentists*, courts state they must give “some deference” to the FTC’s findings of unfairness.⁶³ This repetition of Supreme Court dicta does not necessarily determine the outcome of a case, but rather seems to indicate an increased level of attention courts paid to FTC action under the unfairness prong.

In 1994, Congress codified the FTC’s explanation of its Policy Statement on Unfairness by adding a section to the FTC Act, pronouncing:

The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that [it] is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.⁶⁴

Note both the negative expression of authority that introduces the FTC’s jurisdiction over unfair acts, and Congress’ codification of the Commission’s own move away from actions based on public policy.⁶⁵ As will be explored below, FTC actions under its unfairness authority

⁶² *Id.*

⁶³ *See, e.g.,* Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1063 (11th Cir. 2005); Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1364 (11th Cir. 1988) (quoting *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986)); *Olin Corp. v. FTC*, 986 F.2d 1295, 1297 (9th Cir. 1993) (quoting *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986)).

⁶⁴ Federal Trade Commission Act Amendments of 1994, Pub. L. 103-312, §9 108 Stat. 1691, 1697 (1994) (codified as amended at 15 U.S.C. § 45(n) (1994)).

⁶⁵ *See* *Unfair or Deception Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. at 8324, 8355 (July 2, 1964) (to be codified at 16 C.F.R. pt. 408) (defining public policy as being “established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness.”).

also require more rigorous findings by the Commission than under its deception authority.

In 2003, the former Director of the Bureau of Consumer Protection at the FTC explained his view of the principles codified by this section:

First, the Commission's role is to promote consumer choices, not second-guess those choices. That's the point of the reasonable avoidance test. Second, the Commission should not be in the business of trying to second guess market outcomes when the benefits and costs of a policy are very closely balanced or when the existence of consumer injury is itself disputed. That's the point of the substantial injury test. And the Commission should not be in the business of making essentially political choices about which public policies it wants to pursue. That is the point of codifying the limited role of public policy.⁶⁶

This statement was his view of the administration under George W. Bush, but it can be considered a reflection on the FTC's previous stance on claims of unfairness. While this vision may shift, the extent of possible change to this viewpoint remains unclear because the FTC's current leadership is still in its infancy.

B. Construction of the FTC's Deception Authority

The Supreme Court's seminal case interpreting the FTC's deceptive jurisdiction was in the 1965 case *FTC v. Colgate-Palmolive Co.*⁶⁷ The Court noted the "generality" of the standards of illegality in finding deception and explained that:

This statutory scheme necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations. Moreover, as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts. This admonition is

⁶⁶ J. Howard Beales III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL'Y & MARKETING 192, 196 (2003).

⁶⁷ *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment.⁶⁸

This statement formed the basis of review for all subsequent cases under the FTC's deceptive authority from the Act. Note the high level of deference given to the FTC's determination of which acts and practices are deceptive: "the Commission's judgment is to be given great weight."⁶⁹ This statement gave the FTC greater leeway to act in subsequent cases brought under the deceptive prong of the Act. In the deception context, lower courts have referenced the quote above to give the Commission's judgment "great weight."⁷⁰

Two decades after *Colgate-Palmolive*, the FTC issued a policy statement on its enforcement policy against deceptive acts or practices, appended to an FTC case, *In the Matter of Cliffdale Associates, Inc.*⁷¹ This 1983 FTC Policy Statement on Deception sets forth the FTC's criteria for finding deception, which includes three elements: (1) "there must be a representation, omission or practice that is likely to mislead a consumer"; (2) that is analyzed from the perspective of a consumer acting reasonably in the circumstances; and (3) "the representation, omission or practice must be material."⁷² Congress has not codified this policy but the FTC uses these criteria in bringing complaints and the full Commission and the courts review the FTC's findings according to this test.⁷³

FTC action under this prong has an uncomplicated history and courts seem comfortable accepting the FTC's determination of deception. This is likely the result of the relative ease of the test's requirements and the fact that identifying deception is more straightforward than identifying elusive unfair acts and practices. This, coupled with an absence of a controversial history of FTC action under its deceptive jurisdiction, make it a straightforward method for enforcement when the facts fit the deceptive standard.

⁶⁸ *Id.* at 385 (citation omitted).

⁶⁹ *Id.*

⁷⁰ *See, e.g.,* *Kraft v. FTC*, 970 F.2d 311, 316 (7th Cir. 1992); *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1149-50 (9th Cir. 1984).

⁷¹ F.T.C. Policy Statement on Deception (1983), *appended to Cliffdale Assoc.*, 103 F.T.C. 110, 174 (1984) [hereinafter *FTC Policy Statement on Deception*], available at <http://www.ftc.gov/bcp/policystmt/addecept.htm>.

⁷² *Id.* at 176-83.

⁷³ *See e.g.,* *FTC v. Verity Int'l*, 443 F.3d 48, 63 (2d Cir. 2006); *Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006).

II. REMEDIAL POWER

Congress has given the FTC primary responsibility to address unfair and deceptive practices, and thus, the FTC has broad discretion in drafting remedial measures. It is noteworthy that courts have confirmed the FTC's ability to bring both deceptive and unfair actions against a commercial actor, "without a showing that the offending party intended to cause the consumer injury."⁷⁴ The FTC most commonly brings individual cases against commercial actors who allegedly have violated the Act. If a violation is found, the FTC issues an order for corrective action to remedy the violation. Orders have included disclosure requirements, injunctions, orders to cease and desist, orders for corrective advertising, and orders for monetary damages.

The FTC also has the ability to promulgate rules. The FTC may undertake rulemaking through its own volition⁷⁵ or may be instructed to do so by Congress.⁷⁶ Rulemaking falls subject to two different procedural requirements: fact-finding and time for public comment. The outcome is a comprehensive rule to address an industry-wide deceptive or unfair practice.

A. Orders

The FTC frequently brings individual cases against commercial actors who allegedly violate the Act. If the commercial actor does not enter into a consent order with the Commission,⁷⁷ the case is heard by an Administrative Law Judge (ALJ).⁷⁸ The ALJ's decision is reviewed by the full Commission, which adopts and rejects it to the extent it determines appropriate. The Commission will enter an order for corrective action if a violation of the FTC Act is found and the commercial actor may appeal that decision and order to a federal court.

⁷⁴ *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988) ("Given that a practice may be deceptive without a showing of intent to deceive, it is apparent that a practice may be found unfair to consumers without a showing that the offending party intended to cause consumer injury.").

⁷⁵ *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 967 (D.C. Cir. 1985).

⁷⁶ *See, e.g., FTC Begins Rulemaking to Address Unfair and Deceptive Mortgage Practices*, FED. TRADE COMM'N, <http://www.ftc.gov/opa/2009/05/deceptmortgage.shtm> (last visited Sept. 22, 2009) [hereinafter *FTC Rulemaking*].

⁷⁷ *See, e.g., Swisher Int'l Inc., No. C-3964*, 2000 FTC LEXIS 101, at *3 (Aug. 18, 2000).

⁷⁸ *See e.g., Olin Corp. v. FTC*, 986 F.2d 1295, 1297 (9th Cir. 1993).

The Supreme Court explained that FTC orders are to be reviewed under the reasonable relationship test: “[t]he propriety of a broad order depends upon the specific circumstances of the case, but the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.”⁷⁹ Although the reasonable relationship test is the least burdensome method of judicial review, courts have developed their own guidance to determine whether an FTC Order is adequate.

Most circuit courts consider three elements when determining whether there is a reasonable relationship between the violation of the FTC Act and the scope of the order; but some circuits consider impose additional requirements. The three common elements are: “(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations.”⁸⁰ Some circuits have also considered (4) the potential for health hazards;⁸¹ (5) “the length of time the deceptive ad has been used;” (6) “the difficulty for the average consumer to evaluate such claims through personal experience;” and (7) “whether the pervasive nature of government regulation of the product at issue is likely to create a climate in which questionable claims . . . have all the more power to mislead.”⁸² Some courts have emphasized that the “reasonable relationship analysis operates on a sliding scale—any one factor’s importance varies depending on the extent to which the others are found.”⁸³ FTC Orders generally pass this level of scrutiny.

B. Rulemaking

The FTC can promulgate rules based on the authority granted to it in the FTC Act or when directed to by Congress. As referenced in Section 18 of the FTC Act, the United States Code grants the FTC

⁷⁹ *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965) (citation omitted).

⁸⁰ *Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006) (quoting *Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994)); *see, e.g.*, *Kraft v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992); *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1155 (9th Cir. 1984).

⁸¹ *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 706 (3d Cir. 1982) (“[T]he potential health hazards may well justify a more sweeping order than would be proper were the Commission dealing with a less consequential area.”).

⁸² *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1499 (1st Cir. 1989) (quoting *Am. Home Products Corp. v. FTC*, 695 F.2d 681, 697, 698 (1st Cir. 1989)) (citations omitted).

⁸³ *Telebrands Corp.*, 457 F.3d at 358; *see also Removatron Int’l Corp.*, 884 F.2d at 1499.

authority to prescribe “interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce,”⁸⁴ and “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.”⁸⁵ Most federal agencies may engage in APA rulemaking as a matter of course, but Section 18 imposes additional rulemaking requirements on the FTC that make the FTC process much more onerous and lengthy. Therefore, the FTC issues rules under Section 18 relatively infrequently.

When Congress directs the Commission to engage in rulemaking in a particular area,⁸⁶ however, the relevant legislation may include the authority to promulgate rules pursuant to the much less cumbersome protocol of the APA.⁸⁷ Agency rulemaking under the APA simply requires that agencies: (1) publish a general notice of proposed rulemaking in the Federal Register; (2) “give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation”; (3) consider the relevant matter presented and “incorporate in the rules a concise general statement of their basis and purpose; and (4) “give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”⁸⁸ In specific instances where Congress has granted the FTC authority to promulgate rules under this less burdensome procedure, the rulemaking has been completed as quickly as a year.⁸⁹ The FTC has recently requested that Congress provide the Commission with the same general APA rulemaking authority granted to other agencies.⁹⁰

In the absence of such authority, Section 18’s additional requirements have functioned to deter rulemaking by the Commission. First,

⁸⁴ 15 U.S.C. § 57a(a)(1)(A) (2006).

⁸⁵ 15 U.S.C. § 57a(a)(1)(B).

⁸⁶ See, e.g., *FTC Rulemaking*, *supra* note 76.

⁸⁷ See, e.g., H.R. 4173, 111th Cong. § 4901 (as passed by House of Representatives, Dec. 11, 2009).

⁸⁸ Administrative Procedures Act, 5 U.S.C. § 553 (2006).

⁸⁹ J. Thomas Rosch, Commissioner, FTC, Remarks at the 4th Annual Credit and Collection News Conference: Consumer Protection and the Debt Settlement Industry: A View from the Commission, at 12-13 (Apr. 2, 2009), available at <http://ftc.gov/speeches/09speech.shtm>.

⁹⁰ Lydia Parnes, Director of the Bureau of Consumer Protection, FTC, Prepared Statement of the Federal Trade Commission: Enhancing FTC Consumer Protection in Financial Dealings, with Telemarketers, and on the Internet—Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 110th Cong. 15-16 (Oct. 23 2007), available at <http://www.ftc.gov/os/testimony/071023ReDoNotCallRuleEnforcementHouseP034412.pdf>.

the Commission can only commence rulemaking on its own volition if it believes the practices are “prevalent,” and the FTC has already issued cease and desist orders regarding the act or practice or has other information indicating “a widespread pattern of unfair or deceptive acts or practices.”⁹¹ Further, the section imposes the additional requirements that the FTC: (1) publish an advance notice of proposed rulemaking and seek public comment before publishing its notice of proposed rulemaking in the Federal Register,⁹² and (2) provide an opportunity for a hearing before a presiding officer at which interested persons are accorded certain cross-examination rights. Where there are numerous interested persons, the FTC must determine which have similar interests, have each group of persons with similar interests choose a representative, and make further determinations about representation for those interests in the cross-examination process.⁹³ The sheer amount of effort the FTC must put into rulemaking under Section 18 is noteworthy. For example, both the “Funeral Rule”⁹⁴ and the “Credit Practice Rule”⁹⁵ were only promulgated and finalized after almost a decade of work by the FTC.

A further barrier to rulemaking on the topic of unfair and deceptive food marketing to children is the fact that Congress responded harshly to the Commission’s prior attempt in this area during KidVid. As discussed above, since the FTC Improvements Act of 1980, the FTC Act now includes the following statement: “The Commission shall not have any authority to promulgate any rule in the children’s advertising . . . or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice”⁹⁶

Although this section only prohibits rulemaking under the unfair prong of the Act, Congress’ very act of withdrawing its authority in the realm of marketing to children seems to have hindered further efforts by the Commission.⁹⁷

When the FTC does promulgate a rule, courts review it under a similar standard used to review FTC findings of a violation. The Third Circuit summarized the standard of review as follows:

⁹¹ 15 U.S.C. § 57a(b)(3) (2006).

⁹² 15 U.S.C. § 57a(b)(2)(A).

⁹³ 15 U.S.C. § 57a(c).

⁹⁴ *Pennsylvania Funeral Dir. Assn, Inc. v. FTC*, 41 F.3d 81, 83 (3d Cir. 1994).

⁹⁵ *See Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 962-63 (D.C. Cir. 1985).

⁹⁶ 15 U.S.C. § 57(h) (2006).

⁹⁷ *See Calkins, supra* note 53, 1935-91.

A court may set aside the FTC conclusion if it is not supported by substantial evidence in the rulemaking record taken as a whole, or if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The substantial evidence standard is applied only to the FTC's factual determinations, while the arbitrary and capricious standard is applied to all other determinations. . . . The arbitrary and capricious standard is very deferential . . . [and] the court must determine whether the decision was based on consideration of relevant factors and whether there has been a clear error of judgment.⁹⁸

In the context of food marketing to children, rulemaking seems to be a better suited remedy than individual Orders. Orders are directed at a certain company or group of companies responsible for specific deceptive or unfair acts or practices (e.g., an advertisement campaign for one product). The nature of food marketing to children makes it a prime area for FTC rulemaking because young children are being deceived by most marketing campaigns, and poor nutrition-related beliefs and behaviors develop as a result of industry-wide practices. Although Congress withdrew the FTC's rulemaking authority to promulgate rules on the basis of a determination that children's advertising constitutes an unfair act or practice, the Commission retains its statutory authority to enact such a rule under its deceptive jurisdiction.

One of Congress' stated reasons for the provision limiting the FTC's authority was a concern that the rule violated the First Amendment.⁹⁹ Thus, both the FTC's statutory authority and constitutional restraints on regulating marketing directed at children under the unfair and deceptive prongs of the Act require further analysis.

III. RULEMAKING IN THE REALM OF FOOD MARKETING TO CHILDREN

As previously noted, FTC rulemaking in the realm of child advertising is only statutorily viable under its deceptive authority. This Section will explore the advantages of using the Commission's deception rulemaking authority, and demonstrate that this authority would be

⁹⁸ See *Pennsylvania Funeral Dirs. Ass'n*, 41 F.3d at 85-86 (citations omitted).

⁹⁹ *Am. Fin. Servs. Ass'n*, 767 F.2d at 970 n.12 ("Congress' limitation of the Commission's unfairness authority with respect to commercial advertising was motivated by the threat the FTC's broad industry-wide rulemaking authority posed to *first amendment* interests in the area of commercial speech.") (emphasis added) (citing H.R. Conf. Rep. 917, 96th Cong., 2d Sess. 32 (1980)).

preferential even if Congress reinstated the FTC's authority to promulgate similar rules under FTC's unfairness jurisdiction.

A. Application of the FTC's Unfairness Authority

If Congress were to reinstate the FTC's ability to make rules as unfair in the context of food marketing to children, an industry practice would only be considered unfair if it (1) causes or is likely to cause substantial injury to consumers, (2) which is not reasonably avoidable by consumers themselves, and (3) is not outweighed by countervailing benefits to consumers or to competition.¹⁰⁰

To satisfy the first requirement, substantial injury has been found when there is small harm to a large number of people or if the act raises a significant risk of concrete harm.¹⁰¹ The Act does not cover subjective examples of harm such as emotional distress¹⁰² or "offenses to taste or social belief."¹⁰³ Thus, the consumer injury "must be real."¹⁰⁴ Injury is most commonly monetary in nature, but can involve "unwarranted health and safety risks."¹⁰⁵ In the context of food marketing to children, Michelle Mello observed that this element of unfairness "necessitates proof of a causal link between the specific advertisements to be restricted and some substantial harm to consumers."¹⁰⁶

This requirement may be a difficult hurdle to overcome in the context of food marketing to children. Most cases in the unfairness

¹⁰⁰ 15 USC § 45(n).

¹⁰¹ *Am. Fin. Servs. Ass'n*, 767 F.2d at 972.

¹⁰² *See, e.g.*, *ITT Continental Baking Co. Inc. v. FTC*, 532 F.2d 207, 215 (2d Cir. 1976) (rejecting that deceptive ads "additionally constituted an *unfair* act under § 5 on the theory that they exploited the aspirations of children and injured them psychologically."); *cf.* *FTC v. Accusearch, Inc.*, No. 06-CV-105-D, 2007 U.S. Dist. LEXIS 74905, at *23-24 (D. Wyo. Sept. 28, 2007) (finding risks to safety and economic injury, the court stated that, "while the **substantial injury** requirement may not *ordinarily* be met from emotional impact harm that is 'trivial or merely speculative,' the evidence presented to the Court regarding the sale of consumer phone records in particular demonstrates a host of emotional harms that are substantial and real and cannot fairly be classified as either trivial or speculative.") (emphasis in the original).

¹⁰³ *Am. Fin. Servs. Ass'n*, 767 F.2d at 972-73 n.18 (quoting Letter from FTC Chairman J.C. Miller, III to Senator Packwood and Senator Kasten (Mar. 5, 1982), *reprinted in* H.R. Rep. No. 98-156, Pt. 1, at 32 (1983)).

¹⁰⁴ Beales, *supra* note 66, at 195.

¹⁰⁵ *Int'l Harvester Co.*, 104 F.T.C. 949, 1073 (1984).

¹⁰⁶ Michelle Mello, *Federal Trade Commission Regulation of Food Advertising to Children: Possibilities for a Reinvigorated Role*, 35 J. HEALTH POL. POL'Y & L. 227, 251 (2010).

context address economic injury¹⁰⁷ or risks to safety.¹⁰⁸ Cases involving unwarranted health and safety risks for children commonly involve advertisements showing children performing unsafe acts, such as recklessly riding a bicycle, using a hair dryer near a sink full of water, and standing close to a stove without adult supervision.¹⁰⁹ There are no unfair cases that find substantial injury as a result of health risks under facts similar to the context of food marketing to children. Although the FTC may have a difficult time alleging consumer injury, the following is an attempt to conceptualize the argument in a way most promising to support rulemaking as unfair.

In the scientific literature, childhood exposure to food marketing is associated with increased childhood obesity.¹¹⁰ Although childhood obesity can be deemed a substantial injury, the FTC would have a difficult time linking food marketing to such a multi-factorial outcome.¹¹¹ Thus, the FTC may be required to demonstrate that the advertisements induce consumption of the product and the consumption itself poses a health hazard. Doing so may prove problematic because consumption of food only poses health hazards if one consumes unhealthy food or one consumes food in large quantities. Therefore, the FTC would want to phrase the question of harm as one of behavioral change. It would be much easier to demonstrate that the majority of food marketing directed at children causes injury due to the health outcomes associated with the unhealthy behavior depicted in the advertisements.

Researchers have explained that modern food marketing makes it clear “that it is exciting, fun, and cool to eat great-tasting, high-calorie food almost any time or anywhere, and there are no negative consequences for doing so.”¹¹² Thus, one way to frame the injury is that

¹⁰⁷ See, e.g., *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) (explaining that substantial injury occurred where a breach of contract resulted in \$ 7 million in revenues to which the company was not entitled).

¹⁰⁸ See e.g., *FTC v. Accusearch, Inc.*, No. 06-CV-105-D, 2007 U.S. Dist. LEXIS 74905, at *22-23 (D. Wyo. Sept. 28, 2007) (finding injuries experienced by consumers whose phone records were sold include “the severe harm experienced by some consumers from stalkers and abusers who procured the consumers’ phone records constitutes a clear and unwarranted risk to those consumers’ **health** and safety.”); *Complaint at 380, Beck’s North America, Inc.*, 127 F.T.C. 379 (1999) (No. C-3859) (alleging respondent’s depiction of passengers on a sail boat, at sea, holding bottles of beer and not wearing life jackets was likely to cause substantial injury to consumers in light of the risk of injury of alcohol-related boating fatalities).

¹⁰⁹ Calkins, *supra* note 53, at 1974 n.175.

¹¹⁰ J. Lennert Veerman et al., *By How Much Would Limiting TV Food Advertising Reduce Childhood Obesity?* 19 *EUR. J. PUB. HEALTH* 365, 365 (2009).

¹¹¹ Mello, *supra* note 106, at 251.

¹¹² Harris et al., *supra* note 13, at 213.

poor nutrition-related behaviors result from food marketing. Another is that the plethora of food marketing itself causes children to over-consume all food. The resulting health risks include overweight, obesity, and diabetes.

In a similar vein, the FTC brought an action against R.J. Reynolds Tobacco Company for promoting its Camel brand cigarettes with the cartoon camel, "Joe Camel."¹¹³ The FTC claimed that the Joe Camel campaign made the Camel brand "attractive" to children, "induced" children and adolescents to smoke Camel cigarettes, and "caused or was likely to have caused these children and adolescents to initiate or continue smoking cigarettes."¹¹⁴ The FTC mentioned the fact that the purchase of the target products was illegal for minors under eighteen; however, the risk of addiction and the short and long term health problems associated with smoking was the injury the FTC sought to avoid by banning the use of Joe Camel. The injury was thus framed as the negative health effects that result from consuming cigarettes. In the food marketing context, a similar injury is cognizable—that of poor health as a result of consuming too much unhealthy food.

However, while one cigarette does not lead to poor health outcomes, the addictive nature of tobacco products makes them a uniquely susceptible target under the substantial injury test. In contrast, there is a fine line between consuming food and over-consumption; poor health effects are only associated with the latter. Further, food is a necessity to sustain life, which is not the case for tobacco products. However, it can be argued that the most highly marketed food products to children—restaurant food, children's cereal and sugar sweetened beverages—are also unnecessary for a healthy life. Further, the poor nutrition-related behaviors depicted in food marketing are not associated with sustenance, but the over-consumption of food without any negative health outcomes.

The bottom line is that it is unclear how a court would consider the FTC's claim that food marketing to children causes substantial injury because nothing like this has been tested before. While the FTC does have evidence to support the notion that poor nutrition-related behaviors result from common depictions in food marketing campaigns, it is questionable whether food advertisements aimed at children would be considered by courts to create such health risks as to meet this first requirement.

Under the unfair standard, the FTC must secondly demonstrate that the injury is not reasonably avoidable by consumers. Courts look

¹¹³ Complaint at 50, R.J. Reynolds Tobacco Co., 127 F.T.C. 49 (1999) (No. 9285).

¹¹⁴ *Id.*

to “whether consumers had a free and informed choice that would have enabled them to avoid the injury”,¹¹⁵ or “mitigate the damages afterward if they are aware of potential avenues toward that end.”¹¹⁶ Cases often focus on the consumers’ ability to make a choice and whether some action by the commercial actor thwarts free and informed choice.¹¹⁷ The FTC explained that:

[I]t has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary. . . . Most of the Commission’s unfairness matters are brought . . . to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.

Sellers may adopt a number of practices that unjustifiably hinder such free market decisions. . . . some may exercise undue influence over highly susceptible classes of purchasers as by promoting fraudulent ‘cures’ to seriously ill cancer patients. Each of these practices undermines an essential precondition to a free and informed consumer transaction, and, in turn, to a well functioning market. Each of them is therefore properly banned as an unfair practice under the FTC Act.¹¹⁸

On its face, this inquiry would seem slightly peculiar in the context of marketing to children because it is unclear which consumers are expected to avoid the injury: the child who receives the marketing messages or the parent who may be the primary purchaser of food products for the household. Adding to this confusion is the fact that much advertising directed at children is geared towards having them pester their parents into purchasing the most advertised child products.¹¹⁹

¹¹⁵ *FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 945 (N.D. Ill. 2008) (quoting *FTC v. Windward Mktg.*, No. 1:96-CV-615-FMH, 1997 U.S. Dist. LEXIS 17114, at *32 (D. Ga. Sept. 30, 1997)).

¹¹⁶ *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) (quoting *Orkin Exterminating Co., Inc.*, 108 F.T.C. 263, 366 (1986)).

¹¹⁷ See, e.g., *Pennsylvania Funeral Dirs. Ass’n v. FTC*, 41 F.3d 81, 91-92 (3d Cir. 1994); *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 976 (D.C. Cir. 1985); *FTC v. Seismic Entm’t Prods.*, No. 04-377-JD, 2004 U.S. Dist. LEXIS 22788, at *12 (D. NH Oct. 31, 2004).

¹¹⁸ *IFC Credit Corp.*, 543 F. Supp. 2d at 946 (quoting H.R. Rep. No. 98-156, pt. 1, at 37 (1983)).

¹¹⁹ James U. McNeal, *Tapping the Three Kids’ Markets*, AM. DEMOGRAPHICS, Apr. 1998, at 36, 39-40 (“Children’s influence of their parents’ spending has grown . . . [a]bout 90 percent of product requests made by children to a parent are by brand name The dollar value of the ‘kidfluence’ market is more difficult to track than

Research indicates that children do have their own money and use it to purchase such items as sweets, snacks and beverages.¹²⁰ If the consumers are children—the target of the food marketing—the FTC would have a good argument that injury is not reasonably avoidable because food marketers exert undue influence over this highly susceptible class.¹²¹ On the other hand, the products most advertised to children are cereals, fast food and beverages.¹²² Although beverages are commonly purchased by children, many of the remaining items, such as children's cereal, are more likely to be purchased by a parent.¹²³ In this context, the FTC explained that “most unfairness cases are brought to protect the exercise of consumer choice in the initial purchase decision.”¹²⁴ Parents presumably have a choice, even if being hounded by their children, to avoid purchasing unhealthy items for their children. This inquiry is further complicated by the fact that household food purchases are not the sole source of food to which children have access.¹²⁵

FTC precedent supports the argument that marketing directed at children, whether for products purchased or purchasable by children, is analyzed from the perspective of the child. The FTC has said: “If, however, advertising is aimed at a specially susceptible group of people (e.g., children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed.”¹²⁶

spending by children themselves.”); see ANNE SUTHERLAND & BETH THOMPSON, *KIDFLUENCE: THE MARKETER'S GUIDE TO UNDERSTANDING AND REACHING GENERATION Y—KIDS, TWEENS, AND TEENS 3* (2003) (“Kidfluence is about kids who are in control.”).

¹²⁰ See Juliet B. Schor & Margaret Ford, *From Tastes Great to Cool: Children's Food Marketing and the Rise of the Symbolic*, 35 J. L. MED. & ETHICS 10, 10 (2007).

¹²¹ See Susan Linn & Courtney L. Novosat, *Calories for Sale: Food Marketing to Children in the Twenty-first Century*, 615 ANNALS AM. ACAD. POL. & SOC. SCI. 133, 133 (2008) (“Moreover, advances in digital technology allow marketers to find more direct, personalized gateways to reach young audiences that sidestep parental authority and bank as much on the unknowing parent as the gullible child.”).

¹²² See FTC REPORT, *supra* note 8, at ES-2, -23 (“Carbonated beverages, [quick service restaurants], and breakfast cereals accounted for . . . 63% of the total amount spent on marketing to youth by the reporting companies [M]ore than 90% of the youth-directed in-school expenditures was reported in the carbonated beverages and juice and non-carbonated beverages categories . . .”).

¹²³ See Hellene Hill, *Packaging of Children's Breakfast Cereal: Manufacturers Versus Children*, 104 BRIT. FOOD J. 766, 771 (2002).

¹²⁴ Int'l Harvester Co., 104 F.T.C. 949, 1061 n.46 (1984); see also Beales, *supra* note 66, at 196 (stating that the FTC should only interfere when an unfair practice robs the individual of his or her freedom to exercise consumer decision making.).

¹²⁵ See Mello, *supra* note 106, at 233.

¹²⁶ Heinz W. Kirchner Trading as Universe Co., 63 F.T.C. 1282, 1290 (1963), *aff'd sub nom.* Kirchner v. FTC, 337 F.2d 751 (9th Cir. 1964).

In the context of an FTC case over monopolization, the FTC's complaint against companies that produced and marketed ready to eat (RTE) cereals alleged that the use of "unfair methods of competition in advertising and product promotion has the capacity and tendency to mislead consumers, particularly children, into the mistaken belief that respondents' RTE cereals are different from other RTE cereals."¹²⁷ Thus, children were considered consumers, although presumably parents were the actual purchasers of the cereal.

In a complaint against R.J. Reynolds Tobacco Company, the FTC alleged that the Joe Camel campaign was designed to cause children and adolescents to initiate or continue smoking.¹²⁸ The FTC alleged that the companies' actions were likely to cause injury to children and adolescents "that is not reasonably avoidable by these consumers."¹²⁹ Children and adolescents cannot legally purchase cigarettes so the FTC's designation of this group as the consumers who could not avoid injury confirms that the Commission's inquiry focuses on the target of the advertising, and not the ultimate purchaser of the product. Thus, the target of the unfair marketing practice should be considered the consumer for this inquiry, and not the ultimate purchaser. This is in accord with the "purpose of the Federal Trade Commission Act, [which] is to protect the public."¹³⁰ Thus, the FTC should be able to argue successfully that children are a susceptible class who could not reasonably avoid the injury in this context.

The final element the FTC must prove to establish food marketing as an unfair practice is that the injury must not be outweighed by countervailing benefits to consumers or to competition.¹³¹ The former Director of the Bureau of Consumer Protection at the FTC explained that "it is important to consider both the costs of imposing a remedy (such as the cost of requiring a particular disclosure in advertising) and any benefits that consumers enjoy as a result of the practice, such as the avoided costs of more stringent authorization procedures and the value of consumer convenience."¹³²

Rulemaking in this arena would restrict marketing to children. However, if the FTC could support the argument that there is a substantial injury as a result of marketing directed at children under the first inquiry, then this third element should not prove difficult to pass

¹²⁷ Complaint at 13-14, Kellogg Co., 99 F.T.C. 8 (1982) (No. 8883).

¹²⁸ Complaint at 50, R.J. Reynolds Tobacco Company, 127 F.T.C. 49 (1999) (No. 9285).

¹²⁹ *Id.* at 51.

¹³⁰ *Regina Corp. v. F.T.C.*, 322 F.2d 765, 768 (3d Cir.1963).

¹³¹ *See* 15 U.S.C. § 45(n) (2006).

¹³² Beales, *supra* note 66, at 195.

because of the lack of any countervailing public policy concerns. The restrictions would be narrowly tailored because marketing of such food items could still be directed at older minors (depending on the tailoring mechanism) and certainly adults. Thus, although one avenue of advertising may be limited, companies would still have an audience to whom they could promote their products. Further, since FTC rule-making would apply to all food marketers, this would not negatively affect competition among companies because they would all need to comply with the FTC's rules. Finally, due to the marketing techniques that encourage children to pester their parents, withdrawing this mode of communication is likely to *increase* parents' "convenience" and ability to purchase healthier items for their children. Studies confirm that arguing and child disappointment were the common responses to parental refusals to purchase cereal at the supermarket.¹³³ Restricting marketing directed to children should enable parents to make decisions more appropriate for their children's health requirements, absent this external influence.

In sum, there are reasonable arguments that marketing directed at children is unfair but the required showing of causation under the first prong of the inquiry may prove to be a difficult hurdle. Beyond the absence of statutory authority, the actual elements of unfairness are more stringent than those establishing deception. Therefore, FTC action under its deceptive jurisdiction in the Act may be an easier road for the FTC to rule-make in this area.

B. Application of the FTC's Deception Authority

FTC action under its deceptive authority is not only the more politically viable method to address marketing to youth, but also fits well with the factual circumstances of food marketing practices directed at children. There are three elements to finding deception: (1) there must be a representation, omission or practice that is likely to mislead a consumer, (2) that is analyzed from the perspective of a consumer acting reasonably in the circumstances, and (3) the representation, omission or practice must be material.¹³⁴

Under the first element of deception, there must be a representation, omission or practice that is likely to mislead the consumer.¹³⁵ The issue here is whether the act or practice, taken as a whole, "is

¹³³ WILCOX ET AL., *supra* note 34; Charles K. Atkin, *Observation of Parent-Child Interaction in Supermarket Decision-Making*, J. MARKETING, Oct. 1978, at 41.

¹³⁴ Cliffdale Assoc., Inc., 103 F.T.C. 110, 164-65 (1984).

¹³⁵ *Id.* at 165.

likely to mislead,” rather than whether anyone was actually misled.¹³⁶ Note the relative leniency of this standard compared to the substantial injury test under the first prong of the unfair inquiry. Relevant to this element, the FTC brought a case against an encyclopedia salesman who disguised his role as a salesman in order to initiate contact with prospective consumers.¹³⁷ In that case, the target of the speech did not understand the commercial speaker’s intent to initiate a commercial transaction. The FTC required that the encyclopedia salesmen disclose the purpose of their business to correct the deception, and the Seventh Circuit affirmed this commercial disclosure requirement.¹³⁸

There is a strong argument that modern marketing practices directed at children are also likely to mislead the intended audience. Like the prospective customers of the encyclopedia salesman, children do not understand marketers’ intent to persuade them into a commercial transaction. The Institute of Medicine’s review of the scientific literature led the committee to conclude that, “[m]ost children ages 8 years and under do not effectively comprehend the persuasive intent of marketing messages, and most children ages 4 years and under cannot consistently discriminate between television advertising and programming.”¹³⁹ Likewise, the report by the American Psychological Association’s Task Force on Advertising and Children found that, “young children who lack the ability to attribute persuasive intent to television advertising are uniquely vulnerable to such effects. Children below age 7–8 years tend to accept commercial claims and appeals as truthful and accurate because they fail to comprehend the advertiser’s motive to exaggerate and embellish.”¹⁴⁰

In a case on point, the Second Circuit affirmed an FTC finding of deception based on misleading commercials for Wonder Bread directed at children.¹⁴¹ The FTC found that the characters in the ads (Captain Kangaroo and Bozo the Clown) portrayed Wonder Bread as “an extraordinary food for producing dramatic growth in children.”¹⁴² The court agreed that the evidence supported the FTC’s argument “that the challenged commercials were false and misleading because, *inter alia*, children below the age of six ‘will tend to perceive . . . the

¹³⁶ *Id.*

¹³⁷ *Id.* at 177 (citing Complaint at 497, *Encyclopedia Britannica*, 87 F.T.C. 421 (1976) (No. 8908)).

¹³⁸ Complaint at 497, *Encyclopedia Britannica*, 87 F.T.C. 421 (1976) (No. 8908).

¹³⁹ *FOOD MARKETING*, *supra* note 1, at 298.

¹⁴⁰ *WILCOX ET AL.*, *supra* note 34, at 35.

¹⁴¹ *See ITT Continental Baking Co. Inc. v. FTC*, 532 F.2d 207, 215, 219 (2d Cir. 1976).

¹⁴² *Id.* at 219.

Captain Kangaroo and Bozo ads . . . as promising some special growth capacity . . . and children between the ages of approximately six and twelve will tend to perceive all the challenged television ads as promising a special growth potential which would not be available without eating Wonder Bread."¹⁴³ The court affirmed the FTC's finding that "the presentations were misleading to children."¹⁴⁴

Thus, because children cannot understand the persuasive intent of marketing, cannot distinguish between commercial and noncommercial speech, and cannot discern puffery from fact, marketing directed at them is more than likely to mislead them. Unlike with the encyclopedia salesman, studies suggest that marketing directed at children is not similarly amenable to curing through disclosure requirements.¹⁴⁵ Further, the FTC itself already determined that factual disclosures cannot cure the deceptive nature of marketing directed at children. During KidVid, the FTC rejected mandatory disclosures as a viable alternative to bans on advertising to young children because young children "have trouble understanding (and sometimes even perceiving) such disclosures."¹⁴⁶ Modern food marketing practices directed at children are indeed likely to deceive this intended audience and should thus pass this first part of the inquiry.

Under the second part of the FTC's deception standard, the Commission examines the practice in question from the perspective of a consumer acting reasonably under the circumstances. Thus, if "the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group."¹⁴⁷ Indeed, the Supreme Court also takes this approach with misleading commercial speech.¹⁴⁸ Thus, when children are the target of advertisements or practices, the FTC determines whether the advertisement is misleading based on the "sophistication" of that audience.¹⁴⁹ In one case where children were the target of the speech, the FTC adopted the finding that "False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See WILCOX ET AL., *supra* note 34, at 24 ("Studies make clear that young children do not comprehend the intended meaning of the most widely used disclaimers.").

¹⁴⁶ Mello, *supra* note 106, at 263 (quoting FED. TRADE COMM'N, FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN (1978)).

¹⁴⁷ FTC Policy Statement of Deception, *supra* note 71, at 175.

¹⁴⁸ See *Bates v. Arizona*, 433 U.S. 350, 383 n.37 (1977).

¹⁴⁹ FTC Policy Statement of Deception, *supra* note 71, at 179 n.29 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 n.37 (1977)).

appreciate the possibility that representations may be exaggerated or untrue.”¹⁵⁰ Because children are more vulnerable to deceptive marketing practices, the FTC would analyze the practice from their perspective. Children lack the cognitive ability to understand that marketers’ intentions are to influence their behavior and consumption, making them highly susceptible to marketing. From a child’s perspective, food marketing techniques are deceptive and misleading even if they are not so for adults.

The third requirement necessary to find deception is that the representation, omission, or practice must be “material.” This means that it is “likely to affect the consumer’s conduct or decision with regard to a product or service.”¹⁵¹ Materiality occurs when the misrepresentation or practice influences a consumer’s decision to purchase a product and when it affects conduct “other than the decision to purchase a product.”¹⁵² Thus, if a consumer “would have chosen differently, but for the deception,” this fact satisfies the materiality requirement.¹⁵³ Studies show that starting at twenty-four months of age, children’s purchase requests reflect their exposure rate to advertisements for those food products and categories.¹⁵⁴ Since much food marketing directed at children is actually intended to manipulate them into goading their parents for the product,¹⁵⁵ the marketing practices are influencing their conduct and also their parents’ decision to purchase the product.¹⁵⁶ Studies reveal that, “food advertising *does* cause ‘pestering’ by children and results in parents buying less healthy products that are associated with obesity.”¹⁵⁷ Further, as evidenced by high request rates by children for advertised products,¹⁵⁸ and high rates of arguing that result when children pester their parents for those products,¹⁵⁹ parents are likely purchasing products as a result of the psychological manipulation used on their child, rather than based on the true nature of the product. Thus, the marketing practices materially

¹⁵⁰ *Id.* at 181 (quoting *Ideal Toy Corp.*, 64 F.T.C. 297, 310 (1964)).

¹⁵¹ *Id.* at 175.

¹⁵² *Id.* at 182 n.45, 188.

¹⁵³ *Id.* at 183, 188, 196.

¹⁵⁴ Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the US*, 1 INT’L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 3, 13 (1994).

¹⁵⁵ See McNeal, *supra* note 119, at 39-40.

¹⁵⁶ Laura McDermott et al., *International Food Advertising, Pester Power and Its Effects*, 25 INT’L J. ADVERTISING 513 (2006).

¹⁵⁷ *Id.* at 513 (emphasis in original).

¹⁵⁸ See Story & French, *supra* note 154.

¹⁵⁹ WILCOX ET AL., *supra* note 34, at 30.

influence the consumers' decision to purchase the products, regardless of any additional link from child to parent.

Additionally, the FTC has found that in many instances materiality can be presumed from the nature of the practice.¹⁶⁰ The FTC "considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned."¹⁶¹ Marketing in this area encourages consumption of unhealthy food and beverages and the over-consumption of food in general. Thus, since health and safety are immediate concerns with respect to the consumption of food, deceptive advertising in this area may be presumed to be material on its own.¹⁶²

The deceptive prong avoids the causation problem inherent in the inquiries under the unfairness prong. Because the FTC's deceptive jurisdiction focuses on deceptive acts and practices, and not consumer injury, FTC rulemaking under it is more readily applicable to the context of food marketing directed at children. The nature of the FTC's deception authority and its relatively less troubled history of congressional interference and judicial review make the FTC's deceptive jurisdiction a more appropriate venue for rulemaking in this area.

C. Application of the First Amendment to FTC Rulemaking

FTC rulemaking under its deception authority is compatible with First Amendment jurisprudence. Advertising and marketing are generally considered "commercial speech" protected by the First Amendment.¹⁶³ When the government seeks to restrict commercial speech, courts apply an intermediate level of scrutiny, first articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, to determine if such restrictions are constitutionally sound. Under this test, a court must determine whether: (1) the expression is protected by the First Amendment, meaning that it must relate to a lawful activity and not be false, deceptive, or misleading; (2) the government asserted a substantial interest to be achieved by restricting commercial speech; (3) the regulation directly advances

¹⁶⁰ FTC Policy Statement of Deception, *supra* note 71, at 175-76.

¹⁶¹ *Id.* at 182.

¹⁶² See *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992); see also *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 162 (7th Cir. 1977) ("The fact that health is involved enhances the interests of both consumers and the public in being assured 'that the stream of commercial information flow cleanly as well as freely.'" (citation omitted).

¹⁶³ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

this interest; and (4) the restriction is not more extensive than necessary to serve this interest.¹⁶⁴

Under the first inquiry of the *Central Hudson* test, a court must determine whether the expression is false, deceptive or misleading because such speech is not protected by the First Amendment. There is a limited body of case law explaining this doctrine,¹⁶⁵ but most importantly, the Court has confirmed that deceptive and misleading commercial speech is not constitutionally protected and thus can be freely regulated.¹⁶⁶ Courts use the terms misleading and deceptive interchangeably and FTC rulemaking pursuant to its deceptive jurisdiction would fit well into this framework.

There are three types of deceptive or misleading commercial speech that the government has the power to regulate. The first two, actually misleading and inherently misleading speech, the government can ban outright.¹⁶⁷ Actually misleading speech is speech that has proven to be misleading in practice.¹⁶⁸ Inherently misleading speech is speech that is inherently conducive to deception and thus is “in-capable of being presented in a way that is not deceptive.”¹⁶⁹ Therefore, if the FTC proves that the speech is actually misleading through the use of extrinsic evidence,¹⁷⁰ or the court determines that the speech is inherently misleading,¹⁷¹ the government can ban or otherwise restrict the communication. If the FTC were to pursue rulemaking in the realm of food marketing to children, it could make the argument that the marketing practices utilized by food companies are inherently or actually misleading and deceptive when directed at children.¹⁷²

The third category is potentially misleading speech, which is speech that can be presented in a way that is not misleading or deceptive.¹⁷³ For such speech, the government can only prescribe methods

¹⁶⁴ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

¹⁶⁵ See Jennifer L. Pomeranz, *Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate*, 38 J.L. MED. & ETHICS 98, 101-03 (2010).

¹⁶⁶ *In re R.M.J.*, 455 U.S. 191, 203 (1982).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 207.

¹⁶⁹ *Bioganic Safety Brands v. Ament*, 174 F.Supp.2d 1168, 1180 (D. Co. 2001) (quoting *Revo v. Disciplinary Bd. of the Sup. Ct of N.M.*, 106 F.3d 929, 933 (10th Cir. 1997)).

¹⁷⁰ *In re R.M.J.*, 455 U.S. at 203.

¹⁷¹ See *Peel v. Attorney Disciplinary Comm’n*, 496 U.S. 91, 112 (1990) (Marshall J., concurring).

¹⁷² See Pomeranz, *supra* note 165.

¹⁷³ *In re R.M.J.*, 455 U.S. 191, 203 (1982).

to remedy the misleading nature of the speech. Courts sanction government required disclosures or explanations to cure the potential deception, but do not permit the government to ban this speech outright.¹⁷⁴ Restrictions on potentially misleading speech are thus subject to the remaining three prongs of the *Central Hudson* test. As discussed above, disclosure requirements are unlikely to be effective cures for deceptive advertising aimed at children because they likely cannot comprehend their meaning.¹⁷⁵ The fact that a disclosure requirement cannot cure the deceptions inherent in food marketing to children, leads to the conclusion that such speech is more likely actually or inherently misleading, rather than only potentially so. Therefore, restrictions on food marketing to children should withstand First Amendment scrutiny.

If Congress reinstated the FTC's ability to rule-make in this area under its unfairness jurisdiction, judicial review of the rule's compatibility with the First Amendment may not be as straightforward as it would be if the rules were based on deceptive advertising. There is almost no case law discussing the First Amendment application to government regulations of purely unfair speech. Under the *Central Hudson* test, there is no discussion of "unfair" commercial communication, but rather, only false, deceptive and misleading speech, which has been excluded from First Amendment protection by the Court. Therefore, like the potentially misleading category, speech that is deemed unfair may be subject to the remaining three prongs of the *Central Hudson* test.

When the FTC brings an action under both the unfair and deceptive prongs of the FTC Act, courts differentiate between deceptive speech and unfair *practices* in their First Amendment discussion. For example, in one case, providers of funeral services challenged the initial implementation of the Funeral Rule, which regulates unfair and deceptive acts in the funeral home industry and includes disclosure requirements and prohibitions on "engaging in any misrepresentation."¹⁷⁶ The providers claimed that these provisions violated their First Amendment rights. The Fourth Circuit held that they did not:

Nor do we agree that the First Amendment prevents the Commission from remedying deception by means of an affirmative disclosure requirement. Assuming that the sales practices in question are commercial 'speech,' the First Amendment gives that speech no protection when it is mis-

¹⁷⁴ *Id.*

¹⁷⁵ WILCOX ET AL., *supra* note 34, at 24.

¹⁷⁶ *Harry and Bryant Co. v. FTC*, 726 F.2d 993, 1001 (4th Cir. 1983).

leading, and poses no barrier to any remedy formulated by the Commission reasonably necessary to the prevention of future deception. The practices that the Commission sought to remedy by promulgation of the Funeral Rule were unfair and misleading and thus are not ‘speech’ entitled to First Amendment protection.¹⁷⁷

The court specifically referenced the first prong of the *Central Hudson* test to explain that the First Amendment does not protect misleading and deceptive commercial speech, and thus it could be regulated by the FTC. The court did not say that unfair speech is not protected by the First Amendment, but discussed it in terms of the *practices* that the FTC sought to remedy.

Courts apply the full *Central Hudson* test to speech that it determines is only potentially misleading,¹⁷⁸ unfair,¹⁷⁹ or both. The concept of unfair speech is rarely discussed with the exception of a handful of cases in the bankruptcy context. For example, in *In re Barcelo*, the district court upheld a provision of the bankruptcy code challenged under the First Amendment.¹⁸⁰ The provision in question permitted claims based on unfair, fraudulent or deceptive acts by a bankruptcy petition preparer.¹⁸¹ The trustee alleged that the defendant engaged in fraudulent and deceptive speech in violation of this provision.¹⁸² In holding that the speech at issue was subject to the *Central Hudson* test, the court explained that First Amendment “protection is not absolute, and less protection is afforded when dealing with legislation that safeguards against potentially fraudulent, unfair, or deceptive commercial speech.”¹⁸³ The court cited *Central Hudson* for this proposition, a case that does not include “unfair” in its litany of unprotected speech,¹⁸⁴ but it seems that the district court was merely explaining that potentially fraudulent and deceptive speech, like unfair speech, is subject to scrutiny under the *Central Hudson* test. It acknowledged

¹⁷⁷ *Id.* at 1001-02 (citations omitted).

¹⁷⁸ *FTC v. Direct Marketing Concepts, Inc.*, 569 F.Supp. 2d 285, 306-07 (D. Mass. 2008).

¹⁷⁹ *See e.g., In re Barcelo*, 313 B.R. 135, 145-49 (E.D.N.Y. 2004).

¹⁸⁰ *Id.* at 149.

¹⁸¹ *See id.* at 144 (citing 11 U.S.C. § 110 (1994)).

¹⁸² *See id.* at 144.

¹⁸³ *Id.* at 146 (citation omitted); *see also Gould v. Clippard*, 340 B.R. 861, 884 (M.D. Tenn. 2006) (explaining that *Central Hudson* teaches “that the protection of speech may be limited with substantial discretion by Congress when enacting legislation dealing with commercial speech that is fraudulent, unfair or deceptive.”).

¹⁸⁴ *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

that it could stop after prong one if the speech was inherently misleading or deceptive, but did not find that factually to be the case.¹⁸⁵

Therefore, if the speech is not considered actually or inherently misleading or deceptive but instead either unfair or only potentially misleading or deceptive, the regulation likely would be subject to the four prongs of the *Central Hudson* test. Thus, notwithstanding the lack of statutory authority for the FTC to rule-make under the unfair prong in this realm, it may not be able to withstand First Amendment challenges as easily.

Having to pass the four prongs of *Central Hudson* is not fatal.¹⁸⁶ However, because there is a dearth of case law discussing the regulation of unfair speech relative to the regulation of deceptive speech, the FTC may want to proceed under the deceptive prong even if Congress restores its authority to make rules under the unfair standard in the realm of child marketing. This will enable the Commission to draft a rule in accordance with the existing case law and enable courts to apply the standard with relative ease. Courts will likely give more deference to actions under the deceptive prong based on the history of FTC action, and constitutional scrutiny is likely to be easier to pass due to the relatively abundant First Amendment jurisprudence on the topic.

Proceeding under its deceptive jurisdiction would be especially favorable for the FTC because it has evidence that food marketing is deceptive and misleading when targeted at children. Under the Act, the FTC is only required to show that the speech is likely to mislead consumers. Nevertheless, the FTC should present evidence that such communications actually do mislead children or are inherently misleading when directed at them to improve the rule's chances of passing constitutional scrutiny. In light of reports created by the IOM,¹⁸⁷ the American Psychological Association,¹⁸⁸ and others,¹⁸⁹ the FTC would have a strong argument that such communications are actually or inherently deceptive when directed at children. Because such speech is not protected by the First Amendment, the FTC would have greater leeway to draft a remedy that courts should uphold pursuant to this charge.

¹⁸⁵ *In re Barcelo*, 313 B.R. at 147 n.12.

¹⁸⁶ *See, e.g.*, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995).

¹⁸⁷ *See* FOOD MARKETING, *supra* note 1.

¹⁸⁸ *See* WILCOX ET AL., *supra* note 34, at 30.

¹⁸⁹ *See, e.g.*, John, *supra* note 34.

CONCLUSION

FTC action under its deceptive authority is not only the more politically viable method to address marketing to youth, but the deceptive standard fits well with the factual circumstances of food marketing practices directed at children. Although there are reasonable arguments that marketing directed at children is unfair, the history of failed action in this arena, the current state of the FTC Act and the ample legal and scientific support for a finding of deception more readily supports FTC rulemaking under its deception authority. Further, as a constitutional matter, deceptive commercial speech likely garners less protection than unfair commercial speech under the First Amendment. Thus, if such rulemaking were subject to judicial review, it would have a greater likelihood of passing First Amendment scrutiny if based on the FTC's findings of deception. Therefore, even if Congress rescinded the ban on FTC rulemaking for unfair children's advertising, the FTC's deceptive jurisdiction may provide a more viable path for the FTC to pursue these practices.

The FTC can initiate rulemaking on its own volition under the authority granted to it under the FTC Act to correct deceptive acts and practices. However, rulemaking under this authority is burdensome and time consuming. To remedy this, Congress should direct the Commission to promulgate rules under its deceptive jurisdiction following APA requirements to avoid the Act's heavy burdens. Alternatively, Congress could revise Section 18 to rescind the additional barriers to FTC rulemaking and allow the FTC to follow standard APA protocol. Under either of these options, the FTC could pursue rulemaking on the subject of deceptive food marketing to children in an effective and efficient manner to correct the current market inefficiencies that result from deceptive practices directed at vulnerable consumers.

