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Advertising Obesity: Can the U.S. Follow the Lead of the UK in Limiting Television Marketing of Unhealthy Foods to Children?

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ABSTRACT

Childhood obesity has tripled in the U.S. since the 1970s, and television advertisement of unhealthy foods has been linked to the unhealthy eating habits of children. The United Kingdom, facing a similar problem, promulgated regulations in 2007 banning the advertisement of foods high in fat, sodium, and sugar during programming directed at children below age 16.

In the U.S., industry representatives, public policy advocates, and government officials are debating whether to rely on self-regulation efforts or to implement government-established guidelines. Industry representatives argue that government guidelines would do little to solve the childhood obesity problem and that the UK regulations did more damage than good. Advocates argue that these advertisements significantly encourage unhealthy eating habits. This Note compares the path such regulations would have to take in the U.S. as compared to that in the UK and analyzes the arguments for and against implementing UK-style regulations in the U.S. This Note concludes that American implementation of the UK's limited restriction of such advertising is an appropriate step toward reversing the rate of childhood obesity in the United States.

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I. INTRODUCTION

In the United States and the United Kingdom, advocates, government officials, and parents have expressed concern over the drastic increase in the weight of children.[1] In just three decades, the rate of childhood obesity in the U.S. has more than tripled, from about 4% of six- to eleven-year-olds in the 1970s to more than 15% of

1. *See, e.g.*, Brooks Barnes, *Limiting Ads of Junk Food to Children*, N.Y. TIMES, July 18, 2007, *available at* http://www.nytimes.com/2007/07/18/business/18food.html; *New Rules on Junk Food Ads Urged*, BBC NEWS, Mar. 8, 2004, http://news.bbc.co.uk/2/hi/health/3544089.stm.

the same age group in 2004.[2] In the UK, the problem is even more serious. Between 1995 and 2004, the rate of obesity in British children between ages two and ten rose from 10% to 16% in boys and from 10% to 11% in girls.[3] At the same time in the UK, the rate among children between ages eleven to fifteen rose from 14% in boys and 15% in girls to 24% and 26%, respectively.[4] These alarming statistics have regulators and legislators searching for solutions, and some proposals include television advertisements targeting children.[5] In the U.S., the problem remains that half of all television advertisements promote food.[6] Moreover, of that half, 72% promote candy and snacks, cereal, and fast food.[7]

Why do such advertisements present such a problem for children's eating habits? Advertisers take aim at children because of their significant buying power, either through direct purchases made on their own or through pressure exerted on their parents, specifically in regards to food purchased at the grocery store and restaurants.[8] Further, while "the fast food industry is an important force in the obesity epidemic . . .[,] the television and video industries play a key role by directly advertising foods to children and by encouraging sedentary behavior. The best single predictor of obesity is television viewing."[9] Although advertisers contend that advertisements do not lead directly to over-consumption of unhealthy foods and consumers believe that they are not susceptible to advertising, television advertisements are an effective tool when directed at children.[10]

U.S. regulators have long addressed advertising to children but have never implemented sweeping or direct initiatives dealing with

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2. INST. OF MED., COMM. ON PREVENTION OF OBESITY IN CHILDREN AND YOUTH, OVERVIEW OF THE IOM'S CHILDHOOD OBESITY PREVENTION STUDY FACT SHEET (2004), *available at* http://www.iom.edu/Object.File/Master/22/604/fact%20sheet%20-%20overview%20finalBitticks.pdf [hereinafter PREVENTING CHILDHOOD OBESITY].

3. Press Release, The NHS Info. Centre for Health and Soc. Care, Rise in Childhood Obesity Rates—New Statistics from Health Survey for England (Apr. 2005–Mar. 2006), *available at* http://www.ic.nhs.uk/news-and-events/press-office/press-releases/archived-press-releases/april-2005--march-2006/rise-in-childhood-obesity-rates--new-statistics-from-health-survey-for-england.

4. *Id.*

5. *See, e.g.*, Fed. Commc'n Comm'n [FCC], Recent Actions: Task Force on Media and Childhood Obesity, http://www.fcc.gov/obesity/actions.html (last visited Dec. 23, 2008).

6. WALTER GANTZ ET AL., KAISER FAM. FOUND., FOOD FOR THOUGHT: TELEVISION FOOD ADVERTISING TO CHILDREN IN THE UNITED STATES 3 (2007), *available at* http://www.kff.org/entmedia/upload/7618.pdf.

7. *Id.*

8. Valere Fulwider, Comment, *Future Benefits? Tax Policy, Advertising, and the Epidemic of Obesity in Children*, 20 J. CONTEMP. HEALTH L. & POL'Y 217, 223 (2003).

9. *Id.* at 224.

10. *Id.* at 227.

it.[11] However, the connection between childhood obesity and television advertisements of unhealthy foods has sparked new life in the debate over such initiatives.[12] The UK has similarly discussed the issue for some time,[13] but, unlike the inaction in the U.S., UK regulators have taken a more forceful and direct stand against certain advertising practices targeting children—completely banning the advertising of certain food categories to children.[14]

While other nations, such as Sweden and Norway, have addressed these and other concerns by completely banning all advertising directed at children of certain ages, lawmakers in the U.S. recently have only considered regulation to narrow television advertising directed at children.[15] Since the February 2007 announcement by the British Office of Communications (Ofcom) concerning its new policies regarding food advertising to children,[16] U.S. policymakers have begun discussing the implementation of similar methods.[17] This Note addresses how the authority of U.S. regulatory agencies, including the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC), can interpret—as the law stands or through Congressional action—their directives in order to mirror Ofcom and the Food Standards Agency (FSA) with respect to the issue of banning the advertisement of all unhealthy foods during children's television programming.

While others have advocated the implementation of restrictions against certain advertising practices, this Note focuses only on a total ban on the advertisement of unhealthy food to children and the boundaries of such a ban. Some advocate the reduction in overall amount of time allowed for advertisement during children's

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11. *See infra* Part I.

12. *See* Marian Burros, *New Approach to Childhood Obesity Urged*, N.Y. TIMES, Oct. 1, 2004, *available at* http://www.nytimes.com/2004/10/01/health/01obese.html ("A comprehensive report on the causes and solutions for childhood obesity in the United States has taken a new approach to the epidemic. The report . . . calls for broad societal strategy rather than focusing on personal responsibility.").

13. *See* Nick Higham, *Confusion Over "Junk Food" Ads*, BBC NEWS, Oct. 6, 2003, http://news.bbc.co.uk/2/hi/entertainment/3168270.stm ("Advertising to children has always been controversial."); *see also MP Angry Over TV Food Ads*, BBC NEWS, Apr. 10, 2003, http://news.bbc.co.uk/2/hi/uk_news/politics/2914161.stm .

14. Press Release, Office of Commc'ns, Ofcom Publishes Final Statement on the Television Advertising of Food and Drink Products to Children (Feb. 22, 2007), *available at* http://www.ofcom.org.uk/media/news/2007/02/nr_20070222 [hereinafter Ofcom Final Statement].

15. Fulwider, *supra* note 8, at 226.

16. OFFICE OF COMMC'NS [OFCOM], TELEVISION ADVERTISING OF FOOD AND DRINK PRODUCTS TO CHILDREN: FINAL STATEMENT 47 (2007), *available at* http://www.ofcom.org.uk/consult/condocs/foodads_new/statement/statement.pdf.

17. Letter from Edward Markey, Chairman, U.S. House Subcomm. on Telecomms. & the Internet, to FCC Chairman Kevin Martin and Comm'rs Michael Copps and Deborah Taylor Tate (Apr. 16, 2007), *available at* http://markey.house.gov/docs/telecomm/Letter%20to%20FCC%20on%20Childhood%20Obesity.pdf.

programming;[18] however, it is the content of commercials that causes damage to children and not the duration of or number of advertisements.[19] Similarly, some advocate restrictions on the use of character selling (the use of brand characters or licensed characters to promote products), product placement, and other advertising techniques.[20] However, critics counter that restricting advertising tools rather than the advertisements as a whole would not significantly address the problem because "the problem is not so much that advertisements are deceptive, but that the products advertised are most often for food of poor nutritional quality."[21] Therefore, as the problem of childhood obesity is accentuated not merely by the advertising techniques used but by the wholesale advertisement of those products, this Note addresses the elimination of advertising those products rather than restricting methods used to promote those products through television advertising. Given that advertisers are willing to spend hundreds of millions of dollars each year marketing food, beverages, and restaurants to children,[22] they likely will find a means of making those advertisements effective.

Part II of this Note discusses the background of the issue, including a brief history of regulation of children's advertising in the U.S. and the details of Ofcom's newest regulations. Part III will compare the current authority and limitations of U.S. and UK regulators in dealing with children's advertising. Part IV addresses arguments against the imposition of Ofcom's regulations both in the UK and the U.S. Part V proposes the implementation and implications of new Ofcom regulations in the United States. Finally, the conclusion summarizes the reasoning for rejecting criticisms of and accepting the U.S. translation of Ofcom's policy banning unhealthy food advertisements from children's television.

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18. *Id.*

19. William A. Ramsey, *Rethinking Regulation of Advertising Aimed at Children*, 58 FED. COMM. L.J. 361, 384 (2006).

20. *E.g.*, Angela Campbell, *Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 LOY. L.A. L. REV. 447 *passim* (2006).

21. *Id.* at 498.

22. FED. TRADE COMM'N [FTC], MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION ES-2 (2008), *available at* http://www.ftc.gov/os/2008/07/P064504 foodmktingreport.pdf [hereinafter MARKETING FOOD TO CHILDREN].

II. BACKGROUND

A. *History of U.S. Efforts*

Politicians in Washington have hotly debated advertising during children's television programming for several decades.[23] While this issue has recently been characterized by regulatory threats followed by self-regulatory compromises, the 1970s saw demands from public interest groups that fueled a much more aggressive position in the executive agencies.[24] In 1971, the FCC, responding to petitions from the group Action for Children's Television, a public interest group dedicated to reformation of programming and advertising, issued regulations requiring a "clear separation" between programming and advertising.[25] The regulations included bans on program-length commercials targeting children, host-selling (advertisement by a character in a program during that program's airing), and requirements that advertisements be clearly delineated from programming by phrases such as "We'll be back after these messages."[26] Action for Children's Television then persuaded the FTC that children's advertising unfairly targeted children because they are too young to understand the intent of advertising.[27] Television and advertising companies countered quickly by successfully lobbying Congress for legislation restricting the FTC from taking such action, which effectively ended any such broad regulations.[28]

During the 1980s, several public advocacy groups, including the National Coalition on Television Violence, the National Citizen Committee for Broadcasting, and the Parent Teacher Association, released reports and public policy statements encouraging federal action to promote educational children's programming and discouraging violent content.[29] Action for Children's Television used this atmosphere to make its final push for legislative action, resulting in the Children's Television Act of 1990 (CTA), the first federal

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23. Alison Alexander & Keisha L. Hoerrner, *How Does the U.S. Government Regulate Children's Media?*, *in* TWENTY QUESTIONS ABOUT YOUTH & THE MEDIA 29, 35 (Sharon R. Mazzarella ed., 2007)

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; BRIAN L. WILCOX ET AL., REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON ADVERTISING AND CHILDREN 38 (2004), *available at* http://www.apa.org/pi/cyf/advertisingandchildren.pdf.

28. WILCOX ET AL., *supra* note 27, at 38.

29. Museum of Broadcast Communications, Children and Television, http://www.museum.tv/archives/etv/C/htmlC/childrenand/childrenand.htm (last visited Dec. 23, 2008).

legislation directly addressing children's programming.[30] Congress based this new legislation on the premise that "as part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children."[31] However, the CTA did not impose specific bans on any particular type of content; instead, it required broadcasters to include an educational programming component monitored by the FCC.[32] The CTA did specifically limit advertising to 10.5 minutes per hour during the weekend and 12 minutes per hour during the week,[33] because "special safeguards are appropriate to protect children from overcommercialization on television"[34] and "television station operators and licensees should follow practices in connection with children's television programming and advertising that take into consideration the characteristics of this child audience."[35] The CTA noted, however, that a comprehensive ban on advertising during children's programming would be damaging because "the financial support of advertisers assists in the provision of programming to children."[36] Again, Congress left the implementation and oversight to the FCC, directing it to "review and evaluate the advertising duration limitations," to consider "the need for modification of such limitations," and to "modify such limitations in accordance with the public interest."[37] Since implementation, the FCC has not revised these duration guidelines.[38]

In the 2000s, critics of advertising during children's programming gained a specific target and vehicle for their arguments, shifting the sympathy of lawmakers and the public. In 2002, Senator Tom Harkin, then Chairman of the Agriculture, Nutrition, and Forestry Committee, requested the Institute of Medicine to report on the status of childhood obesity in the U.S. and recommend initiatives to mitigate the situation.[39] The report, released in 2004, found that the rate of childhood obesity in two to

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30. Museum of Broadcast Communications, Action for Children's Television, http://www.museum.tv/archives/etv/A/htmlA/actionforch/actionforch.htm (last visited Dec. 23, 2008); *see* FCC, Consumer & Governmental Affairs Bureau, Children's Educational Television, http://www.fcc.gov/cgb/consumerfacts/childtv.html (last visited Dec. 23, 2008).

31. Children's Television Act of 1990, Pub. L. No. 101-437, § 101(2), § 303a note, 104 Stat. 996 (codified as amended at 47 U.S.C. § 303a (2006)).

32. 47 U.S.C. § 303b (2006).

33. *Id.*

34. Children's Television Act § 101(4).

35. *Id.* § 101(5).

36. *Id.* § 101(3).

37. *Id.* § 102(c)(2).

38. Letter from Edward Markey, *supra* note 17.

39. *See* JEFFREY P. KOPLAN, CATHARYN T. LIVERMAN & VIVICA A. KRAAK, INST. OF MED., PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE (2004), *available at* http://www.iom.edu/CMS/3788/5867/22596.aspx.

five year-olds and twelve to nineteen year-olds had doubled and among six to eleven year-olds had tripled over the preceding three decades.[40] The Institute of Medicine implored the media and advertising industries to voluntarily cease advertising certain foods to children and recommended the establishment of nutritional standards to differentiate between healthy and unhealthy foods.[41] Later that year, a poll found that 73% of Americans likely supported a ban on the advertising of unhealthy foods to children.[42]

Following a July 2006 conference entitled "The Future of Children's Media: Advertising,"[43] the FCC announced the launch of the Task Force on Media and Childhood Obesity: Today and Tomorrow (the Task Force).[44] The Task Force, chaired by Senators Harkin and Sam Brownback, includes participants from the FCC, television networks, the advertising industry, food and beverage manufacturers and retailers, and children's advocacy groups focused on establishing a system of industry self-regulation—the Task Force sought to build "consensus regarding voluntary steps and goals that the public and private sectors can take to combat childhood obesity."[45]

After the announcement of the Task Force formation, the Council of Better Business Bureaus and the National Advertising Review Council (NARC) responded with the formation of the Children's Food and Beverage Advertising Initiative—the largest in a series of private, self-regulatory initiatives aimed at addressing the media's role in increasing the rate of childhood obesity.[46] The Initiative collected pledges from fourteen of the largest food and beverage manufacturers to commit half of their advertisements to healthier

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40. *Id.* at 40.

41. *Id.* at 168–75.

42. Senator Tom Harkin, Remarks at the FTC/HHS Workshop on Marketing, Self-Regulation, and Childhood Obesity (July 14, 2005) (transcript available at http://harkin.senate.gov/pr/p.cfm?i=240635).

43. Conference, Children NOW, The Future of Children's Media: Advertising, July 20, 2006, http://www.childrennow.org/issues/media/advertising_conference.html (featuring Senators Hillary Clinton and Sam Brownback and FCC Commissioners Deborah Taylor Tate, Jonathan Adelstein, and Michael Copps, hosted by Children Now—a San Francisco-based children's advocacy group—at the Kaiser Family Foundation's Washington, DC office).

44. *See* FCC, Recent Actions: Task Force on Media and Childhood Obesity, *supra* note 5 (describing task force history and recent and ongoing activities).

45. FCC, Task Force on Media & Childhood Obesity, http://www.fcc.gov/obesity/Welcome.html (last visited Dec. 23, 2008) (providing an overview of the task force mission).

46. Better Bus. Bureau, Children's Food and Beverage Advertising Initiative, About the Initiative, http://us.bbb.org/WWWRoot/SitePage.aspx?site=113&id=b712b7a7-fcd5-479c-af49-8649107a4b02 (last visited Dec. 23, 2008).

foods and lifestyles and to reduce, if not eliminate, the use of third-party-licensed characters.[47]

Shortly after the first meeting of the Task Force on Media and Childhood Obesity[48] and spurred by the release of the Kaiser Family Foundation's study *Food for Thought: Television Food Advertising to Children in the United States*,[49] Congressman Ed Markey, Chairman of the House Subcommittee on Telecommunications and the Internet, sent a letter to FCC Chairman Martin and Commissioners Tate and Copps expressing concern that the Task Force and other recent self-regulation efforts might fail to reduce the total amount of advertising of unhealthy food products.[50] Congressman Markey proposed that the FCC make certain policy shifts, which included prohibiting stations from broadcasting any programming containing advertisements for unhealthy foods among its core educational programming requirements and reducing the overall amount of time allowed for advertisements per hour during children's programming.[51] Congressman Markey also suggested that the FCC take an international perspective on childhood obesity efforts for the first time.[52] "The Commission could start," he suggested, "by examining the efforts of [Ofcom], its sister agency in the United Kingdom, which recently imposed significant restrictions on television advertising to limit children's exposure to ads for food and drink products that are high in fat, salt, and sugar (HFSS)."[53] Markey encouraged the Commission to take into account that "Australia is considering a similar ban, while governments in France, the Philippines, Thailand, China, Denmark, Finland, Malaysia, Korea, and Romania have already placed restrictions on food advertising to children, though they do not ban such ads outright."[54]

Because the Task Force on Media and Childhood Obesity has yet to issue a final report (twice postponing it because public advocates continue to criticize other self-regulatory efforts as falling short of effecting real change), policymakers continue to question whether a regulatory regime such as the UK's is feasible or even advisable.[55]

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47. Better Bus. Bureau, Children's Food and Beverage Advertising Initiative, http://us.bbb.org/WWWRoot/SitePage.aspx?site=113&id=dba51fbb-9317-4f88-9bcb-3942d7336e87 (last visited Dec. 23, 2008); Better Bus. Bureau, Children's Food and Beverage Advertising Initiative, About the Initiative, *supra* note 46.

48. FCC, Task Force on Media and Childhood Obesity, Meetings, http://www.fcc.gov/obesity/meetings.html (last visited Dec. 23, 2008).

49. *See* GANTZ ET AL., *supra* note 6.

50. Letter from Edward Markey, *supra* note 17.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. John Eggerton, *Childhood-Obesity Report Delayed Again*, BROADCASTING & CABLE, July 19, 2007, http://www.broadcastingcable.com/article/CA6479807.html (discussing delay in issuing report).

Both sides of the political aisle express support for government action.[56] During the 2008 election cycle, both presidential candidates addressed national regulation of food advertising and marketing to children.[57] Senator Barack Obama stated that if self-regulatory schemes failed to effectively address the issue, he would support government regulations restricting the advertisements of unhealthy foods and beverages to children.[58] Senator John McCain also stated that regulations were vital, but encouraged food marketers to create voluntary standards.[59]

B. *UK Ban*

Though Ofcom regulators met initial requests to investigate the link between advertisements and childhood obesity in the UK with skepticism,[60] the British agency specifically restricted the advertisement of certain types of foods on the airwaves in its final statement on television advertising of food to children, released in February 2007.[61]

Ofcom deferred to the FSA in determining which food products would be affected by the ban because "Ofcom is not in a position to comment on specific products"[62] because it "does not have the relevant expertise in nutritional profiling."[63] The FSA, in turn, developed a categorization model "which recognises the contribution made by beneficial nutrients that are important in a child's diet (protein, fibre, fruit and vegetables, and nuts) and penalises foods with ingredients that children should eat less of (saturated fats, salt and sugars)."[64] The model directs Ofcom on procedures that differentiate between foods acceptable for advertisement during

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56. FCC, Task Force on Media & Childhood Obesity, Task Force Participants, http://www.fcc.gov/obesity/participants.html (last visited Nov. 6, 2008) (noting that two of the chairmen of the task force are Senators Tom Harkin (D-IA) and Sam Brownback (R-KS)).

57. *Young Lives at Risk: Our Overweight Children: What the Candidates Had to Say*, WASH. POST, May 18, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/05/18/AR2008051801391.html [hereinafter *Candidates on Overweight Children*].

58. *Id.*

59. *Id.*

60. *See TV Child Food Ad Ban is Ruled Out*, BBC NEWS, July 22, 2004, http://news.bbc.co.uk/2/hi/health/3916091.stm (quoting Ofcom Chief Exec. Stephen Carter: "Television advertising clearly has an influence and equally clearly there is a need for a tightening of specific rules. However, a total ban would be neither proportionate nor, in isolation, effective.").

61. Ofcom Final Statement, *supra* note 14.

62. *Id.*

63. *Id.*

64. Food Standards Agency, Nutrient Profiling, http://www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/ (last visited Dec. 23, 2008).

children's programming and foods that are high in fat, salt, and sugar (HFSS foods).[65]

Generally, the new regulations from Ofcom ban the advertising of "food or drink products that are assessed as [HFSS foods] in accordance with the nutrient profiling scheme published by the [FSA]" during times "in or adjacent to children's programmes or programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16."[66] Further, "[a]dvertisements must avoid anything likely to encourage poor nutritional habits or an unhealthy lifestyle in children."[67] Importantly, notes accompanying this provision detail the meaning of the provision:

> (1) This rule does not preclude responsible advertising for any products including those that should be eaten only in moderation.
>
> (2) In particular, advertisements should not encourage excessive consumption of any food or drink, frequent eating between meals or eating immediately before going to bed.
>
> (3) It is important to avoid encouraging or condoning attitudes associated with poor diets, for example, a dislike of green vegetables.
>
> (4) Portion sizes or quantities of food shown should be responsible and relevant to the scene depicted, especially if children are involved. No advertisement should suggest that a portion intended for more than one person is to be consumed by a single individual or an adult's portion, by a small child.
>
> (5) Advertisements for food should not suggest that an inactive or sedentary lifestyle is preferable to physical activity.[68]

Ofcom's final report further details the notion of excessive consumption in advertisements in another provision requiring that "[a]dvertisements must not encourage or condone excessive consumption of any food."[69] Again, the agency included descriptive notes to illustrate the depth of this provision, which included the following example: "Interpretation of this rule should be by reference to generally accepted nutritional advice. It would clearly not be inconsistent with shots of someone enjoying a chocolate bar; it would, however, preclude someone being shown eating whole boxes of chocolates in one sitting."[70]

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65. Food Standards Agency, Key Facts, http://www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/nutrientprofilefacts (last visited Dec. 23, 2008). For a guide to calculating whether a food or drink qualifies as "less healthy" under the FSA model, see Food Standards Agency, Guide to Using the Model, http://www.food.gov.uk/healthiereating/advertisingtochildren/nutlab/nutprofmod (last visited Dec. 23, 2008).

66. *See* OFCOM, TELEVISION ADVERTISING OF FOOD AND DRINK PRODUCTS TO CHILDREN, *supra* note 16, at 48.

67. *Id.*

68. *Id.* at 48–49.

69. *Id.* at 52.

70. *Id.*

Ofcom also restricts the use of licensed characters and celebrities, completely barring their use in the advertisement of HFSS foods that target preschool or primary school children.[71] However, the agency places interpretive responsibility on advertisers targeting children above those age ranges, requiring that "[l]icensed characters and celebrities popular with children must be used with a due sense of responsibility."[72]

An earlier proposal by Ofcom blocked only advertisements during programming targeted toward children up to age nine.[73] However, the FSA intervened to urge a broader reach for Ofcom's "childhood" umbrella.[74] It reasoned that because children between the ages of nine and fifteen years old make many of their own decisions regarding food, restrictions should especially protect them.[75] "With a quarter of all 11 to 15 year olds now facing obesity, we have to be sure that any restrictions on advertising are aimed at children of all ages to have a real effect in helping to reverse this trend," FSA chair Deirdre Hutton argued.[76]

III. COMMUNICATIONS REGULATORY STRUCTURE IN THE UNITED KINGDOM AND THE UNITED STATES

A. *Ofcom*

Parliament created Ofcom when it passed the Office of Communications Act 2002, which consolidated a number of previously existing regulatory agencies with authority over matters concerning both televisions and radio broadcasts.[77] The new agency received its marching orders the next year under the Communications Act 2003, which bestowed upon Ofcom the responsibilities of furthering "the interests of citizens in relation to communications matters" and "the interests of consumers in relevant markets, where appropriate by promoting competition."[78] Specifically, Ofcom is to apply "standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services."[79] With regard to the UK's youth, Ofcom is directed to consider "the

71. *Id.* at 50.
72. *Id.*
73. *Id.* at 14–15.
74. Anthony Fletcher, *FSA "Disappointed" at Junk Food Ad Proposals*, BAKERYANDSNACKS.COM, June 16, 2006, http://www.bakeryandsnacks.com/news/ng.asp?id=68475-fsa-obesity-salt.
75. *Id.*
76. *Id.*
77. Office of Communications Act, 2002, c. 11 (Eng.).
78. Office of Communications Act, 2003, c. 21, § 3(1)(a)–(b) (Eng.).
79. *Id.* § 3(2)(e).

vulnerability of children and of other whose circumstances appear to Ofcom to put them in need of special protection."[80] In dealing with advertising, the Communications Act 2003 requires Ofcom to ensure "that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented."[81] Though broad in meaning, this provision ensures that regulators will heavily consider the effects of advertisements on the well-being of the citizenry.

Ofcom set forth its guiding regulatory principles in the pursuit of these goals. Among those principles is the sentiment that it should avoid regulatory action in favor of market forces and self-regulatory efforts:[82] "Ofcom will operate with a bias against intervention."[83] However, when market forces and self-regulation fail, the agency will operate with a "willingness to intervene firmly, promptly, and effectively where required."[84] Additionally, it "will always seek the least intrusive regulatory mechanisms to achieve its policy objectives,"[85] trying to allow the market to operate as freely and efficiently as possible without allowing it to intrude on the greater welfare of the public. Finally, it will ensure that any restrictive actions it takes have only a minimal impact on the targeted industry.[86] In so doing, "Ofcom will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation on a market."[87] This goal has become especially crucial in the debate over intervention concerning television advertising of food targeting children and has been the central argument of proponents of self-regulation or at least those wishing for softer sanctions than those decided upon by Ofcom regulators in 2007.[88]

In addition to Ofcom's operating principles, both statutory and self-imposed, the Communications Act 2003 requires that Ofcom take into account other avenues of achieving its policy goals, specifically through self-regulation.[89] Parliament sets out that "OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances . . . the desirability of promoting and facilitating the development and use of

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80. *Id.* § 3(4)(h).
81. *Id.* § 319(2)(h).
82. Office of Commc'ns, About Ofcom: Statutory Duties and Regulatory Principles, http://www.ofcom.org.uk/about/sdrp/ (last visited Dec. 23, 2008).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *See infra* Part III.
89. *See* Communications Act, 2003, c. 21, § 3(4)(c) (Eng.).

effective forms of self-regulation."[90] Additionally, when describing Ofcom's responsibility to review regulatory burdens on industries, the Communications Act 2003 further requires that

> it shall be the duty of OFCOM—(a) to have regard to the extent to which the matters which they are required . . . to further or to secure are already furthered or secured, or are likely to be furthered or secured, by effective self-regulation; and (b) in the light of that, to consider to what extent it would be appropriate to remove or reduce regulatory burdens imposed by OFCOM.[91]

In consideration of these mandates, Ofcom, soon after its creation, contracted out some of its regulatory authority over advertisements.[92] However, considering the language of statutory provisions, the government regulators apparently became strongly convinced that avenues of self-regulation were highly unlikely to produce the sort of industry overhaul it felt necessary to fully address the problem of television advertising's impact on childhood obesity, stripping those self-regulatory agents of choice in approaching the crisis.

Also, leading up to the final announcement of a regulatory plan, children's advocates pushed for a deadline of 9:00 p.m., before which no junk food advertisements could be aired.[93] Though Ofcom initially refused to implement such a ban, calls for extended restrictions continued into 2008.[94] Political figures such as Prime Minister Brown appeared to favor the more aggressive approach.[95] Nevertheless, in January 2008, Ofcom rejected the notion that it was considering such a plan.[96]

B. *The Federal Communications Commission*

Chairman Markey, in his April 2007 letter to the FCC chairman and commissioners, suggested that the FCC already has the ability to act on children's advertising and that it perhaps should, hinting that the Task Force on Childhood Obesity is likely to yield no real solutions.[97] Chairman Markey suggested that the FCC derives the authority to act under the CTA, which deals directly with television

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90. *Id.*

91. *Id.* at § 6(2).

92. BROADCAST COMM. OF ADVER. PRAC., TELEVISION ADVERTISING STANDARDS CODE 6 (2008), *available at* http://www.cap.org.uk/NR/rdonlyres/89548571-FA23-4642-B04D-8812C58D9FF3/0/BCAP_Television_Advertising_Standards_Code_20080108.pdf.

93. Elsa McLaren, *Junk Food Advert Ban Is Toothless, Say Health Campaigners*, TIMES (London), Feb. 22, 2007, *available at* http://www.timesonline.co.uk/tol/news/uk/health/article1424757.ece.

94. Mark Sweney, *Fresh Hope for Ad Industry on Junk Food Ban*, THE GUARDIAN (London), Nov. 26, 2007, *available at* http://www.guardian.co.uk/media/2007/nov/26/advertising.

95. *Id.*

96. *Id.*

97. Letter from Edward Markey, *supra* note 17.

advertisements targeting American children.[98] He argued that the FCC should simply look to provisions within the statute directing it to review restrictions placed on advertisements during children's programming and modify them "in accordance with the public interest" and to the law's section directing the FCC to consider television stations' service to "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs" when determining whether to renew broadcast licenses.[99] He asked the chairman and commissioners to consider simply reducing overall advertising time during children's programming, ensuring that food advertisers have fewer opportunities to target children.[100] Alternatively, he suggested heightening application requirements for license renewals if stations air advertising for foods high in fat, sugar, and salt, putting greater pressure on licensees to limit advertising themselves.[101]

The FCC has argued that the CTA addresses the content of advertisement as well, giving the agency some regulatory authority over such matters.[102] The CTA, though, seems to grant only general power to limit the amount of television advertising directed at children, rather than granting the FCC the ability to target certain types of advertising or advertising promoting only certain products.[103] The CTA instructs the FCC to "prescribe standards applicable to commercial television broadcast licensees with respect to the *time devoted* to commercial matter in conjunction with children's television programming" and to alter them as needed to bring them into "accordance with the public interest."[104]

In *Becker v. FCC*, the FCC argued that a television station could move a federal political campaign's advertisement, due to its potentially offensive content, to a time viewed by less children during a so-called safe harbor time.[105] The FCC drew on the CTA, arguing that Congress wished to grant it the power to guard children from "the adverse effects of televised material."[106] The court, however, noted that the CTA addresses only "the quantity and duration of advertisements during children's programs, not their content."[107] Though that case dealt with political content rather than commercial

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98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. Becker v. FCC, 95 F.3d 75, 77–78 (D.C. Cir. 1996).
103. *See id.* at 81 ("[T]he first of the cited provisions deals with the quantity and duration of advertisements during children's programs, not their content . . . .").
104. 47 U.S.C. § 303a (2006).
105. *Becker*, 95 F.3d at 77.
106. *Id.* at 81.
107. *Id.*

content, the court did not qualify its assertion that the CTA holds no implications for advertising content.[108]

C. *The Federal Trade Commission*

Within the U.S. regulatory system, the FTC has the most sweeping power over advertising.[109] While U.S. businesses and officials often use these regulations for protection from competitors, the FTC's regulatory scheme equally protects consumers from businesses peddling their wares.[110] The FTC's original standards "declared unlawful . . . unfair methods of competition."[111] With the 1934 decision in *FTC v. R.F. Keppel & Bros.*, the Supreme Court recognized that the FTC could legitimately operate within the realm of unfair acts or practices in order to protect children from advertising that would ultimately bring them harm.[112] The Court noted that the advertising practice in question, though it "[did] not involve any fraud or deception," nevertheless "induce[d] children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package."[113]

Decades later, in 1980, the FTC more clearly defined its approach to findings of "unfair acts or practices" in its Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, requiring that the practice be offensive to public policy concerns, be immoral or unethical, and be injurious to the consumer.[114] In response, however, Congress offered amendments to the Federal Trade Commission Act (the FTC Act) in 1980 that specifically prohibited the agency from issuing any rule on children's advertising using the "unfair act or practice" reasoning and prohibited the FTC from promulgating new rules to restrict advertising on unfairness grounds for three years.[115]

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108. *See generally id.*

109. *See, e.g.*, WILCOX ET AL., *supra* note 27, at 37.

110. *See id.* at 8, 37.

111. Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1936 (2000).

112. *Id.* at 1948–49.

113. FTC v. R.F. Keppel & Bros, 291 U.S. 304, 309 (1934).

114. *See* Calkins, *supra* note 110, at 1951–55.

115. FTC Improvements Act of 1980, Pub. L. No. 96-252, § 11, 94 Stat. 374 (1980); Roscoe Starek, Comm'r, FTC, Summary of Prepared Remarks at the Minnesota Institute of Legal Education: The ABCs at the FTC: Marketing and Advertising to Children (July 25, 1997), *available at* http://www.ftc.gov/speeches/starek/minnfin.shtm.

The prohibition on rulemaking proceedings relating to advertising restrictions continued until 1994.[116] In that year, Congress amended the FTC Act with Section 5(n):

> The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause [(1)] substantial injury to consumers which is [(2)] not reasonably avoidable by consumers themselves and [(3)] not outweighed by countervailing benefits to consumers or to competition.[117]

Additionally, Congress disallowed the FTC from basing such decisions solely on public policy considerations.[118] With this statute, legislators placed strong obstacles in front of FTC commissioners wishing to prevent advertisers from utilizing practices antithetical to their view of the public good. Nevertheless, that codification of public policy concerns left the door open for the FTC to consider the well-being of consumers generally, including children, who, as the Court had previously noted, were "too young to be capable of exercising an intelligent judgment of the transaction."[119]

Still, it appears that the FTC's powers concerning the discovery of unfair practices in misleading children stop short of allowing it to dictate general policy over the content of all advertising.[120] The combined effect of these restrictions has "crippled the potential for any broad-spectrum regulation in advertising to children for nearly three decades."[121]

Thus, as it stands now, the FCC has no authority over advertising content and the FTC lost any real authority to set broad policy. The U.S. regulatory system holds no power to directly influence advertising content, and any such policy would need to be legislative, unless Congress decides to reinstate the pre-1980 powers of the FTC.[122]

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116. Starek, *supra* note 115.

117. FTC Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (codified at 15 U.S.C. § 45(n) (2006)).

118. *Id.*

119. FTC v. R.F. Keppel & Bros., 291 U.S. 304, 309 (1934).

120. *See* Susan Linn & Courtney Novosat, *Obesity Rates Mirror Rise in Marketing; History of Television Deregulation Complicit*, 615 ANNALS 133, 135 (2008).

> Although the FTC maintains authority to regulate advertising deemed "deceptive," the restriction of its authority crippled the potential for any broad-spectrum regulation in advertising to children for nearly three decades. As a result of the restriction placed on the FTC, today it is easier to regulate advertising targeted to adults than advertising targeted to children.

Id.

121. *Id.*

122. 47 U.S.C. § 303a (2006).

D. *Self-Regulation: The Children's Food and Beverage Advertising Initiative*

In recent years, many in food and beverage manufacturing and retail, the media, and advertising have implemented self-regulatory programs. The one receiving the most attention of late is the Children's Food and Beverage Advertising Initiative, a product of the Council of Better Business Bureaus and fourteen major food and beverage manufacturers and retailers.[123] The Initiative addresses the nutrition of food and beverage products advertised to children under twelve.[124] The participants of the Initiative account for at least two-thirds of 2004 television advertising expenditures targeting children for food and beverages.[125]

The Council of Better Business Bureaus required the participants to contribute individual pledges to meet at least a minimum core set of principles. Each participant must pledge (1) to "devote at least half of their advertising primarily directed to children under [twelve] . . . to better-for-you products and/or to messages that encourage good nutrition or healthy lifestyles"; (2) to "[r]educe the use of third-party licensed characters in advertising primarily directed to children under [twelve], unless such advertising is for better-for-you foods or includes healthy lifestyle messaging"; (3) to "[c]ease paying for or actively seeking to place their food and beverage products in editorial/programming content that is primarily directed to children under [twelve] for the purpose of promoting the sale of those products"; (4) to "[i]ncorporate better-for-you foods or include healthy lifestyle messaging in interactive games that integrate a company's food or beverage products"; and (5) to "[s]top advertising food and beverage products to children in elementary schools."[126]

The Council of Better Business Bureaus monitors compliance through yearly annual reports.[127] If a participant fails to meet its obligations and pledged standards, though, the most severe

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123. Better Bus. Bureau, Children's Food and Beverage Advertising Initiative, About the Initiative, *supra* note 46. These companies include Burger King Corp, Cadbury Adams, USA, LLC, Campbell Soup Company, The Coca-Cola Company, ConAgra Foods, Inc., The Hershey Company, Kellogg Company, Kraft Foods Inc., Mars, Inc., McDonald's USA, Nestlé USA, PepsiCo, Inc., and Unilever United States. *Id.*

124. ELAINE D. KOLISH & C. LEE PEELER, COUNCIL OF BETTER BUS. BUREAUS, HANGING THE LANDSCAPE OF FOOD AND BEVERAGE ADVERTISING: THE CHILDREN'S FOOD AND BEVERAGE ADVERTISING INITIATIVE IN ACTION 3 (2008), *available at* http://us.bbb.org/WWWRoot/storage/16/documents/CFBAI/ChildrenF&BInit_Sept21.pdf.

125. *Id.*

126. *Id.* at 4–5. The restrictions placed on companies in relation to elementary schools do not limit their ability to display food and beverage products. *Id.* at 5.

127. *Id.* at 5.

punishment possible is (the relatively insignificant) expulsion from the Initiative.[128]

The Initiative presents other problems, as well. For example, the Initiative does not define "advertising primarily directed to children under [twelve]."[129] One company, Mars, Inc., for example, defines "advertising primarily directed to children under [twelve]" as advertising that has an audience in which 25% or more is "composed of children under [twelve]."[130] Coca-Cola and Cadbury Adams, LLC define it as having 50% or more of its audience "composed of children under [twelve]."[131] Other companies, including PepsiCo, have a number of factors, "no single one of which will be controlling . . . ."[132] For PepsiCo, these factors include

> Whether the content of the media is designed for children under [twelve]; [w]hether the advertised product or service is intended for use by, or is of interest to, children under [twelve]; [w]here the media in which the advertising appears is promoted and advertised; [a]vailable projections, at the time the advertising is placed, of audience demographics; and [f]or television programs, whether they are aired during what is generally understood to be children's programming.[133]

In July 2008, Commissioner Jon Leibowitz of the FTC, in speaking of the Initiative, noted that "a more appropriate standard for measuring a children audience could be created."[134] Additionally, the Initiative does not set standards for "better-for-you" products,[135] leading to criticism that "'better-for-you' does not necessarily mean good for you."[136] Commissioner Leibowitz further stated that "[i]f the CBBB Initiative is to serve as the gold standard for self-regulation in food marketing, it needs to strengthen its guidelines."[137] Thus, the Initiative's efforts appear commendable, but far from establishing a final solution in the field.

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128. *Id.*
129. *Id.* at 10.
130. *Id.* at 11.
131. *Id.*
132. *Id.*
133. *Id.*
134. Jon Leibowitz, Comm'r, FTC, Concurring Statement, Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation 2 (July 29, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/080729foodmarketingtochildren.pdf.
135. KOLISH & PEELER, *supra* note 124, at 6.
136. Leibowitz, *supra* note 134, at 2.
137. *Id.*

IV. ARGUMENTS AGAINST IMPOSING THE BRITISH SYSTEM

A. *Criticism From the Media, Advertisers, and Food and Beverage Manufacturers*

1. Reduced Funding for Quality Children's Programming

In the UK, television network executives argue that the elimination of advertising HFSS food and beverages during children's programming and programming drawing disproportionate amounts of children viewers will soon spell the end of quality children's television.[138] Because cereals, candies, snacks, and fast food account for approximately 72% of all food advertisements targeting the children's television audience in the U.S.,[139] networks are dependent on those sponsorships to fund the production of shows that range from cartoons to educational television.[140]

So far in the UK, the new regulations have had an obvious impact on the landscape of children's television advertising. Income generated from advertising may drop by £39 million, reducing funding for children's television by about a third.[141] In response, the British television network ITV ended the production of popular television shows, such as *My Parents Are Aliens*, and began airing programs targeting adults during time slots often reserved for children's programming.[142] Media representatives in the U.S. fear similar results if such obligations are placed on American producers of children's programming.[143] Representatives have noted that "[c]ranking out cartoons, developing new ones and selling ads is expensive,"[144] and "[y]ou can't turn the business upside down overnight."[145] To many, this is simply an unacceptable means to an end, especially considering research that has found children's

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138. *See, e.g.*, Adam Sherwin, *Children Getting a Raw Deal as TV Loses Junk Food Adverts*, TIMES ONLINE (LONDON), July 26, 2007, *available at* http://www.timesonline.co.uk/tol/news/uk/article2141369.ece ("Children are losing high-quality television programmes that reflect their lives because of underfunding . . . .").

139. GANTZ ET AL., *supra* note 6, at 3.

140. *See* Sherwin, *supra* note 138 (noting that some stations have responded to reduced revenue from food advertising by "scrapping new commissions and long-running hits").

141. Valerie Elliot, *TV's New Junk Food Rules Allow Chips with Everything*, TIMES (London), Feb. 23, 2007, *available at* http://www.timesonline.co.uk/tol/news/uk/health/article1426542.ece; Sherwin, *supra* note 138.

142. Sherwin, *supra* note 138.

143. *See* John M. Higgins, *Junk-Food Suit Gives Nick Bellyache*, BROADCASTING & CABLE, Jan. 23, 2006, http://www.broadcastingcable.com/article/CA6301221.html.

144. *Id.*

145. *Id.*

television to play a crucial role in social, cognitive, and emotional development.[146]

2. Minimal Impact of Advertising on Children's Health

Ultimately though, many among the media, advertisement industry, and food and beverage manufacturers argue that this rule in the UK and the proposal of similar regulations in the U.S. are simply unnecessary and ultimately ineffective. As stated by an executive for television marketing group Thinkbox, "I am tired of [advertising] being used as a scapegoat for some of society's genuine problems, and increasingly angry at the distorted arguments being used by some of its opponents."[147] Similarly in the U.S., industry representatives contend that simply changing advertising practices will not have the effect of reversing obesity trends because "there is no magic wand that we can wave to solve [the] problem."[148] Many in the U.S. federal government agree, such as Representative Fred Upton, who pressed that "we are much quicker to lay blame for our ills rather than acknowledging our own foibles" and that it is parents' responsibility to limit children's intake of unhealthy foods and to promote healthy lifestyles.[149]

In addition to their belief in personal and parental responsibility, and perhaps more importantly, U.S. industry representatives and other opponents to strict regulation of children's television advertising emphasize that while childhood obesity has tripled in recent decades, the amount of childhood exposure to television advertising of food has remained virtually unchanged or, according to a 2007 FTC report, has even declined.[150] The FTC reported that in 1977, children viewed, on average, 6,084 food advertisements.[151] In 2004, however, children viewed only 5,538 food advertisements.[152] The change amounts to a reduction of approximately 9% of food advertisements on television seen by children between the 1970s and

146. Sherwin, *supra* note 138.

147. Sweney, *supra* note 94.

148. Daniel L. Jaffe, Executive Vice President, Assoc. of Nat'l Advertisers, Remarks at the First Meeting of the Task Force on Media and Childhood Obesity 1 (March 21, 2007), *available at* http://www.fcc.gov/obesity/march07meeting/Jaffe.pdf.

149. Press Release, Congressman Fred Upton, Upton Comments on Images Kids See on the Screen (June 22, 2007), *available at* http://www.house.gov/upton/press/press-06-22-07b.html.

150. DEBRA J. HOLT ET AL., FTC, CHILDREN'S EXPOSURE TO TV ADVERTISING IN 1977 AND 2004: INFORMATION FOR THE OBESITY DEBATE 63 (2007), *available at* http://www.ftc.gov/os/2007/06/cabebw.pdf; Alan Zarembo, *Child Obesity Rate in U.S. Hits Plateau, Researchers Say*, L.A. TIMES, May 28, 2008, *available at* http://articles.latimes.com/2008/may/28/science/sci-obesity28.

151. HOLT ET AL., *supra* note 150, at 55.

152. *Id.*

the 2000s,[153] the same period of time during which doctors and researchers have noted that childhood obesity has increasingly become a national epidemic.[154] Coupled with the fact that the average commercial length declined from thirty seconds in 1977 to twenty-five seconds in 2004, the total exposure of children to food advertisements has waned even further.[155]

Therefore, the increasing rate of childhood obesity and overweight does not find a correlation in any increased amount of food advertisements on television directed at children. In fact, just the opposite appears to have occurred.

3. Inappropriate Age Range

Initially, the ban implemented by Ofcom on food advertising was to apply to programming appealing to and made specifically for children ages four to nine.[156] As expressed by one media executive in the UK, "[t]his judgment opens up a whole new debate because, in our view, [ten]- to [fifteen]-year-olds are completely different from under [nine]-year-olds."[157]

Much of the advocacy against advertising to children generally derives from the notion that children do not possess the same cognitive abilities as adults to distinguish between programming and advertising or even to understand the persuasive intent of advertising.[158] When adults view television advertisements, they watch knowing that the statements are being made from a perspective and with interests different than theirs—that the advertiser's intent is to persuade them to purchase the product or service; that the advertiser is biased toward the product or service; and that they must accordingly think of the advertised message

153. *Id.*

154. PREVENTING CHILDHOOD OBESITY, *supra* note 2, at 1–2.

155. HOLT ET AL., *supra* note 150, at 49.

156. OFCOM, TELEVISION ADVERTISING OF FOOD AND DRINK PRODUCTS TO CHILDREN, *supra* note 16, at 14.

157. Tara Conlan & Leigh Holmwood, *Junk Food Ad Ban "Draconian," Says Five*, GUARDIAN (London), Nov. 17, 2006, *available at* http://www.guardian.co.uk/media/2006/nov/17/channel5.channel4.

158. *See* WILCOX ET AL., *supra* note 27, at 20.

> Because young children lack the cognitive skills and abilities of older children and adults, they do not comprehend commercial messages in the same way as do more mature audiences, and, hence, are uniquely susceptible to advertising influence. A substantial body of research evidence documents age-related differences in how children understand and are affected by television advertising. This evidence has formed the basis for a wide range of policies in the United States designed to protect children from advertising that would take unfair advantage of youngsters' limited comprehension of the nature and purpose of commercial appeals.

Id.

differently than they do other television programming.[159] Children, on the other hand, perceive the world in a more egocentric manner, and, thus, have difficulty realizing the need to look at the advertisement as coming from another person's perspective.[160] They tend to accept the message of an advertiser as an assertion of fact, as if it had taken place in the program that it sponsors.[161] However, around age eight, children begin to develop those cognitive abilities that enable them to distinguish between programming and advertising and to recognize the advertisement's persuasive intent.[162] Thus, children age nine and under are arguably more susceptible to advertising than those between ages ten to fifteen,[163] supporting the distinction between the two groups in the restriction of advertising.

B. *Criticism from Public Advocates*

Utilizing evidence that the regulatory plan truly must have been a compromise on Ofcom's part, public advocates have joined in the media and advertising industries' chorus of criticisms. Of course, the advocates generally find the new regulations far too weak.[164] Noting that such food advertisements still air during some shows watched by children, a number of regulatory watchdogs and advocates assert that the junk food advertising bans are ultimately toothless.[165]

Public advocates looked to Ofcom to impose much stricter regulations on the timing of food advertising than the compromises reached in 2007.[166] In fact, in October 2007, a handful of British officials, including Prime Minister Brown, indicated that this was a very serious consideration and possibly even a preferred action.[167] Nevertheless, in January 2008, Ofcom officials put to rest, at least for the time being, the notion of implementing the 9:00 p.m. time limit for junk food advertising for which the advocates had clamored.[168] The rejection once again brought up arguments that the limitations of HFSS food advertising during programming intended specifically for children and during programming viewed by a disproportionate amount of children was essentially ineffectual.[169] In a December

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159. *Id.* at 25.
160. *Id.* at 25–26.
161. *See id.*
162. *Id.* at 28.
163. *See id.*
164. McLaren, *supra* note 93.
165. *Id.*
166. *See id.* (reporting that advocates pushed for a 9:00 p.m. watershed for advertisement of unhealthy foods to kids).
167. Mark Sweney, *Plans for Junk Food Ad Ban Dropped*, GUARDIAN, Jan. 22, 2008, *available at* http://www.guardian.co.uk/media/2008/jan/22/advertising.health.
168. *Id.*
169. *See id.*

2007 report, Ofcom acknowledged that since 2005, children between ages four and fifteen view 26% more advertisements during programming intended for adults.[170] However, they attribute this to the rise in number of children watching adult programming rather than an increase in advertising.[171]

Additionally, though, the most-watched programs among children seem to escape the category of programs regulated by Ofcom's new restrictions. A survey of children's programming in the first half of September 2007 showed that only two out of the ten programs with the highest under-ten audience fell within the provisions of Ofcom's regulations.[172] The top-ranked program actually covered by the regulations, *The Simpsons*, came in seventh in terms of total viewership of the under-ten group, with a total under-ten audience of approximately 163,000.[173] The top-ranked program in terms of total viewership of children under age ten, *Ant and Dec's Saturday Night Takeaway*, had an audience of over 440,000 of those children.[174] During the showings of that program, advertisements promoted food products such as McDonald's Apple Pie and Toffee Sundae, Milky Way, and Twix.[175]

The seemingly disproportionate reaction to advertising on different types of shows results from the fact that distinctions between programs covered by Ofcom's guidelines and those not covered are made based upon the proportion of children composing the total audience.[176] Programs with a very large absolute number of children viewing—even higher than that of programming made specifically for children—but not a disproportionately large percentage of children in the audience may not fall under the food advertising restrictions.

Accordingly, many argue that without extending coverage of Ofcom's regulations to all programming until 9:00 p.m., government action will be ultimately ineffective, allowing conditions in which children will nevertheless be targets of advertisements for foods high in fat, sugar, and salt.[177]

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170. Mark Sweney, *Children Less Exposed to Junk Food Ads*, GUARDIAN (London), Dec. 12, 2007, *available at* http://www.guardian.co.uk/media/2007/dec/12/advertising.ofcom.

171. *Id.*

172. *Marketing of Unhealthy Foods to Children: How TV Advertising Restrictions Are Failing Children*, WHICH?, Nov. 2007, at 4–5.

173. *Id.* at 4.

174. *Id.*

175. *Id.*

176. *Id.* at 2.

177. *See, e.g.*, *id.* at 1–2 ("Twelve of the top twenty programmes watched by under tens are not covered by the restrictions and these all featured adverts for unhealthy foods.").

V. TRANSLATION INTO UNITED STATES POLICY

A. *Some Action Should Be Taken*

1. With Such a Large Target Consumer Market, Children's Television Programming Can Rebound

In response to claims of lost profits, even Ofcom acknowledges the potential financial damage of eliminating junk food advertisements from children's programming.[178] For that reason, Ofcom extended the deadline of full compliance for networks dedicated only to children's programming until the end of 2008, beyond the deadline of other networks.[179] Nevertheless, considering the purchasing power of children, media executives in the UK remain committed to substituting lost revenue from the drop in food advertising with revenue from advertising other products.[180]

In the U.S., children under the age of fifteen make direct purchases worth $24 billion and influence $190 billion through their parents.[181] Consequently, children "are a primary market, spending discretionary income on a variety of products that they acquire by spending their own money; an influence market, determining a large proportion of what is spent by parents and households; and a future market, representing tomorrow's adult customers for branded products and services."[182]

In the year 2000, there were more than 24 million potential consumers between ages three and eight, more than 16 million between ages nine and twelve, and more than 28 million teenage consumers.[183] Television remains the primary means by which food and drink products are marketed to them.[184] Accordingly, advertisers remain committed to tapping into that market, spending billions of dollars each year, approximately $745 million of which is committed to television advertisements directed toward younger people for food and beverages.[185] As a result, while children's programming may

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178. Press Release, Ofcom, New Restrictions on the Television Advertising of Food and Drink Products to Children (Nov. 11, 2006), *available at* http://www.ofcom.org.uk/media/news/2006/11/nr_20061117 [hereinafter New Restrictions]; Ofcom Final Statement, *supra* note 14.

179. New Restrictions, *supra* note 178; Ofcom Final Statement, *supra* note 14.

180. *See* Conlan & Holmwood, *supra* note 157.

181. WILCOX ET AL., *supra* note 27, at 21.

182. INST. OF MED. COMM. ON FOOD MARKETING AND THE DIETS OF CHILDREN AND YOUTH, FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY? 21 (J. Michael McGinnis, Jennifer A. Gootman & Vivica I. Kraak eds., 2006) [hereinafter INST. OF MED., FOOD MARKETING].

183. *Id.* at 139.

184. *Id.* at 377.

185. MARKETING FOOD TO CHILDREN, *supra* note 22, at ES-2.

face the danger of lost revenue from food and beverage advertising restrictions, it seems unlikely that new advertisers and retailers would express no interest in this group or that food and beverage manufacturers would forfeit such a large demographic without exploring other products to market to children.

2. Advertising of Unhealthy Food Does, in Fact, Impact Children's Health

Considering the FTC comparison between the 1970s and the 2000s, finding a slight decline in overall food advertising seen by children,[186] the change in content of those advertisements presents a problem. Between the mid-1990s and the mid-2000s, new food and beverage advertising targeting children increased at a higher rate than advertising targeting the general market.[187] Advertising of food products of larger portion sizes has also increased over the past thirty years.[188] Further, marketing techniques have changed dramatically over the past few decades, with television advertisements working in coordination with a number of other marketing mediums and methods.[189] Additionally, studies have found that "commercialism and consumerism pervade the daily life of young children to an extent that is far greater than that experienced by previous generations."[190]

Studies indicate that advertisements adversely affect the health of children[191] despite the claims of industry representatives that food advertising has a minimal impact on the health of children in relation to other behavior and societal factors, and that, accordingly, no additional action reducing the amount of food advertising targeting children is necessary.[192] Additionally, studies have found that "the heavy marketing of high-calorie and low-nutrient foods and fast food outlets represents a probable increased risk for childhood obesity" and that a diet consisting of foods viewed by children in advertisements would exceed the fat, saturated fat, and sodium content recommended by the U.S. Department of Agriculture.[193] Other contemporary research findings include a relationship between viewing advertisements for unhealthy foods and obesity, a correlation between viewing such advertisements and eating fewer healthful foods such as fruits and vegetables, and a greater negative effect on the health of already-obese children.[194]

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186. HOLT ET AL., *supra* note 150, at 51.
187. INST. OF MED., FOOD MARKETING, *supra* note 182, at 4.
188. *Id.* at 376.
189. *Id.* at 21.
190. *Id.* at 31.
191. *Id.* at 9–10.
192. *See supra* Part IV.A.2.
193. Linn & Novosat, *supra* note 120, at 134–35.
194. Ramsey, *supra* note 19, at 368–69.

The Committee on Food Marketing and the Diets of Children and Youth has found strong evidence that television advertisements affect food and beverage preferences and purchase requests of children between ages two and eleven, leading to the conclusion that such advertisements influence those children "to prefer and request high-calorie and low-nutrient foods and beverages."[195] It also found some evidence that television advertisements influence that group's short-term consumption and usual dietary intake.[196] Finally, the committee's report found "strong evidence" linking exposure to television advertising and adiposity (body fatness) in children between the ages of two and eighteen.[197] Actions against the amount of food advertising targeting children appear warranted based on the merits of combating childhood obesity.

As for claims that the responsibility should be on parents rather than advertisers, studies show that children's demands for such foods often lead to strains in parent-child relationships.[198] Children become disappointed and even angry with their parents when denied requests for products such as sugary cereals—requests associated with children's exposure to advertisements for those foods.[199] Further, children have increased discretionary spending capabilities, meaning that parents cannot necessarily control every purchase made by children, with food and beverages representing the leading category of such purchases.[200] While parents certainly should monitor their children's dietary choices, they no longer control all such purchases, and, in relation to those food purchases that they do control, parents face adverse effects on their family relationships if they choose to oppose advertising messages.

3. Advertising Restrictions Should Be Extended to Cover Older Children as Well

While research does indicate that children begin to develop greater cognitive abilities around age seven or eight that allow them to better interpret advertisements, their abilities to do so remain limited even at that time.[201] They begin to understand that the advertisements intend to sell something to them, but they still may not comprehend the bias of the message.[202] The skepticism exercised by adults in viewing advertisements is absent in most eight-year-old

195. INST. OF MED., FOOD MARKETING, *supra* note 182, at 8.
196. *Id.* at 8–9.
197. *Id.* at 9.
198. WILCOX ET AL., *supra* note 27, at 30.
199. *Id.*
200. INST. OF MED., FOOD MARKETING, *supra* note 182, at 5.
201. WILCOX ET AL., *supra* note 27, at 27–28.
202. *Id.* at 9.

children.[203] Additionally, food advertisements in the U.S. heavily influence the diet preferences of both younger and older children.[204] The relationship confirms Ofcom's reasoning in extending its restrictions to children under age sixteen, which emphasized that food advertisements on television have been linked to obesity in children between ages two and eleven as well as children between age twelve and eighteen.[205]

Based on policy considerations of negative effects that advertising of unhealthy foods and beverages has on children and families, a ban on such advertisements based on a standardized nutrition criteria should be implemented in the U.S. as it was in the UK, assuming that food and beverage manufacturers, retailers, advertisers, and broadcasters fail to reform self-regulatory initiatives to affect real change.

B. *Constitutional Implications and a Pre-Watershed Absolute Ban*

In discussing the translation of communications policy from the UK to the U.S., a critical distinction between the two nations must be factored into the equation: the First Amendment. Can advertisements of HFSS foods be banned to any degree? If so, how far may U.S. regulators and lawmakers go in order to prevent them from reaching children?

The Supreme Court has recognized that, as advertisements are "related solely to the economic interests of the speaker and its audience," such speech has "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."[206] Thus, it established a three-prong test to be used in determining the constitutionality of government restrictions of commercial speech that falls within the protection of the First Amendment: "(1) there must be a substantial government interest served by the restriction, and (2) the restriction must directly advance that government interest, and (3) the restrictions must be no more extensive than necessary to serve that government interest."[207] Though broad restrictions on advertising HFSS food products to children has never been brought to the Supreme Court, a history of Court decisions and research concerning the effect of food advertising

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203. *Id.*

204. Linn & Novosat, *supra* note 120, at 134.

205. Ofcom Final Statement, *supra* note 14; OFCOM, TELEVISION ADVERTISING OF FOOD AND DRINK PRODUCTS TO CHILDREN, *supra* note 16, at 1, 3.

206. Ramsey, *supra* note 19, at 371–72 (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980)); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

207. H.R. REP. No. 101-385, at 9 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 1605, 1614.

on children suggest at least some level of restriction is constitutional.[208]

The federal government has an interest in restricting the advertisement of unhealthy foods to children. As noted in the House Report for the CTA, children are vulnerable to commercial exploitation because they do not have the ability to distinguish adequately between programming and advertising or to view advertising in light of its bias.[209] Combining children's vulnerability with research findings linking advertisements of unhealthy foods to rising rates of childhood obesity,[210] the Court should conclude that unhealthy food advertisements are harmful and that the government has a significant interest in preventing such harm.[211] Such restrictions would satisfy the first prong.

Second, such regulation must "substantially protect children from the harms caused by advertising."[212] When arguing for the constitutionality of the CTA, one problem with finding that restrictions on television advertising directly advance the protection of children is the fact that advertisers also use other mediums of communication.[213] However, at least for now, "advertisers rely on television ads more than ads through other mediums."[214] The results from the UK's ban show that eliminating advertising of such foods during children's programming could reduce children's total exposure to unhealthy food advertisements in the U.S.[215] The Supreme Court has "acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect."[216] A ban on advertising unhealthy foods to children would likely pass the second prong.

Finally, banning HFSS food advertisements only during programming with a viewership composed of a disproportionately high percentage of children would also likely pass the Central Hudson test, as it appears narrowly tailored for the goal intended. As

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208. *See id.* at 8–12.
209. *Id.* at 9.
210. *See supra* Parts IV.A.3, V.A.2.
211. Ramsey, *supra* note 19, at 378.
212. *Id.*
213. *Id.*
214. *Id.*
215. *See* Ofcom, Update on Impact of Restrictions on Food and Drink Advertising to Children, Feb. 2008, http://www.ofcom.org.uk/research/tv/reports/update [hereinafter Update on Impact].

> [W]hile it is still too early to come to any firm conclusions about the success or otherwise of the new rules, there are clear signs that the new rules are having the intended effect on reducing the amount of food and drink advertising that children are exposed to on television.

Id.
216. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 557 (2001).

the majority House Report for the CTA claimed in arguing the constitutionality of time limitations for all advertising during children's programming, such a restriction would be narrowly drawn "because it is narrowly focused and specifically limited in application to children's programs."[217] This is clearly different from other cases in which the Court found regulations too broad to pass the *Central Hudson* test.[218] In *Lorillard Tobacco Co. v. Reilly*, the Attorney General of Massachusetts sought to further regulate the advertising of tobacco products in an effort to shield children from encouragement to use them.[219] Though recognizing that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States"[220] and that the government certainly had a substantial interest in the prevention of children's use of tobacco products,[221] the Court nevertheless rejected the Massachusetts regulations in part based on its analysis of the facts of the case within the third prong of the test:[222] "We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products."[223] However, in this situation, adults' access to advertising would not be significantly infringed upon, as only programs appealing to a largely child-based audience would be affected.

However, there are indications that the Court would not agree. One Justice has already apparently dismissed the notion of allowing such restrictions to pass muster with the Court.[224] In his concurrence in *Lorillard*, Justice Clarence Thomas argued against the tobacco advertising restrictions by comparing them to a much stronger case for advertising restrictions against unhealthy food.[225] While highlighting major arguments supporting food advertising restrictions to safeguard children's health, Justice Thomas nevertheless notes that he finds the case unpersuasive, thus

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217. H.R. REP. No. 101-385, at 10 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 1605, 1614.

218. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 875 (1997) ("[T]he governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.") (citations omitted).

219. *Lorillard Tobacco*, 533 U.S. at 533–34.

220. *Id.* at 570 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000)).

221. *Id.* at 564.

222. *Id.* at 528–29, 566–67.

223. *Id.* at 564.

224. *Id.* at 589–90.

225. *Id.* at 587–88.

emphasizing the unconvincing nature of the case for tobacco advertising restrictions:[226]

> Respondents say that tobacco companies are covertly targeting children in their advertising. Fast food companies do so openly. Moreover, there is considerable evidence that they have been successful in changing children's eating behavior. The effect of advertising on children's eating habits is significant for two reasons. First, childhood obesity is a serious health problem in its own right. Second, eating preferences formed in childhood tend to persist in adulthood. So even though fast food is not addictive in the same way tobacco is, children's exposure to fast food advertising can have deleterious consequences that are difficult to reverse.
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> . . . .
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> Respondents have identified no principle of law or logic that would preclude the imposition of restrictions on fast food and alcohol advertising similar to those they seek to impose on tobacco advertising. In effect, they seek a "vice" exception to the First Amendment. No such exception exists. If it did, it would have almost no limit, for "any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.'" That is why "a 'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity."[227]

Justice Thomas is unlikely to warm to the notion of restricting all unhealthy food advertisements during children's programming. However, he may not serve as an accurate indicator of the Court's general trends regarding its commercial speech doctrine. As the majority in *Lorillard* noted, Thomas has advocated the abandonment of the *Central Hudson* test on multiple occasions in favor of a strict scrutiny standard for commercial speech, elevating it to the same protective regard as political speech.[228] Nevertheless, the majority holds that there exists "no need to break new ground.[229] *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."[230] Furthermore, while Thomas found objectionable the overall concept of regulating commercial speech merely in the interest of legislative valuation of the public health, the majority finds the "critical inquiry in this case" to be the reasonable fit analysis of the advertising restrictions.[231] The majority opinion does not even attempt to question the validity of the state's interest in regulating this "vice" advertisement. In fact,

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226. *Id.* at 588–90.
227. *Id.* (citations omitted).
228. *Id.* at 554, 575.
229. *Id.* at 554 (quoting Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999)).
230. *Id.* at 554–55 (quoting *Greater New Orleans*, 527 U.S. at 184).
231. *Id.* at 561.

even the tobacco manufacturer concedes that point.[232] The problem with the regulations does not lie in the target, as Justice Thomas insists, but rather in the overly broad means to the end.[233]

However, the third prong may be the key to judging the validity of a watershed time such as that being demanded by many public advocates in the UK. If a ban of that magnitude were implemented, a direct analogy could be drawn to the Supreme Court's decision in *Lorillard Tobacco Co. v. Reilly*.[234] There the Court noted "'the governmental interest in protecting children from harmful materials' . . . does not 'justify an unnecessarily broad suppression of speech addressed to adults.'"[235] In studying the regulations' limiting effect on the means by which and geographical locations in which the tobacco company could advertise to adults, the majority found that the Attorney General did not narrowly tailor the action.[236]

Similarly, in following the *Lorillard* decision, the Court would be more likely to find a 9:00 p.m. time limit for advertisements of foods high in fat, sodium, and sugar violative of the third prong of the *Central Hudson* test. While the Supreme Court has "acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect,"[237] and studies have shown that such advertisements do have an adverse effect on children's health,[238] such a limitation on even adults' ability to view advertisements from food retailers and manufacturers would likely be too broad. Furthermore, disregarding the public policy implications of such a limit's effect on advertising revenue, which appears to be unknown in the United States but has been estimated to have a potential impact of £211 million in the United Kingdom,[239] the Court might consider the lost revenue an additional reason for finding such a ban overly broad and, consequently, falling short of passing the *Central Hudson* test.

Further, the results thus far in the UK seem to indicate that banning such advertisements during programs with a disproportionate percentage of children viewers can effectively reduce the amount of those advertisements seen by children.[240] Research released in December 2007 indicates that children under the age of sixteen generally viewed 20% less food advertisements between 2005 and 2007, and there was a 59% reduction in impacts during children's

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232. *Id.* at 555.
233. *Id.* at 584–86.
234. *Id.* at 571.
235. *Id.* at 564 (quoting Reno v. Am. Civil Liberties Union, 521 U.S. 844, 875 (1997)).
236. *Id.* at 570.
237. *Id.* at 557, 560–61.
238. *See supra* Part V.A.2.
239. Sweney, *supra* note 94.
240. *See* Update on Impact, *supra* note 215.

programming, 53% of which occurred between 2006 and 2007, the period during which the Ofcom regulations were introduced.[241] Considering the fact that networks targeted only at children will not be required to completely phase out these ads until the end of 2008, these numbers seem promising, furthering the notion that extending restrictions beyond programming with a disproportionate percentage of children might not be considered "narrowly tailored" for the Supreme Court, or even necessary.

Thus, U.S. government officials should not consider extending any such bans on advertisements for unhealthy foods to encompass all programming up to a time limit. Rather, a compromise such as that found in Ofcom's regulations should be used.

VI. CONCLUSION

With a tripling of childhood obesity rates and a rise in health problems such as diabetes to match, the U.S. must act to curb the perpetuation of this critical epidemic.[242] With 72% of food product ads within the children's television advertising category pertaining to the sale of cereals, snacks, candy, and fast food,[243] and research pointing to a correlation between children's viewing those advertisements and obesity,[244] the advertising industry should alter its practices and act responsibly in communicating with children.

However, media and advertising industry representatives are not as convinced that the changes imposed by the UK's Ofcom constitute an appropriate response, arguing that children's programming will be irreparably harmed by loss of advertising revenue. Additionally, they feel that television advertisements have only a minimal impact on children's health compared to other facets of their lives, and, even given government regulation, children over an elementary-school age should not be included in such a ban because they are more capable of adequately assessing television advertisements than elementary-school age children.

Nevertheless, some action is necessary to curb the amount of advertisements for food seen by children, as viewing such advertisements has a correlation with childhood obesity and a detrimental effect on the health of children. Additionally, older children should be included in this equation. Though they have a better understanding of the intent of advertising, their cognitive abilities are not yet on par with adults, and those advertisements

241. *Id.*
242. PREVENTING CHILDHOOD OBESITY, *supra* note 2, at 1–2.
243. GANTZ ET AL., *supra* note 6, at 3.
244. Linn & Novosat, *supra* note 120, at 134; Ramsey, *supra* note 19, at 368.

continue to have an adverse effect on the dietary and lifestyle choices of older children. Still, U.S. officials would be well advised to heed the warnings of Ofcom and not adopt an absolute ban on advertisements of unhealthy foods before a watershed evening time. While such a move would prevent far more such advertisements from reaching children, the greater loss of advertising revenue may be prohibitive. Furthermore, unlike UK officials, U.S. policymakers must worry about overstepping limits set by the First Amendment. While a ban on HFSS food advertisements during children's programming would likely pass constitutional muster, a ban that would infringe on adult programming as well would likely not.

Depending on the results of further studies by Ofcom into the success of their regulations, the U.S. should seriously consider adopting their plan, unless the relevant industries begin to take serious steps toward regulating themselves and reversing the negative effects that they have had on children. The results of Ofcom's regulations appear promising so far; the results of self-regulatory efforts in the U.S., however, appear to fall short.

Though these limitations on advertising HFSS food to children surely cannot alone solve the pressing problem of childhood obesity, they are nevertheless a necessary component of reversing health trends among America's youth. Unless eating habits change, today's children will certainly have a shorter lifespan than their parents.

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* J.D. Candidate, May 2009, Vanderbilt University Law School; B.A., Vanderbilt University, 2006. Special thanks to Commissioner Deborah Taylor Tate, whose views are not necessarily expressed in this Note, but who has committed much time and effort to fighting childhood obesity and inspired the topic of this Note. Dedicated to my parents, Harold and Jeanette Darwin, of whom I am so proud and to whom I am so grateful.