

Possibilities for Administrative Regulation of Food Marketing

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Presenter Disclosures

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(1) The following personal financial relationships with commercial interests relevant to this presentation existed during the past 12 months:

No relationships to disclose.



[Roadmap]

- Scope of FTC authority
- Barriers to FTC regulation of food advertising to children
- Potential regulatory strategies



[FTC's regulatory authority]

- 1938: Granted statutory power to regulate "unfair or deceptive acts or practices in or affecting commerce"
- Remedies: can quash advertisements or require corrective advertising
- 1980: Stripped of authority to promulgate rules regulating children's advertising on an unfairness theory
- 1994: Statutory amendments further restricted unfairness authority



[The unfairness doctrine]

- A practice is “unfair” if:
 - It is *likely to cause substantial injury* to consumers;
 - The injury is *not reasonably avoidable* by consumers; and
 - The injury is *not outweighed by countervailing benefits* to consumers or competition.



[The deception doctrine]

- Advertising is “deceptive” if:
 1. A *claim* is made;
 2. The claim is *likely to mislead* a reasonable consumer; and
 - Child-oriented advertising is evaluated in light of how the target age group would perceive it
 3. The claim is *material*.
- No proof of consumer injury required



Barriers to regulating food ads: philosophical

“I continue to have confidence that self-regulation and industry initiatives can effectively contribute, and to believe that industry action can bring change more quickly and effectively than government regulation of speech.”

- *FTC Chairman Deborah Platt Majoras, 2007*



■ Regime change

“If companies don’t do the right thing, the failure of self-regulation may make the next Congress and the next president more inclined toward government regulation.”

- *FTC Chairman Jon Leibowitz, 2008*



Advertising to children merits a “hard look”.

- *Director of FTC Bureau of Consumer Protection David Vladeck, 2009*



Barriers to regulating food ads: legal

- Restrictions on rulemaking under the unfairness doctrine
- Reasonable avoidance
- Causation issues
- Tailoring problems
- Constitutional limitations



[Strategies for FTC regulation]

- Regulate under deception doctrine
- Restore unfairness authority
- Further encourage voluntary restrictions



[Conclusions]

- FTC has considerable latitude to regulate individual food ads more aggressively
- Rulemaking to restrict children's advertising as inherently unfair would require statutory amendment
- FTC could begin by helping the food industry address challenges to effective self-regulation



[Further information]

Mello MM. Federal Trade Commission regulation of food advertising to children: possibilities for a reinvigorated role. *Journal of Health Politics, Policy & Law* (forthcoming).

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