

# FRONT-OF-PACKAGE NUTRITION CLAIMS: TRUSTWORTHY FACTS OR DECEPTIVE MARKETING? CLOSING THE LOOPHOLES IN LABELING

KATHRYN E. HAYES\*

## INTRODUCTION

Buying healthy food for the family should be a simple task. Grocery store shelves are packed with advertisements for “healthy,” “natural,” “better for you” options.<sup>1</sup> For breakfast, kids can choose between Apple Jacks, loaded with fiber and lean on fat,<sup>2</sup> and Frosted Mini-Wheats, which—advertisements tell consumers—are proven to keep children focused at school.<sup>3</sup> Lunchtime options include Spaghettios, packed with a full serving of vegetables and containing bone-building calcium,<sup>4</sup> along with Dora the Explorer fruit snacks, which are both low in calories and gluten free.<sup>5</sup> To end the day, Kid Cuisine microwave dinners provide protein-rich white meat chicken and zero artificial colors.<sup>6</sup> At first glance, the emergence of these health claims on front-of-package (“FOP”) labels appear to be the positive result of health-conscious parents demanding more straightforward information to identify nutritious foods, but the facts paint a drastically different picture.<sup>7</sup> In a recent study of FOP labels on children’s foods, eighty-four percent

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\* J.D. Candidate, Benjamin N. Cardozo School of Law, Class of 2013; B.S., Pennsylvania State University, 2008. Special thanks to my family for their love, support and encouragement in all that I do; and to my dog Olive, for the countless hours she spent by my side throughout the writing of this Note.

<sup>1</sup> See Mary Rothschild, *Kids Foods Labeled ‘Better for You’ Often Aren’t*, FOOD SAFETY NEWS (Jan. 20, 2011), <http://www.foodsafetynews.com/2011/01/kids-foods-labeled-better-for-you-arent/>.

<sup>2</sup> See Larry Cohen, *Kids’ Food Labels: Healthy or Not?*, HUFFINGTON POST (Jan. 20, 2011), [http://www.huffingtonpost.com/larry/kids-food-labels-healthy\\_b\\_811656.html#s225814&title=Claiming\\_Health](http://www.huffingtonpost.com/larry/kids-food-labels-healthy_b_811656.html#s225814&title=Claiming_Health).

<sup>3</sup> Kellogg’s ad campaign claimed that eating a bowl of Frosted Mini-Wheats cereal for breakfast was clinically shown to improve children’s attentiveness by nearly twenty percent. The actual study results showed only about half the children who ate Frosted Mini-Wheats showed improvement and only one in nine children who ate the cereal improved their attentiveness by twenty percent or more. See News Release, F.T.C., *Kellogg Settles FTC Charges That Ads for Frosted Mini-Wheats Were False* (Apr. 20, 2009), *available at*, <http://www.ftc.gov/opa/2009/04/kellogg.shtm>.

<sup>4</sup> Cohen, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> For background information on FOP labeling, see *Background Information on Point of Purchase Labeling*, U.S. FOOD & DRUG ADMIN., (Oct. 2009), <http://www.fda.gov/Food/LabelingNutrition/LabelClaims/ucm187320.htm>.

of products failed to meet basic nutritional standards.<sup>8</sup> More than half of the products were deemed high in sugar and low in fiber—ninety-five percent contained added sugar—and were devoid of *any* fruits or vegetables.<sup>9</sup> The seemingly healthy products listed above illustrate these alarming results. Some additional information health-conscious parents might want to see on the front of those packages include: the fact that Spaghettios are loaded with sodium and the only “vegetables” contained in the “full serving” of such are tomato puree and high fructose corn syrup; Dora the Explorer “natural” fruit snacks contain no actual fruit; Apple Jacks are laden with sugar and harmful food dyes; and high-fat Kids Cuisine dinners supplement their frozen feasts with added sugar and trans fats.<sup>10</sup>

For the average working parent juggling a myriad of family responsibilities, finding the time to decode the relative nutritional value of the wide variety of food products currently available is a not luxury most will be able to afford. The positive news is that as public health advocates and government agencies stress the importance of instilling healthy habits in young children, families are responding with a willingness to change their purchasing habits in an effort to prioritize nutrition.<sup>11</sup> Unfortunately, however, these families still face an uphill battle against manufacturers of children’s food and beverages who carefully craft statements claiming alleged benefits, while minimizing or hiding the reality of the nutritional deficiencies in their products.<sup>12</sup>

Statistics show that the large majority of the food and beverages marketed to consumers under eighteen years old are unhealthy and at odds with the United States Department of Agriculture’s (“USDA”) nutritional standards.<sup>13</sup> While children and adolescents are depriving their growing bodies of fruits, vegetables and whole grains, a recent study of children ages two to eighteen reveals that nearly forty percent of their total calories consumed come from “empty calories”—

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<sup>8</sup> See Juliet Sims et al., *Claiming Health: Front-of-Package Labeling of Children’s Food*, PREVENTION INST. 1 (Jan. 2011), [http://www.preventioninstitute.org/images/stories/Documents/Claiming\\_Health.pdf](http://www.preventioninstitute.org/images/stories/Documents/Claiming_Health.pdf).

<sup>9</sup> Of the remaining percentage of products that did contain some fruit or vegetable, over half consisted of solely tomato and/or corn. See *New Study Finds Front-of-Package Labels Misleading*, PREVENTION INST., <http://www.preventioninstitute.org/press/highlights/553-new-study-finds-front-of-package-labels-misleading.html> (last visited Mar. 5, 2012).

<sup>10</sup> Larry Cohen, the Executive Director of Prevention Institute, posted this blog entry in which he altered product packages to more accurately depict their nutritional content. Even though Cohen did not pick the worst products on the list, the labeling on these so-called ‘smart choices’ or ‘sensible solutions’ shared a worrying aspect: tout a nutritional benefit to attract health-conscious customers and hide the truth about the product’s overwhelming detrimental nutritional contents. Cohen, *supra* note 2; see also *Food Dyes: A Rainbow of Risks*, CTR. FOR SCI. IN PUB. INTEREST (Jun. 2010), <http://cspinet.org/new/pdf/food-dyes-rainbow-of-risks.pdf>.

<sup>11</sup> *2011 Food & Health Survey: Consumer Attitudes Toward Food Safety, Nutrition & Health*, FOOD INSIGHT (Sept. 1, 2011), available at [http://www.foodinsight.org/Resources/Detail.aspx?topic=2011\\_Food\\_Health\\_Survey\\_Consumer\\_Attitudes\\_Toward\\_Food\\_Safety\\_Nutrition\\_Health](http://www.foodinsight.org/Resources/Detail.aspx?topic=2011_Food_Health_Survey_Consumer_Attitudes_Toward_Food_Safety_Nutrition_Health).

<sup>12</sup> See Lauren E. Manning, Note, *The Skinny on the FOP Flop: Why the FDA Must Tighten the Belt on FOP Labeling in Light of the Obesity Crisis*, 38 HOFSTRA L. REV. 1227 (2010).

<sup>13</sup> See Jennifer L. Pomeranz, *Federal Trade Commission’s Authority to Regulate Marketing to Children: Deceptive vs. Unfair Rulemaking*, 21 HEALTH MATRIX 521 (2011).

unhealthy fats and added sugars.<sup>14</sup> With statistics like these, it is no surprise that childhood obesity is on the rise, threatening the future health of our nation's citizenry.<sup>15</sup> Nor is it surprising that child health experts believe food marketing is contributing to this increase.<sup>16</sup> Food preferences and behaviors are established during childhood and adolescence, so deceptive labeling aimed at young people fosters unhealthy decision-making that will have lifelong consequences for the nutritional wellbeing of the individual and his or her family.<sup>17</sup>

In order to combat these problems, it is essential that families instill healthy habits in children at a young age so that they are capable of making beneficial decisions for themselves as they grow up.<sup>18</sup> The nation stands divided as to how best to accomplish this goal.<sup>19</sup> Some advocate for greater government intervention and more restrictions on dietary choices while others criticize those actions as unwarranted interferences stealing the focus away from creating more efficient self-regulation within the food industry.<sup>20</sup> It is true that self-regulation can potentially provide results in a quicker manner; however, the overriding problem with self-regulation of children's food products is that manufacturers and retailers are more concerned with their bottom line than the greater public health.<sup>21</sup> In other words, there is not sufficient motivation for them to reformulate existing products and manufacture nutritious new products when they can more easily—and lucratively—rebrand the same goods as “healthier.”<sup>22</sup> Moreover, FOP labeling is largely unregulated and subject to lenient criteria which allows room for “misleading claims, [inconsistency] with the Dietary Guidelines for Americans, [and have] the effect of encouraging consumers to choose highly processed foods and refined grains instead of fruits, vegetables and whole grains.”<sup>23</sup>

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<sup>14</sup> Sims et al., *supra* note 8.

<sup>15</sup> See Joan R. Rothenberg, *In Search of the Silver Bullet: Regulatory Models to Address Childhood Obesity*, 65 FOOD & DRUG L.J. 185, 185 (2010); *Interagency Working Group Seeks Input on Proposed Voluntary Principles for Marketing Food to Children*, FEDERAL TRADE COMMISSION (Apr. 28, 2011), available at <http://www.ftc.gov/opa/2011/04/foodmarket.shtm>. (“One in three children is overweight or obese, and the rates are even higher among some racial and ethnic groups.”). In addition to health care costs, there are indirect economic costs resulting from adults taking time away from work and children losing time in school. Children who are obese may experience a shorter life span than their parents, thus debilitating the capacity of our future workforce. *Id.*

<sup>16</sup> See *Childhood Obesity*, U.S. DEP'T OF HEALTH & HUM. SERVS., available at [http://aspe.hhs.gov/health/reports/child\\_obesity/#\\_ftn22](http://aspe.hhs.gov/health/reports/child_obesity/#_ftn22) (last visited Mar. 9, 2012); Michael M. Mello, *Federal Trade Commission Regulation of Food Advertising to Children: Possibilities for a Reinvented Role*, 35 J. HEALTH POLICY & L. 227 (2010).

<sup>17</sup> Pomeranz, *supra* note 13, at 524.

<sup>18</sup> See, e.g., *Childhood Obesity*, *supra* note 16; Gail H. Javitt, *Supersizing the Pint-Sized: The Need for FDA-Mandated Child-Oriented Food Labeling*, 39 LOY. L.A. L. REV. 311, 360 (2006).

<sup>19</sup> Rothenberg, *supra* note 15, at 186.

<sup>20</sup> *Id.*

<sup>21</sup> MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 362, 391 (rev. ed. 2007).

<sup>22</sup> *Id.*

<sup>23</sup> Rothschild, *supra* note 1.

This Note aims to uncover the problems inherent in our current regulatory system of labeling and advertising of foods marketed toward children and adolescents and to propose changes that will create more accountability for manufacturers while promoting healthier decision making among families. Both FOP labeling as well as consumer education initiatives are integral elements involved in achieving these health-minded goals. Part I will offer a brief history of the key U.S. government agencies at play—the Federal Drug Administration (“FDA”), the Federal Trade Commission (“FTC”) and the USDA, each agency’s jurisdictional authority to regulate health claims on food and beverages, as well as highlight key areas of change and emerging trends pertaining to marketing toward children and adolescents. Part II will analyze the inadequacies of our current state of self-regulation for FOP labels on food products marketed to young people, specifically calling attention to the confusing array of schemes and tactics developed by manufacturers and retailers to deceive parents into buying products that appear more nutritious for their kids. Part III uncovers the major barriers to policing the food industry’s marketing of products to children and adolescents, acknowledging both the imminent need for more efficient policing as well as the challenges involved with increasing government regulation of the private sector. Finally, Part IV endorses adoption of a uniform, mandatory system for FOP labeling on food products marketed to children and adolescents and proposes a variety of recommendations directed at achieving efficient regulation of health claims and strengthening agency accountability. Ultimately, these recommendations aim to eliminate barriers standing between families and sound decision-making with regard to nutrition.<sup>24</sup>

## I. FEDERAL GOVERNMENT’S AUTHORITY TO REGULATE LABELING AND ADVERTISING OF FOOD TO CHILDREN & ADOLESCENTS

### *A. Background*

#### 1. Overlapping Authority of Administrative Agencies to Regulate Food Labeling & Advertising

Administrative agencies work both independently and collaboratively to ensure that the labeling and advertising of food products is not deceptive or misleading to consumers.<sup>25</sup> The USDA regulates food labeling and marketing for

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<sup>24</sup> See Prepared Statement, F.T.C., Interagency Working Group on Food Marketed to Children Before the House Energy and Commerce Subcomm., Subcomm. on Commerce, Mfg., and Trade, and the Subcomm. on Health, 112th Cong. (2011), available at <http://www.ftc.gov/os/testimony/111012foodmarketing.pdf>.

<sup>25</sup> See *A Guide to Federal Food Labeling Requirements for Meat and Poultry Products*, USDA (2007), available at [http://www.fsis.usda.gov/pdf/labeling\\_requirements\\_guide.pdf](http://www.fsis.usda.gov/pdf/labeling_requirements_guide.pdf).

meat and poultry to avoid misbranding,<sup>26</sup> whereas the FDA<sup>27</sup> and the FTC<sup>28</sup> exercise concurrent regulatory authority over the labeling and advertising of packaged foods, including nutritional claims marketed to parents through FOP labeling.<sup>29</sup> The breadth of the USDA reaches parents and children through nutrition assistance programs created by the Food and Nutrition Service (“FNS”).<sup>30</sup> For example, Women, Infants and Children (“WIC”) and the School Meals Programs are tailored to improve health by allowing easier access to nutritious food and increased nutrition education.<sup>31</sup> The FTC is tasked with regulating the advertising of food products,<sup>32</sup> but the agency works closely with the FDA, whose prime responsibility is to regulate food labels, because food labeling often qualifies as a form of advertising.<sup>33</sup> As more manufacturers use FOP labels to attract health-conscious parents, the lines distinguishing advertising and labeling become less defined.<sup>34</sup>

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<sup>26</sup> *Id.* The USDA’s Food Safety and Inspection Service (“FSIS”) gets its authority primarily from the Federal Meat Inspection Act. The FSIS must approve all meat and poultry labels before the product can be marketed in interstate commerce. The label must be truthful, accurate and not misleading. *Id.*

<sup>27</sup> The FDA was formed following the enactment of the Pure Food and Drug Act of 1906, which prohibited the “manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors.” While this was a step in a positive direction toward regulating food and protecting consumers, the jurisdiction of the 1906 Act was fairly narrow and certain foods were beyond its reach. Noting a need for further regulation, Congress passed the FDCA in 1938, which vested authority in the FDA to ensure foods were safe for human consumption and manufacturers were not misleading consumers through false labeling. In an effort to promote these goals set out by the legislature, courts have interpreted the FDCA to afford the FDA a broad jurisdiction over both substantive and procedural aspects of food labeling. Chelsea M. Childs, *Federal Regulation of the “Smart Choices Program”: Subjecting Front-of-Package Nutrition Labeling Schemes to Concurrent Regulation by the FDA and the FTC*, 90 B.U. L. REV. 2403, 2406 (2010). Toward the end of the 20<sup>th</sup> century, Congress acknowledged a need for further regulation of the content and format of food labels so they passed the Nutritional Labeling and Education Act (“NLEA”) of 1990 to standardize labels and create procedures for reviewing health claims. Javitt, *supra* note 18, at 311.

<sup>28</sup> The FTC, established by the Federal Trade Commission Act in 1914, is headed by a Chairman and five Commissioners, each of whom are appointed by the President and confirmed by the Senate to serve seven-year terms. By enforcing truthful advertising through its regulatory framework, the FTC aims to promote healthy competition and encourage companies to develop innovative solutions to satisfy emerging consumer demands. In order to achieve its overarching goals of protecting consumers and promoting competition, the FTC works side by side with the FDA, pursuant to the terms of a 1971 liaison agreement. See Anne V. Maher & Lesley Fair, *The FTC’s Regulation of Advertising*, 65 FOOD & DRUG L.J. 589, (2010).

<sup>29</sup> Childs, *supra* note 27.

<sup>30</sup> See *Nutrition Assistance Programs*, USDA FNS, <http://www.fns.usda.gov/fns/> (last visited July 2, 2012).

<sup>31</sup> Rothenberg, *supra* note 15, at 192.

<sup>32</sup> 15 U.S.C. §§ 52, 55 (1980). The FTC has set forth its interpretations of this authority in its Deception Policy Statement and its Statement on Advertising Substantiation. See *generally supra* note 28.

<sup>33</sup> See 21 U.S.C. § 343(a). Section 403(a) of the Federal Food, Drug, and Cosmetic Act (FDCA), which prohibits “labeling [that] is false or misleading in any particular.” See also Childs, *supra* note 27, at 2413.

<sup>34</sup> Childs, *supra* note 27, at 2404.

## 2. Defending Government Interference in the Private Sector

Government regulation of social and economic private activity—such as a family’s grocery store purchases and a food company’s marketing tactics—is a divisive issue that stirs up controversy over what role the government should play in interfering with the free market.<sup>35</sup> There is a constant power struggle between law and economics in our “food economy”—referring to the transactional relationships between food producer, consumer, and the government as a regulator.<sup>36</sup>

In the United States, a country founded on the principles of capitalism, it is easy to argue for a free market approach, but such an approach overlooks the importance of food as more than just a commodity but rather a direct link to family health and wellbeing.<sup>37</sup> Food safety advocate Denis Stearns argues that “there is no rational—which is to say, cogent and fact-supported—justification for an argument in favor of a ‘free’ market of food.”<sup>38</sup> On the one hand, “[i]f consumers want to eat ‘healthy’ and ‘natural’ foods, our regulatory system should allow for that.”<sup>39</sup> At the same time, families who wish to make purchasing decisions based on taste preferences alone should do so “with fuller disclosure of the negative personal, public, and environmental health consequences of those decisions.”<sup>40</sup> Many people fail to take into consideration the fact that what we may view as bad “decision-making” by parents is not always based on informed choices; instead, it may be due to a lack of understanding of nutrition labels and the proliferation of deceptive advertising meant to brand products as healthy for children despite their overall lack of nutritional value.<sup>41</sup> As a result, problems of childhood obesity and poor nutrition are wrongly viewed as solely due to poor self-control on behalf of parents and children.<sup>42</sup>

## 3. Categories of Food to Focus On

The categories of food identified as being marketed most heavily toward children and adolescents are breakfast cereals, carbonated beverages, and snack foods.<sup>43</sup> In 2006, the FTC reported that about \$870 million was spent on

<sup>35</sup> Denis W. Stearns, *On (C)redibility: Why Food in the United States May Never Be Safe*, 21 STAN. L. & POL’Y REV. 245, (2010).

<sup>36</sup> Margaret Sova McCabe, *Loco Labels and Marketing Madness: Improving How Consumers Interpret Information in the American Food Economy*, 17 J.L. & POL’Y 493, 527 (2009).

<sup>37</sup> *Id.* at 500.

<sup>38</sup> Stearns, *supra* note 35, at 245 (questioning whether a rational economic actor can be expected to take the initiative to improve the safety of the food he sells).

<sup>39</sup> McCabe, *supra* note 36, at 503.

<sup>40</sup> *Id.*

<sup>41</sup> Lauren Kaplin, *A National Strategy to Combat the Childhood Obesity Epidemic*, 15 U.C. DAVIS J. JUV. L. & POL’Y 347, 381-82 (2011).

<sup>42</sup> *Id.* at 381.

<sup>43</sup> *Interagency Working Group on Food Marketed to Children, Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts: Request for Comments*, F.T.C. (2011), available at

marketing directed at children—defined as between two and eleven years of age—and \$1 billion on marketing to adolescents—twelve to seventeen years old.<sup>44</sup> Furthermore, about sixty-three percent of the total amount spent on marketing to young people was for soda, fast food, and cereal.<sup>45</sup> Another thirty-three percent was spent on juice, snack foods, candy or frozen desserts, prepared foods, and baked goods, while merely four percent was devoted to dairy products and fruits and vegetables.<sup>46</sup> Among the \$492 million spent marketing carbonated beverages, \$474 million—or ninety-six percent—was spent targeting adolescents.<sup>47</sup> For breakfast cereal, \$229 million of marketers' total \$237 million expenditure—almost ninety-seven percent—was directed to children.<sup>48</sup> An overwhelming majority of these foods and beverages were of such low nutritional quality that they conflict with the USDA's modest nutritional guidelines.<sup>49</sup> The concern over these foods does not stem from a desire to completely eliminate the occasional “treat” or snack item but rather from a legitimate fear that frequent and excessive consumption of these items will turn into life-long habits that create serious adverse health consequences.<sup>50</sup>

#### *B. The FDA's Broad Authority Over Labeling on Food Products Marketed to Kids*

The FDA regulates the use of nutrient content claims and specific health claims on FOP labels of food products marketed to children and adolescents.<sup>51</sup> Unlike the USDA, which requires prior approval of meat and poultry labels before such products are sold in interstate commerce, the FDA only reviews a small portion of labels for compliance and the review process is usually spurred by an informal request by a manufacturer, competitor, or consumer.<sup>52</sup> In 1990, the enactment of the Nutritional Labeling and Education Act (“NLEA”) set new boundaries for the FDA and required, among other things, that “label[s] facilitate consumer education.”<sup>53</sup> However, the NLEA has been largely unsuccessful in educating parents about children's specific nutritional needs.<sup>54</sup>

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<http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf>.

<sup>44</sup> Pomeranz, *supra* note 13; see also *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, F.T.C. (July 2008) [hereinafter *Marketing Food to Children and Adolescents*], available at <http://www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf>.

<sup>45</sup> *Marketing Food to Children and Adolescents*, *supra* note 44.

<sup>46</sup> *Id.* at 9.

<sup>47</sup> *Id.* at 7.

<sup>48</sup> *Id.* at 7-8.

<sup>49</sup> Pomeranz, *supra* note 13, at 523.

<sup>50</sup> Rothenberg, *supra* note 15, at 196.

<sup>51</sup> *Enforcement Policy Statement on Food Advertising*, F.T.C. (May 1994), available at <http://www.ftc.gov/bcp/policystmt/ad-food.shtml>. [hereinafter *Enforcement Policy Statement*].

<sup>52</sup> *A Guide to Federal Food Labeling Requirements for Meat and Poultry Products*, F.T.C. (Aug. 2007), available at [http://www.fsis.usda.gov/pdf/labeling\\_requirements\\_guide.pdf](http://www.fsis.usda.gov/pdf/labeling_requirements_guide.pdf).

<sup>53</sup> Javitt, *supra* note 18, at 330.

<sup>54</sup> *Id.*

Much to the delight of food industry leaders, another major change codified by the NLEA was Congress' decision to allow health claims to appear on FOP labels.<sup>55</sup> The FDA has different regulatory power depending on the type of claim.<sup>56</sup> Regarding specific health claims, the FDA has the sole power to approve labels pertaining to claims that link a food or nutritional component of the food to a specific disease or health condition.<sup>57</sup> However, the FDA has less power over claims that merely tout the effect of certain nutrients.<sup>58</sup> For example, claims like "bone-building calcium" are allowed as long as they are truthful and not misleading, but this can create an opportunity for misleading parents.<sup>59</sup> While calcium is an essential nutrient for young people, the recommended amount of calcium for nine to eighteen year-olds is 1,300 milligrams ("mg")—the equivalent to three cups of low-fat milk and additional servings of calcium-rich foods. Allowing products with less than 100 mg of calcium to boast claims of "calcium for strong bones" diminishes the likelihood that parents will reach the nutritional goals set for their children.<sup>60</sup> In situations where a label's nutrient content claims are thought to be untruthful or misleading, the FDA takes a case-by-case approach

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<sup>55</sup> Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified in part at 21 U.S.C. § 343(i), (q) and (r)). The NLEA defines a "nutrient content claim" as any claim that expressly or by implication "characterizes the level of any nutrient" and a "health claim" as any claim that characterizes the relationship of any nutrient to a "disease or health related condition." *Id.*

<sup>56</sup> 21 C.F.R. § 101.14 et seq. (1993). To regulate health claims, which are claims that characterize the relationship of a substance in a food to a disease or health-related condition, the FDA has established these general standards: "(1) limiting authorization of health claims only to those categories for which there is 'significant scientific agreement' that the relevant diet-disease relationship is supported by the scientific evidence; (2) establishing disqualifying levels for total fat, saturated fat, cholesterol, and sodium, above which foods are disqualified from bearing any health claims; (3) for the specific substance that is the subject of a health claim, setting a threshold level for the amount of such substance in the food, that is either sufficiently low or sufficiently high to support the health claim; (4) requiring that foods bearing health claims have some minimal nutritional value; and (5) requiring that health claims identify those factors, other than dietary intake of the substance, that affect the diet-disease relationship." *Id.* The FDA has also established specific maximum levels of total fat, saturated fat, cholesterol, and sodium which foods can contain before they are disqualified from bearing health claims. *Enforcement Policy Statement, supra* note 51, at 5.

<sup>57</sup> Timothy D. Lytton, *Signs of Change or Clash of Symbols? FDA Regulation of Nutrient Profile Labeling*, 20 HEALTH MATRIX 93, 109-10 (2010). The FDA only allows claims linking foods with diet and disease if such claims are based on "the totality of the publicly available scientific evidence . . . that there is significant scientific agreement, among experts qualified by scientific training and experience to evaluate such claims, that the claim is supported by such evidence." *Enforcement Policy Statement, supra* note 51, at 5.

<sup>58</sup> Lytton, *supra* note 57, at 109-10; *see also Enforcement Policy Statement, supra* note 51.

<sup>59</sup> Lytton, *supra* note 57, at 110.

<sup>60</sup> *How Much Calcium Do Kids Need?*, MILK MATTERS, [http://www.nichd.nih.gov/milk/prob/calcium\\_need.cfm](http://www.nichd.nih.gov/milk/prob/calcium_need.cfm) (last visited March 1, 2012); *see also Calories in Pizza Stuffers*, CALORIE COUNT, <http://caloriecount.about.com/calories-totinos-pizza-stuffers-i269003> (last visited March 1, 2012) (Totino's Pizza Stuffers, whose package depicts a pizza pocket with cheese oozing out, might seem to be a decent supply of calcium. Unfortunately, one pizza pocket contains a mere 60 mg of calcium while packing 270 calories and 700 mg of sodium); *Nature Valley Vanilla Yogurt Product Detail*, NATURE VALLEY, <http://www.naturevalley.com/ProductDetail.aspx?ProductId=22> (last visited March 1, 2012) (On front-of-package label, Nature Valley Chewy Yogurt Granola Bars boasts an "excellent source of calcium" when contains 100 mg—less than 10% of child's daily calcium requirement.).

to evaluating the claims and, if necessary, pursuing action against the manufacturer or retailer responsible for the deceptive labeling.<sup>61</sup>

In the realm of nutrient content claims, the FDA defines certain absolute terms—*e.g.*, “low” or “high”—and comparative terms—*e.g.*, “reduced” or “more”—that can be used to characterize nutrient levels in a food.<sup>62</sup> For comparative nutrient content claims in which a food label compares the nutrient contents to that of a “reference” food, the FDA requires that these comparative terms meet minimum standards and that the label disclose the reference food being used as a comparison.<sup>63</sup>

### *C. The Responsibility of the FTC to Prevent Deceptive Advertising to Parents & Children*

In the wake of the NLEA, the FTC set forth its Enforcement Policy Statement on Food Advertising, recognizing an increasing need for consistency between health claims on labels and in advertisements in order to help parents make informed decisions.<sup>64</sup> The FTC has broad authority to regulate individual advertisements to ensure they are not deceptive or unfair.<sup>65</sup> In order to assess the legality of their claims, food advertisers can seek guidance from precedent established in FTC food cases and from the FTC’s Deception Policy Statement and its Statement on Advertising Substantiation, both of which interpret its authority to prohibit deceptive acts or practices.<sup>66</sup>

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<sup>61</sup> Childs, *supra* note 27, at 2425.

<sup>62</sup> *Enforcement Policy Statement*, *supra* note 51, at 2. ‘Absolute’ terms describe the amount of nutrient in one serving of a food. ‘Relative’ or comparative terms compare the amount of a nutrient in one food with the amount of the same nutrient in another food. With very few exceptions, only these specific terms, and certain approved synonyms, may be used on food labels to characterize the level of a nutrient. In some cases, depending on the overall context of the label, statements about ingredients may be deemed as nutrient content claims and certain ingredient statements are always deemed to be nutrient content claims when they appear on labels. *Id.* For example, “a claim that a food contains oat bran is a claim that it is a good source of dietary fiber . . . and that a food contains no oil is a claim that it is fat free.” *Id.* at 48 (citing 21 C.F.R. § 101.65(c)(3)(1992)).

<sup>63</sup> *Enforcement Policy Statement*, *supra* note 51, at 3. The minimum standards required by the FDA vary depending on the nutrient content comparison. In order to claim that a product has “less” or a “reduced” amount, the nutrient in question must be a minimum of 25% less than the quantity in the reference food. Generally, if a product’s nutrient content claims comply with these FDA standards, they will also comply with §5 of the FTC Act. *Id.*

<sup>64</sup> *Id.* at 2. The FTC asserted its desire “to harmonize its advertising enforcement program with FDA’s food labeling regulations.” The statement “focuses on the general issues that are likely to remain relevant to the Commission’s regulation of food advertising over time, as specific provisions in the FDA regulations are amended.” *Id.*

<sup>65</sup> 15 U.S.C. § 45(a)(1) (2006). Section 5 of the FTC Act declares unlawful any “unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.” *Id.* § 5. Sections 12 and 15 of the FTC Act prohibit “any false advertisement” that is “misleading in a material respect.” *Id.* §§ 12, 15.

<sup>66</sup> *Enforcement Policy Statement*, *supra* note 51; *see also* Kraft, Inc., F.T.C. Dkt. No. 9208, Slip Op. at 7 (Jan. 30, 1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993); Nestle Food Co., F.T.C. Dkt. No. C-2265 (Jan. 21, 1992) (consent order); Presto Food Prods., Inc., FTC Dkt. No. C-3480 (Feb. 23, 1994) (consent order); Clorox Co., F.T.C. Dkt. No. C-3427 (May 17, 1993) (consent order); Isaly Klondike Co., F.T.C. Dkt. No. C-3412 (Jan. 28, 1993) (consent order).

The FTC shares a similar framework to the FDA in assessing both nutrient content claims and health claims on FOP labels of children's food products.<sup>67</sup> If the FTC finds a single advertiser's claims to be false or misleading, either from their own investigation or through complaints from individual businesses or consumers, the Commission may bring an action to challenge the claims in an administrative hearing.<sup>68</sup>

In determining whether a particular claim is "deceptive" as matter of law, the FTC seeks to prove the following: (1) the advertiser uses a deceptive representation,<sup>69</sup> omission<sup>70</sup> or practice; (2) which is likely to mislead a reasonable consumer; and (3) is material enough to affect the consumer's conduct in choosing a product.<sup>71</sup> There is a presumption of materiality<sup>72</sup> for express claims as well as for claims relating to health or safety.<sup>73</sup> Furthermore, it is presumed that objective claims asserting the nutrition or health benefits of a particular food are grounded upon valid evidence substantiating such a claim.<sup>74</sup> When defending accusations that a claim is deceptive, the advertiser can try to prove the consumer does not take the claims literally and thus they cannot be deceptive, or the advertiser can claim that there is sufficient proof to make the claim.<sup>75</sup>

In assessing comparative nutrient content claims, the FTC, similar to the FDA, requires that advertisers clearly identify the reference food to which the

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<sup>67</sup> *Enforcement Policy Statement*, *supra* note 51. The FTC's approach is consistent with that of the FDA in that it insists that health claims be "adequately substantiated and presented in a manner that is truthful and not misleading." In order to substantiate health claims, the FTC requires such claims be supported by "competent and reliable scientific evidence." *Id.*

<sup>68</sup> 15 U.S.C. § 45(a)(1) (2006).

<sup>69</sup> *Enforcement Policy Statement*, *supra* note 51, at 2 ("A representation may be made by express or implied claims. An express claim directly makes a representation . . . an implied claim requires an examination of both the representation and the overall context of the ad, including the juxtaposition of phrases, images, and the nature of the claim.").

<sup>70</sup> Omission of information that is necessary to prevent a misleading representation can be categorized as deception and silence can be deemed deceptive if meant to promote an implied but false representation. Not all omissions are deceptive. The test for whether an omission rises to the level of deception is not whether providing the information would be beneficial for consumers, but rather whether the overall impression created by the ad is deceptive. *Id.*

<sup>71</sup> Childs, *supra* note 27, at 2409-10 (quoting the FTC Policy Statement on Deception).

<sup>72</sup> A presumption of materiality exists "[i]n some circumstances, [where] the Commission can presume that consumers are likely to reach false beliefs about the product or service because of an omission." FTC Policy Statement on Deception (Oct. 14, 1983), appended to Cliffdale Assoc.'s, Inc., 103 F.T.C. 110, 174 (1984), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>. Evidence may be brought before the Commission to rebut this presumption. In situations where there is not a presumption of materiality, the Commission may require evidence pertaining to consumers' expectations. *Id.*

<sup>73</sup> *Enforcement Policy Statement*, *supra* note 51.

<sup>74</sup> *Id.* At the time an advertiser makes a claim about health or nutrition of the food product, there must be reliable scientific evidence, including tests, analyses, research, and studies, which support and validate the claim.

<sup>75</sup> Childs, *supra* note 27, at 2410. In evaluating the level of substantiation, the FTC looks at six factors: "(1) the nature of the product involved, (2) the type of claim, (3) the benefits of a truthful claim, (4) the cost of developing the substantiation for the claim, (5) the consequences of a false claim, and (6) the amount of substantiation that reasonable experts in the field would agree on." *Id.* (quoting Thompson Med. Co., 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986)).

product is being compared, and if the advertiser uses unqualified comparative terms—such as “less fat” or “more calcium”—the FTC defers to the FDA’s minimum difference requirements to determine if the claim is deceptive.<sup>76</sup> In certain cases however, qualification is necessary to avoid deceiving parents.<sup>77</sup> Qualifications for foods marketed toward children and adolescents are often necessary when the product contains such high levels of a nutrient, such as sodium or fat, that the levels are still quite high despite the reduction.<sup>78</sup>

*D. Increased Focus on the Health of America’s Youth Under the Obama Administration*

Although food companies have taken advantage of loopholes in labeling and advertising regulations to deceive parents, food-related public health issues, specifically those threatening our youth, have received special attention in the Obama Administration.<sup>79</sup> In 2009, President Barack Obama signed a memorandum promising to base government decision-making on science rather than ideology and to listen to scientists “even when it’s inconvenient—especially when it’s inconvenient.”<sup>80</sup> First Lady Michelle Obama jumpstarted the “Let’s Move!” Campaign to promote public awareness of childhood obesity and encourage youth to adopt healthier habits, both through nutrition and exercise.<sup>81</sup> Margaret A. Hamburg, Commissioner of the FDA, has vowed to make “accurate and useful nutrition labeling one of [her] top priorities” because “you can’t have good nutrition without good information.”<sup>82</sup> Commissioner Hamburg recognizes the increase in FOP labeling that is targeted at grabbing parents’ attention, which makes it even more important for this information to be “truthful, meaningful, and

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<sup>76</sup> *Enforcement Policy Statement*, *supra* note 51. Also, some comparative nutrient claims need to be qualified so as not to overstate the nutrient difference when the absolute difference is small. For example, if the advertiser claims that their product contains one third less fat than another product, but the amount of fat in both is very small, that advertiser must clarify by offering the amount in each product to better represent the difference.

<sup>77</sup> *Id.* Some comparative nutrient claims need to be qualified so as not to overstate the nutrient difference when the absolute difference is small. For example, if the advertiser claims that their product contains one third less fat than another product, but the amount of fat in both is very small, that advertiser must clarify by offering the amount in each product to better represent the difference.

<sup>78</sup> *Id.* For example, an advertiser claiming a high-fat product contains “less fat than Brand X” may need to clarify that claim by including the quantitative amount of fat in both products—“e.g., ‘20% less fat than Brand X -- Brand X has 25 g. fat, ours has 20 g. fat.’” *Id.* at 3.

<sup>79</sup> Sarah Roller & Raqiyyah Pippins, *Marketing Nutrition & Health-Related Benefits of Food & Beverage Products: Enforcement, Litigation & Liability Issues*, 65 FOOD & DRUG L.J. 447, 447-48 (2010).

<sup>80</sup> Gardner Harris, *White House and the F.D.A. Often at Odds*, N.Y. TIMES (Apr. 2, 2012), <http://www.nytimes.com/2012/04/03/health/policy/white-house-and-fda-at-odds-on-regulatory-issues.html>.

<sup>81</sup> LET’S MOVE! CAMPAIGN, <http://www.letsmove.gov/> (last visited Mar. 9, 2012).

<sup>82</sup> Margaret A. Hamburg, *You Can’t Have Good Nutrition Without Good Information*, LET’S MOVE BLOG (Mar. 4, 2010), <http://www.letsmove.gov/blog/2010/03/04/you-cant-have-good-nutrition-without-good-information>.

useful in helping [parents] make healthy food choices that contribute to healthy diets.”<sup>83</sup>

In the FDA’s strategic plan for 2012 to 2016, it addresses the public health problems such as chronic disease and obesity by pledging to “provide accurate and useful information” to consumers so they can make healthier nutrition-related decisions.<sup>84</sup> However, as of this writing, the FDA has yet to publish final rules—or even proposed rules—for updating the nutrition facts label and serving sizes.<sup>85</sup> To improve consumers’ access to and use of nutrition information, the FDA intends to “explore [FOP] nutrition labeling opportunities”<sup>86</sup> and to “collaborate with public/private sector parties on nutrition education,” but the agency failed to establish any dates by which these goals and objectives must be met.<sup>87</sup>

The FTC may also be shifting its ideology toward stricter regulation of foods marketed to children and adolescents under the Obama Administration. President Obama appointed Jonathan Leibowitz as chair of the FTC and David Vladeck as director of the Bureau of Consumer Protection.<sup>88</sup> Leibowitz has been a vocal advocate for stronger regulation of advertising to children and Vladeck is a well-known consumer advocate.<sup>89</sup> Since obesity and other nutrition-related health issues have moved into the public spotlight, a variety of programs have been created to educate Americans about the importance of a healthy diet. At the same time, marketers have been quick to angle their messages in a way that misleads parents as to the actual nutritional value of their products and cashes in on the increased desire to choose healthier products. Under these conditions, consumer advocates, especially those who have voiced strong opinions in favor of protecting children, are an important tool in creating and maintaining a food environment for families to choose foods that actually *are* healthier, not just those products that manufacturers promote as healthier options.

The USDA, which is responsible for setting the Dietary Guidelines for Americans, recently increased its focus on reduced-calorie consumption and increased exercise due to the rise in obesity rates.<sup>90</sup> In January 2011, the USDA announced the 2010 Dietary Guidelines set forth in an attempt to ameliorate the

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<sup>83</sup> *Id.*

<sup>84</sup> Marion Nestle, *FDA Releases Strategic Plan for 2012-2016*, FOOD POLITICS (May 2, 2012), <http://www.foodpolitics.com/2012/05/fda-releases-strategic-plan-for-2012-2016/>.

<sup>85</sup> *See id.*

<sup>86</sup> *Id.* It should be noted that the FDA has already sponsored two FOP labeling studies conducted by the Institute of Medicine. It is unclear whether the FDA’s intention to “explore [FOP] nutrition labeling opportunities” merely conveys its plan to research further or whether it insinuates an intention to abandon the Institute of Medicine’s advice. *Id.*

<sup>87</sup> *Id.* This leaves open the potential for the FDA to delay action until 2016.

<sup>88</sup> Michael M. Mello, *Federal Trade Commission Regulation of Food Advertising to Children: Possibilities for a Reinvigorated Role*, 35 J. HEALTH POL. POL’Y & L. 227, 238 (2010).

<sup>89</sup> *Id.* at 238-39.

<sup>90</sup> USDA, *USDA and HHS Announce New Dietary Guidelines to Help Americans Make Healthier Food Choices and Confront Obesity Epidemic*, USDA (Jan. 31, 2011), <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/PressRelease.pdf>.

national obesity epidemic.<sup>91</sup> Agriculture Secretary Tom Vilsack remarked that “[t]hese new and improved dietary recommendations give individuals the information to make thoughtful choices of healthier foods in the right portions[.] Improving our eating habits is not only good for every individual and family, but also for our country.”<sup>92</sup> In addition to cutting down on calories and ramping up physical activity, the USDA is encouraging families to eat more “vegetables, fruits, whole grains, fat-free and low-fat dairy products, and seafood,” and to decrease their intake of “sodium, saturated and trans fats, added sugars, and refined grains.”<sup>93</sup>

Another change at the USDA occurred in June 2011 when the MyPlate icon replaced the Pyramid as a visual reminder to families to make healthy decisions at mealtimes.<sup>94</sup> The MyPlate initiative challenges parents and children to fill half their plate with fruits and vegetables, make at least half of their grains whole grains, switch to fat-free or low-fat milk, choose lower sodium foods, and substitute water for sugary drinks.<sup>95</sup> In an effort to further steer children toward healthier eating, the USDA has focused on aligning school lunches with the guidelines portrayed by the MyPlate icon.<sup>96</sup> The Healthy, Hunger-Free Kids Act of 2010, which authorizes the USDA to reform school lunch and breakfast programs, has resulted in real changes to school meals beginning in 2012-2013 school year.<sup>97</sup>

While the Obama Administration may have a heightened focus on the health of children and adolescents, lobbying efforts are equally as heightened.<sup>98</sup> Records analyzed by Reuters reveal that industry has dominated policymaking by more than doubling their political spending in the past three years.<sup>99</sup> Government proposals aimed at improving the health of children are easily knocked down by empty promises of voluntary action by industry leaders afraid of losing revenues and market share.<sup>100</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> USDA CHOOSEMYPLATE.GOV, <http://www.choosemyplate.gov> (last visited Mar. 1, 2012).

<sup>95</sup> *Choose My Plate: 10 Tips to a Great Plate*, USDA (Jun. 2011), [www.choosemyplate.gov/food-groups/downloads/TenTips/DGTipsheet1ChooseMyPlate.pdf](http://www.choosemyplate.gov/food-groups/downloads/TenTips/DGTipsheet1ChooseMyPlate.pdf).

<sup>96</sup> *Final Rule: Nutrition Standards for School Meals*, USDA FOOD AND NUTRITION SERVICE, available at <http://www.fns.usda.gov/cnd/governance/legislation/nutritionstandards.htm>.

<sup>97</sup> *Id.*

<sup>98</sup> See Parke Wilde, *Reuters: Washington Soft on Childhood Obesity*, U.S. FOOD POL’Y BLOG (Apr. 28, 2012, 8:00 AM), <http://usfoodpolicy.blogspot.com/2012/04/reuters-washington-soft-on-childhood.html>.

<sup>99</sup> *Id.*

<sup>100</sup> *See id.*

## II. THE INADEQUACIES OF GOVERNMENT REGULATION OF FOOD PRODUCTS TARGETED TOWARD CHILDREN & ADOLESCENTS

### *A. Confusing Consumers: FOP Labeling, Nutritional “Better For You” Schemes, and Deceptive Tactics*

#### 1. The Unregulated World of FOP Labeling on Children’s Food Products

Unlike in the past, when most nutritional information appeared on the side and back of product packages, it is now commonplace to find nutritional claims on the front of packages.<sup>101</sup> FOP labels have the potential to help parents save time while choosing healthy options among an overwhelming array of foods and beverages marketed toward their children, but many FOP claims are confusing and misleading.<sup>102</sup> On one hand, the sheer number of differing schemes to rate and categorize foods based on health is overwhelming, but even more worrisome is that many of these labeling schemes are created by manufacturers and retailers who have a financial interest in selling specific products to kids—regardless of parents’ nutrition goals. Accordingly, the reliability of their messaging is suspect.<sup>103</sup> The result is that parents mistakenly rely on FOP claims for honest guidance but end up with a distorted view of the product’s nutritional value because manufacturers brand products as a positive choice for children simply to increase sales and profits.<sup>104</sup>

FOP claims are largely unregulated, so they avoid compliance with the FDA’s requirement that “food bearing a health claim must not only meet the threshold level for the specific substance or nutrient that is the subject of the health claim . . . but also must contain a sufficient amount of at least one of six nutrients and substances specified by FDA.”<sup>105</sup> The FTC agrees that it is deceptive to use health claims for foods with little or no positive nutritional value because the claim implies that the food contributes significantly to a healthy diet.<sup>106</sup> According to the Prevention Institute,<sup>107</sup> allowing food companies to decide what information should go on FOP labels is dangerous, and, without federal regulation, the current system is deceiving parents instead of helping them make wholesome decisions for

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<sup>101</sup> See Lytton, *supra* note 57.

<sup>102</sup> *Id.* at 96.

<sup>103</sup> See *id.* at 97.

<sup>104</sup> *Id.*

<sup>105</sup> *Enforcement Policy Statement*, *supra* note 51.

<sup>106</sup> See *id.*

<sup>107</sup> PREVENTION INST., <http://preventioninstitute.org/services.html> (last visited Mar. 9, 2012). Prevention Institute is an organization focused on community well-being for both children and adults in all neighborhoods. They pride themselves on bringing “cutting edge research, practice, and analysis to today’s pressing health and safety concerns.” The Prevention Institute fosters a collaborative approach with states, communities and other organizations to create and implement initiatives for promoting health equity and improving health outcomes in low-income communities. *Id.*

their kids.<sup>108</sup> Honest, transparent FOP labeling can make it easier for parents and children to make healthier food decisions and as a result, consumers can use their purchasing power to pressure manufacturers to design healthier products.<sup>109</sup> This would be similar to the shift by food producers and restaurants away from the use of trans fats after the FDA began requiring manufacturers to include trans fat levels on the Nutrition Facts label.<sup>110</sup>

## 2. Litany of Private Labeling Initiatives

Kelly Brownell, Director of Yale University's Rudd Center for Food Policy and Obesity, sums up the current state of private labeling initiatives: "It's been chaos so far[.] . . . There have been too many systems, and industry has used them in a self-serving way."<sup>111</sup> One short-lived labeling program that illustrates the issues associated with allowing food companies to develop systems without guidance and regulation was the "Smart Choices" scheme created in 2009 from a contribution of over one million dollars from food companies such as Kellogg, Kraft, and Unilever.<sup>112</sup> If a product met the criteria, it was able to place a green seal with a check mark on the front of the package, thus branding it a "healthy" item.<sup>113</sup> Notorious examples of products misbranded as "healthier" under this program include Fudgesicles, Froot Loops, and Cheese Stuffed Crust Pizza.<sup>114</sup> The program was voluntarily ended after public outcry and a letter from the FDA and the USDA voicing concerns that the system was misleading and inconsistent with dietary guidelines.<sup>115</sup> Other labeling schemes license their scoring systems to grocery stores. NuVal, which uses a 100-point system to show healthiness of food, and Guiding Stars, which uses three stars to rate food, license their systems to more than 3,000 U.S. grocery store chains.<sup>116</sup> In theory this may seem efficient, but

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<sup>108</sup> See Rothschild, *supra* note 1; Sims et al., *supra* note 8.

<sup>109</sup> See *The Obesity Prevention Source, Healthy Food Environment: Food Marketing and Labeling*, HARV. SCH. OF PUB. HEALTH, <http://www.hsph.harvard.edu/obesity-prevention-source/obesity-prevention/food-environment/food-marketing-and-labeling-and-obesity-prevention.html> (last visited July 2, 2012).

<sup>110</sup> *Id.*

<sup>111</sup> Mike Hughlett, *Simpler Food Labels No Easy Task*, STAR TRIBUNE (Dec. 27, 2011), <http://www.startribune.com/printarticle/?id=136243013>.

<sup>112</sup> Rebecca Ruiz, *Smart Choices Foods: Dumb As They Look?*, FORBES (Sep. 17, 2009), <http://www.forbes.com/2009/09/17/smart-choices-labels-lifestyle-health-foods.html>; see also A. Bryan Endres & Nicholas R. Johnson, *United States Food Law Update: The FDA Food Safety Modernization Act, Obesity and Deceptive Labeling Enforcement*, 7 J. FOOD L. & POL'Y 135, 164 (2011).

<sup>113</sup> Ruiz, *supra* note 112.

<sup>114</sup> *Id.*; see also Endres et al., *supra* note 112, at 165.

<sup>115</sup> Endres et al., *supra* note 112, at 165; see also Michael R. Taylor & Jerold R. Mande, *Letter to the Smart Choices Program*, U.S. FOOD AND DRUG ADMIN. (Aug. 19, 2009), available at <http://www.fda.gov/Food/LabelingNutrition/LabelClaims/ucm180146.htm>. In the letter, the directors express concern over the Smart Choices label having "the effect of encouraging consumers to choose highly processed foods and refined grains instead of fruits, vegetables and whole grains." *Id.*

<sup>116</sup> *Grocery Chains Adopt Healthy Food Ratings*, UPI.COM (Jan. 11, 2012), [http://www.upi.com/Health\\_News/2012/01/11/Grocery-chains-adopt-healthy-food-ratings/UPI-35961326258723/?spt=hs&or=hn](http://www.upi.com/Health_News/2012/01/11/Grocery-chains-adopt-healthy-food-ratings/UPI-35961326258723/?spt=hs&or=hn).

these systems come with their own problems of application.<sup>117</sup> General Mills' Trix cereal, which is predominantly sugar and contains Red 40, Yellow 6, Blue 1 and artificial flavors, scores a twenty-four on the NuVal scale.<sup>118</sup> To many health advocates, a product this devoid of nutritional value should have a score closer to one to more accurately reflect its glaring harm and minuscule benefit on children's health.<sup>119</sup>

In an attempt by the food industry to preempt an FDA directive on FOP labeling, the Grocery Manufacturers' Association ("GMA") and the Food Marketing Institute ("FMI") created Nutrition Keys in early 2011.<sup>120</sup> Nutrition Keys was devised as an industry-wide FOP labeling system aimed at helping time-crunched parents make informed decisions.<sup>121</sup> Nutrition Keys then changed its name to "Facts Up Front" and garnered a \$50 million promotional marketing campaign, which launched in 2012, to educate consumers on the value of this labeling scheme.<sup>122</sup> The label displays the product's key nutritional information on four icons printed on the front of the package, each listing a nutrient that dietary guidelines suggest Americans consume less of—calories, saturated fat, sugars, and sodium.<sup>123</sup> While creators began this program at the request of, and with support from, First Lady Michelle Obama and her "Let's Move!" Campaign, the food industry soon alienated the Obama Administration and the FDA when it refused to amend the voluntary "nutrients to encourage" aspect of the labeling scheme.<sup>124</sup> In addition to the "nutrients to avoid" icons, packages are allowed include up to two "nutrients to encourage" icons for nutrients such as potassium, fiber, Vitamin A, Vitamin C, Vitamin D, calcium, and iron, but only as long as they meet the following requirements: (1) they contain more than ten percent of the daily value of the nutrient; and (2) they satisfy the FDA's requirement for a nutrient content claimed to be a "good source."<sup>125</sup> This aspect is contentious because healthy nutrients can be placed out of context, making otherwise unhealthy products seem

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<sup>117</sup> See Jessica Naudziunas, *Selling Healthy Eating in the Aisles*, HARVEST PUB. MEDIA (Jan. 13, 2012), <http://harvestpublicmedia.org/article/967/selling-healthy-eating-aisles/5>.

<sup>118</sup> *Id.*

<sup>119</sup> *See id.*

<sup>120</sup> *GMA, FMI Bring Nutrition Facts Up Front*, FOOD PRODUCT DESIGN (Sept. 26, 2011), <http://www.foodproductdesign.com/news/2011/09/gma-fmi-bring-nutrition-facts-up-front.aspx> [hereinafter *GMA*].

<sup>121</sup> Endres et al., *supra* note 112, at 163, 169, 179.

<sup>122</sup> *GMA, supra* note 120. *See also, Facts up Front Overview*, FACTSUPFRONT.ORG, available at <http://factsupfront.org/>.

<sup>123</sup> *Facts up Front Overview, supra* note 122.

<sup>124</sup> *Id.*; *see also* LET'SMOVE, <http://www.letsmove.gov/> (last visited Mar. 1, 2012); Nancy Huehnergath, *Top Six Food Politics Lessons Learned in 2011*, THE HUFFINGTON POST (Dec. 27, 2011), [http://www.huffingtonpost.com/nancy-huehnergath/top-six-food-politics-les\\_b\\_1171527.html](http://www.huffingtonpost.com/nancy-huehnergath/top-six-food-politics-les_b_1171527.html). Despite her commendable action starting Let's Move!, its unclear how strong the First Lady will argue in favor of children on these controversial policies since these issues have a strong tie to politics and may upset food industry leaders. Recently, the First Lady was silent as the food industry attacked the IWG's recently unveiled guidelines for food marketed to children.

<sup>125</sup> Endres et al., *supra* note 112, at 163-64.

as if they have “some redeeming quality” and thus confuse parents, undercutting the goal of facilitating educated healthy decision-making.<sup>126</sup> There are also other issues with this system, including its inability to convey whether the amounts of salt, fat and sugar are relatively high or not.<sup>127</sup>

Food manufacturers are trying to maintain some control over FOP labeling so that a uniform focus on healthy choices does not necessitate industry reformulation of products.<sup>128</sup> This seems to undercut the very goal of facilitating informed, educated decision-making because a “program that discloses the twelve grams of sugar per serving in Froot Loops (more than many cookies) while at the same time labeling the cereal as a good source of fiber and Vitamin C may not produce [the desired] level of clarity.”<sup>129</sup> In each of these attempts to create a unified system for FOP labeling, the food industry seems to fall short by choosing to focus on its bottom line instead of the public health.<sup>130</sup>

While the food industry backs GMA’s “Facts Up Front” system, health advocates lean toward a more “interpretive” federally regulated FOP labeling system including stars, checks, or other health rating.<sup>131</sup> In October 2011, the Institute of Medicine (“IOM”)—a non-profit advocate for improved public health—recommended that the federal government create a nutrition rating system for FOP labels based on “calories, saturated and trans fats, sugar and sodium levels.”<sup>132</sup> While the IOM came up with specific nutritional criteria, it left it up to the FDA to develop complete parameters.<sup>133</sup> The head of the Center for Science in the Public Interest, Michael Jacobson, points out that it could take years to create the proper criteria for the system IOM devised and even longer to have it approved by the FDA.<sup>134</sup>

Even individual companies, such as Walmart and Disney, have recently developed their own FOP labeling systems to categorize “healthy” choices. Walmart proactively created their labeling scheme as a means to preempt the FDA’s long anticipated action on the IOM report outlining what should be included in FOP labels.<sup>135</sup> In its press release, Walmart claims that “moms . . . want to

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<sup>126</sup> *Id.* (quoting William Neuman, *Food Makers Devise Own Label Plan*, N.Y. TIMES, Jan. 24, 2011, available at <http://www.nytimes.com/2011/01/25/business/25label.html?>). One example used to demonstrate the misleading effect of having ‘nutrients to encourage’ juxtaposed next to ‘nutrients to avoid’ is that ice cream might be deemed healthy in light of its calcium content. *Id.*

<sup>127</sup> Hemi Weingarten, *Facts Up Front Label – Recycling Consumer Confusion*, FOODUCATE (Oct. 2, 2011), <http://blog.fooducate.com/2011/10/02/facts-up-front-label-recycling-consumer-confusion/>.

<sup>128</sup> Endres et al., *supra* note 112, at 164.

<sup>129</sup> *Id.*

<sup>130</sup> *See id.*

<sup>131</sup> Hughlett, *supra* note 111.

<sup>132</sup> *Grocery Chains Adopt Healthy Food Ratings*, *supra* note 116.

<sup>133</sup> Hughlett, *supra* note 111.

<sup>134</sup> *Id.*

<sup>135</sup> Marion Nestle, *Walmart’s New Front-of-Package “Buy Me” Logo*, FOOD POLITICS (Feb. 7, 2012), <http://www.foodpolitics.com/2012/02/walmarts-new-front-of-package-buy-me-logo/>.

make healthier choices for their families, but need help deciphering all the claims and information,” so the new bright green “Great For You” icon provides customers with an easy way to quickly identify healthier food choices.”<sup>136</sup> This scheme is an improvement over “Facts Up Front” and even closely resembles the IOM’s recommendations.<sup>137</sup> The criteria for salt, sugar, and saturated fat is fairly strict and eliminates many products from pasting the “Great For You” logo on their FOP labels; in fact, they exclude eighty percent of Walmart’s Great Value products.<sup>138</sup> It remains to be seen whether these labels will succeed in motivating parents to purchase healthier foods—and also whether such purchases will lead to healthier kids.<sup>139</sup> Disney’s FOP labeling scheme, “Mickey Check,” is aimed at influencing kids to choose healthy food and it arrived just after Disney’s announcement to stop airing junk food advertisements.<sup>140</sup> This seems like a step in the right direction but certainly leaves some questions up in the air, such as whether Disney theme parks—notoriously known for sugary, unhealthy treats—will also adopt a healthier approach and whether Mickey Check will actually help parents or merely add to the clutter and confusion among labeling schemes.<sup>141</sup>

As industry leaders, government agencies, and health advocates argue over this chaotic mix of schemes, some look to the United Kingdom and Australia for guidance.<sup>142</sup> Their “traffic light” system, first developed at Oxford University, consists of red, amber, or green symbols placed on the front of packages to denote high or low levels of fat, saturated fat, sugars, and salt.<sup>143</sup> Products stamped with a green light are encouraged to be eaten daily because they include excellent sources of positive nutrients and little fat, added sugar, and salt.<sup>144</sup> Packaged goods with an amber symbol are generally processed foods, which should be eaten in moderation due to their moderate values of fat, added sugar, and salt.<sup>145</sup> Finally, a

<sup>136</sup> See *id.*; see also *Walmart Unveils “Great For You” Icon*, WALTAMT (Feb. 7, 2012) (on file with author), available at <http://www.foodpolitics.com/wp-content/uploads/Great-For-You-News-Release-FINAL.pdf>.

<sup>137</sup> See Nestle, *supra* note 135; see also *Walmart Unveils*, *supra* note 136, at 163.

<sup>138</sup> Nestle, *supra* note 135; *Walmart Unveils*, *supra* note 136; see also Stephanie Strom, *Walmart to Label Healthy Foods*, N.Y. TIMES (Feb. 7, 2012), available at [http://www.nytimes.com/2012/02/08/business/walmart-to-add-great-for-you-label-to-healthy-foods.html?\\_r=2&ref=business](http://www.nytimes.com/2012/02/08/business/walmart-to-add-great-for-you-label-to-healthy-foods.html?_r=2&ref=business). The label will not go on any sugary cereals. *Id.*

<sup>139</sup> See Nestle, *supra* note 135.

<sup>140</sup> Brooks Barnes, *Promoting Nutrition, Disney to Restrict Junk-Food Ads*, N.Y. TIMES (June 5, 2012), available at [http://www.nytimes.com/2012/06/05/business/media/in-nutrition-initiative-disney-to-restrict-advertising.html?\\_r=2&pagewanted=all](http://www.nytimes.com/2012/06/05/business/media/in-nutrition-initiative-disney-to-restrict-advertising.html?_r=2&pagewanted=all).

<sup>141</sup> See *id.*

<sup>142</sup> Lee Klein, *Four Ideas for New Nutrition Labels, From Stars to Traffic Lights*, MIAMI NEWS TIMES (Jan. 6, 2012), [http://blogs.miaminewtimes.com/shortorder/2012/01/time\\_for\\_new\\_nutrition\\_labels.php](http://blogs.miaminewtimes.com/shortorder/2012/01/time_for_new_nutrition_labels.php). In the UK, the traffic-light system is voluntary. Reports show that “breakfast cereals with mainly green lights or amber lights grew twice as fast as breakfast cereals in general; sales of frozen meals with red lights fell 35%.” Unfortunately, Europe and Australia also face resistance from food industry lobbyists who are pushing to turn off these traffic lights. *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

red light warns consumers that the product is very low on nutrients and high in fat, sugar, and or salt.<sup>146</sup> One major problem with the traffic light approach is that it classifies foods as inherently “good” or “bad” when the real nutritional value of food is not that black and white.<sup>147</sup> Nevertheless, proponents point out that this system is more conscious of the psychological factors that affect nutritional labeling and provides a handful of information in a single place to time-strapped parents who want to make a healthy choice.<sup>148</sup> Furthermore, it directly applies an individual’s understanding of schemas<sup>149</sup> to help them understand the nutritional value of the food on a scale with which they are already familiar.<sup>150</sup> While this creates simplicity and ease by eliminating the need for parents to evaluate the product on their own, this system also brings in a variety of judgments as to what are “high,” “medium,” and “low” amounts of nutritional components—particularly for the needs of children.<sup>151</sup>

### 3. Deceptive Tactics

The government and the food industry share a responsibility to meet the overwhelming demand for reliable information to utilize in making healthy decisions for our families.<sup>152</sup> With an increasing number of children and adolescents overweight and at an increased likelihood of developing cardiovascular disease, high blood pressure, high cholesterol, and Type 2 diabetes, companies should reformulate products and use FOP labels to steer parents and kids toward more nutritious choices.<sup>153</sup> Instead, companies are cashing in on health-conscious shoppers by creating deceptive marketing and labeling for children’s food products,<sup>154</sup> misleading consumers into believing they are making healthier choices. In fact, these marketing initiatives only makes a parent’s job harder.

The use of terms such as “natural,” “healthy,” and “organic” tend to confuse consumers and lead them to believe these terms are synonymous when they have distinct and regulated definitions.<sup>155</sup> For example, an ice cream product without

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<sup>146</sup> *Id.*

<sup>147</sup> McCabe, *supra* note 36.

<sup>148</sup> Jason M. Szanyi, *Brain Food: Bringing Psychological Insights to Bear on Modern Nutrition Labeling Efforts*, 65 FOOD & DRUG L.J. 159, 183 (2010).

<sup>149</sup> See generally *id.* at 167. In psychology, schemas are organized patterns of thought or behavior. In developing a labeling system that will be most effective, it’s important to understand how people absorb new information and why they make certain choices based on that information. *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See *id.*

<sup>152</sup> *Preliminary Proposed Nutrition Principles, supra* note 43.

<sup>153</sup> See Rothenberg, *supra* note 15.

<sup>154</sup> See *Preliminary Proposed Nutrition Principles, supra* note 43.

<sup>155</sup> *Consumer Updates: Food Label Helps Consumers Make Healthier Choices*, U.S. FOOD AND DRUG ADMIN., available at <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm094536.htm#confusing> (last visited Mar. 5, 2012). A product is “natural” if it does not contain synthetic or artificial ingredients. To be referred to as “healthy,” a product must meet certain criteria for limiting saturated fat, cholesterol, and sodium, and requiring vitamins, minerals, or other nutrients. “Organic”

artificial ingredients which meets certain USDA production requirements may be labeled as “organic” and “natural” while being way too high in fat to be considered “healthy.”<sup>156</sup> Also, the FDA has no official definition of “all natural” so parents must be wary.<sup>157</sup> The bottom line is that even items labeled “healthy,” “natural,” or “organic” can contain high amounts of calories and sugars, or they may be a poor nutritional option for children; accordingly, parents must be careful to check both serving size and nutrient content before relying on these marketing tactics.<sup>158</sup>

The term “multigrain” is often used by marketers to induce parents into believing the product contains “whole grains” or “whole wheat”—which are associated with a reduced risk of heart disease, diabetes, and digestive problems—but it merely means the product contains several grains, which may be whole or refined.<sup>159</sup> Similarly, claims that a product is “made with” whole grains can be misleading because companies can say this even if only a very small percentage of the nutritional contents are whole grains.<sup>160</sup> It is extremely important that children and adolescents have whole grains incorporated into their diet and not just refined carbohydrates.<sup>161</sup> According to the USDA’s “Food Pyramid for Kids,” children ages two to six years old need six serving of grains per day, half of which should be from whole grains.<sup>162</sup> The USDA daily grain requirement for kids is higher than that of any other food because whole grains are packed with fiber, B vitamins, minerals, and other essential nutrients to help nourish growing bodies and develop cognitive skills.<sup>163</sup> The fiber and complex carbohydrates satisfy hunger, aid in digestion, and help children and adolescents maintain a healthy weight.<sup>164</sup> Children who do not eat sufficient whole grains may be low on B vitamins, Niacin, and Thiamine, which could affect attentiveness and mood.<sup>165</sup>

Products labeled as “made with real fruit” are particularly deceiving for parents searching for healthy snacks for their kids. For example, Kellogg’s Pop-Tarts boast “Made with Real Fruit” on the front of the package, while the snack

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standards are set by the Department of Agriculture and do not denote the food as safer or more nutritious than food produced in a different manner. *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Robert J. Davis, *Top 10 Food Label Tricks to Avoid in 2012*, HUFFINGTON POST (Jan. 3, 2012), [http://www.huffingtonpost.com/robert-j-davis-phd/food-labels\\_b\\_1173411.html#s579232&title=All\\_Natural\\_](http://www.huffingtonpost.com/robert-j-davis-phd/food-labels_b_1173411.html#s579232&title=All_Natural_). If the FDA chooses to adopt the USDA approach for “natural” meat and poultry, then some additives would be allowed, which is contrary to what people would assume when they read “natural”—no artificial ingredients.

<sup>158</sup> *Id.*; Beth Wallace, *Don’t Let Food Labels Fool You*, PHILLY.COM (Mar. 21, 2012), <http://www.philly.com/philly/health/Dont-Let-Food-Labels-Fool-You.html>.

<sup>159</sup> Davis, *supra* note 157.

<sup>160</sup> *Id.*

<sup>161</sup> See *Healthy Kids – Go with the Grain*, FROOSE, <http://www.froose.com/the-froose-difference/healthy-kids> (last visited Mar. 1, 2012).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

contains less than two percent of a dried raspberry.<sup>166</sup> Other fruit snacks with the same “real fruit” claim portray fruit images on the package to grab the attention of health-conscious parents.<sup>167</sup> In addition to corn syrup and sugar—the main ingredients in these snacks—fruit snacks usually contain fruit concentrate, but this deceptively healthy name is a mirage for what the USDA classifies merely as an added sugar.<sup>168</sup>

Furthermore, when an express or implied claim leads a consumer to believe that the food product meets the standard for a term such as “high” or “low,” terms which are specifically defined by the FDA, it is essential that the food actually meet the relevant standard so that consumers are not misguided.<sup>169</sup> For example, if an advertiser uses the phrase “packed with” to describe the level of calcium in a food, reasonable parents might infer that the food is “high” in calcium.<sup>170</sup> The FDA’s regulations have different definitions for different terms.<sup>171</sup> It is inappropriate to use the terms “good source” and “high” synonymously; parents may be misled if a “high in calcium” claim is implied when the product is merely a “good source” of calcium.<sup>172</sup>

Closely related is the deception created when an advertiser touts certain health benefits of a product but neglects to disclose to parents the existence of risk-increasing nutrients.<sup>173</sup> This is particularly problematic when the risk-increasing nutrients are closely related to the touted health claim.<sup>174</sup> Parents are likely to infer from the positive health claim that the product is healthful in all respects.<sup>175</sup> According to the Enforcement Policy Statement on Food Advertising, “a statement indicating both the amount of the risk-increasing nutrient and the recommended maximum daily intake of that nutrient, as determined by FDA, would be one example of an acceptable disclosure, provided such information adequately conveys the health implications of the risk-increasing nutrient.”<sup>176</sup>

“No high fructose corn syrup” (hereinafter “HFCS”) is a popular claim found on packages of children’s food products because parents have become extremely wary of caloric sweeteners, most notably genetically engineered HFCS.<sup>177</sup> The

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<sup>166</sup> Josephine Balzac, *A Cry for Help from America’s Youth: What Are Our Children Eating? Why Are We Feeding It to Them? And How Can We Solve This?* THE STUDENT APPEAL (Mar. 26, 2012), <http://thestudentappeal.com/article/what-are-our-children-eating>.

<sup>167</sup> *Id.*

<sup>168</sup> *See id.*

<sup>169</sup> *Enforcement Policy Statement*, *supra* note 51.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *See Enforcement Policy Statement*, *supra* note 51.

<sup>176</sup> *Id.*; *see, e.g.*, In the Matter of Campbell Soup Co., 115 F.T.C. 788 (1992).

<sup>177</sup> Davis, *supra* note 157; *see also High Fructose Corn Syrup*, BABY AND KID ALLERGIES, [http://babyandkidallergies.com/high\\_fructose\\_corn\\_syrup.php](http://babyandkidallergies.com/high_fructose_corn_syrup.php) (last visited Mar. 9, 2012). HFCS is not processed by the body in the same way that sugar is so it can make people hungrier and thus add the

products neglect to mention that in place of HFCS is often an alternative high calorie sweetener which carries with it similar health problems if consumed in excess.<sup>178</sup> A parent that buys fewer products with HFCS in an effort to curb his or her child's hyperactivity or inability to focus may very well see little-to-no improvement in behavior if the child is consuming the same amount of refined sugars, just in a different form.<sup>179</sup>

Manufacturers know the rules well enough to get around them in order to capitalize on the buying habits of health-conscious parents.<sup>180</sup> While claiming that a product "can treat or prevent" a certain condition is strictly regulated, companies get around this by using the phrase "supports a healthy immune system" or "maintains normal functioning of the immune system."<sup>181</sup> Back in 2009, Kellogg printed in large bold letters across the front of Cocoa Krispies boxes: "Now helps support your child's IMMUNITY."<sup>182</sup> Kelly Brownell, director of Yale University's Rudd Center for Food Policy and Obesity, was quick to respond by pointing out that, according to Kellogg's flawed logic, "you can spray vitamins on a pile of leaves, and it will boost immunity."<sup>183</sup>

Lastly, unrealistic serving sizes deceive parents and kids into thinking certain foods and beverages are not as bad as they actually are.<sup>184</sup> Convenience store food and drinks tend to be consumed as one serving but the nutrition facts often account

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incidence of obesity. Large consumption of HFCS is also linked to diabetes. *Id.*

<sup>178</sup> Davis, *supra* note 157.

<sup>179</sup> See Jennifer Byrne, *The Effects of Corn Syrup on Children's Behavior*, LIVESTRONG.COM (Jun. 14, 2011), <http://www.livestrong.com/article/222893-the-effects-of-corn-syrup-on-childrens-behavior/>. ("Hyperactivity is perhaps the most well-known possible behavioral effect of high fructose corn syrup and other sugars. According to the ADDitude website, corn syrup as well as corn sweetener and corn syrup solids are implicated in child hyperactivity. Although the sugar/hyperactivity connection is a source of some debate, ADDitude cited a study conducted at the University of South Carolina, which found that hyperactive children who consumed large amounts of sugar behaved in a more destructive and reckless manner.").

<sup>180</sup> See Davis, *supra* note 157.

<sup>181</sup> *Id.* Davis explains that manufacturers can use labeling loopholes to their benefit by claiming "a food 'maintains' or 'supports' normal functioning (such as a healthy immune system . . . ) instead of explicitly stating that it can treat or prevent a condition." This allows manufacturers to make these claims without providing proof for their assertions.

<sup>182</sup> Bruce Horowitz, *Critics Blast Kellogg's Claim That Cereals Can Boost Immunity*, USA TODAY, Nov. 6, 2009, available at [http://www.usatoday.com/money/industries/food/2009-11-02-cereal-immunity-claim\\_N.htm](http://www.usatoday.com/money/industries/food/2009-11-02-cereal-immunity-claim_N.htm). In order to make this claim, Kellogg merely increased the amount of vitamins A, C and E from 10% daily value to 25% daily value. They did this after the outbreak of swine flu as a means to capitalize off of consumers' concerned with immunity and health. *Id.*

<sup>183</sup> *Id.*; *FTC Investigation of Ad Claims that Rice Krispies Benefits Children's Immunity Leads to Stronger Order Against Kellogg*, FTC (Jun. 3, 2010) (on file with author), available at <http://www.ftc.gov/opa/2010/06/kellogg.shtm>. The FTC announced in 2010 that Kellogg agreed "to expand a settlement order that was reached [the previous] year after the FTC alleged that the company made false claims that its Frosted Mini-Wheats cereal was 'clinically shown to improve kids' attentiveness by nearly 20%.'" In the first settlement order regarding the claims made about Frosted Mini-Wheats, Kellogg was "barred from making claims about the benefits to cognitive health, process, or function provided by any cereal or any morning food or snack food unless the claims were true and substantiated." "The expanded order . . . prohibits the company from making claims about any health benefit of any food unless the claims are backed by scientific evidence and not misleading." *Id.*

<sup>184</sup> Davis, *supra* note 157.

for two to three servings.<sup>185</sup> At quick glance, packages lull consumers into a false sense of health security and children are paying the price.<sup>186</sup> For example, Vitamin Water sounds like an appealing choice for kids at only 50 calories per serving, but at 8 ounces per serving and 2.5 servings per bottle, it packs 125 calories—not to mention this deceptively healthy looking product is little more than “fortified sugar water.”<sup>187</sup> Being cognizant of serving size is crucial for a person to correctly estimate the calories, fat, and sodium he or she is consuming.<sup>188</sup> Rather than readjusting serving sizes to more accurately display excessive consumption, the FDA should consider alternative methods to educate consumers on portion size.<sup>189</sup>

### III. BARRIERS TO POLICING THE CHILDREN’S FOOD INDUSTRY

#### *A. Industry Lobbying*

Our nation has arguably some of the best nutritional information in the world, yet childhood obesity is on the rise, making kids more susceptible to adult health issues like diabetes, high cholesterol, and heart disease.<sup>190</sup> This fuels the fire in attacks against the government for its role in the problem—“yielding to industry lobbying and regulation in ways perceived to promote the processed food industry.”<sup>191</sup> As nutrition advocate Nancy Huehnergath aptly puts it, “Congress is in bed with Big Food and under five layers of blankets. . . . [W]hen it comes to proposed nutrition policy, if Big Food talks, Congress listens and does what the industry wants—America’s kids be damned.”<sup>192</sup> Food, advertising, and media industries spent an astounding \$37 million lobbying in 2011.<sup>193</sup>

Critics point out that our current scheme allows food manufacturers to “emphasize the positives where possible, [while being] nearly silent about the

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *The Truth About Vitamin Water*, FITSUGAR (Aug. 17, 2007), <http://healthy-eating.fitsugar.com/Truth-About-Vitamin-Water-541747>. While Vitamin Water might be a slightly better choice than soda, it is not the “miracle elixir” marketers would like you to believe. To create a healthier refreshing drink that kids will enjoy, parents can squeeze lemon in pure or sparkling water and add Stevia for a touch of sweetness. *Id.*

<sup>188</sup> Davis, *supra* note 157.

<sup>189</sup> *The FDA Wants to Supersize Serving Sizes – Should We Care?*, OPEN SALON (Feb. 8, 2010), [http://open.salon.com/blog/doctorandmama/2010/02/07/the\\_fda\\_wants\\_to\\_supersize\\_serving\\_sizes-should\\_we\\_care](http://open.salon.com/blog/doctorandmama/2010/02/07/the_fda_wants_to_supersize_serving_sizes-should_we_care).

<sup>190</sup> McCabe, *supra* note 36, at 499; see also *Child Obesity in America: Taking Care of Our Children*, HELP CURE CHILDHOOD OBESITY, <http://www.helpcurechildobesity.com/> (last visited Mar. 1, 2012).

<sup>191</sup> McCabe, *supra* note 36, at 499.

<sup>192</sup> Nancy Huehnergath, *Top Six Food Politics Lessons Learned in 2011*, THE HUFFINGTON POST (Dec. 27, 2011), [http://www.huffingtonpost.com/nancy-huehnergath/top-six-food-politics-les\\_b\\_1171527.html](http://www.huffingtonpost.com/nancy-huehnergath/top-six-food-politics-les_b_1171527.html).

<sup>193</sup> Michele Simon, *Congress to Kids: Drop Dead*, APPETITE FOR PROFIT (Dec. 17, 2011), <http://www.appetiteforprofit.com/2011/12/17/congress-to-kids-drop-dead/>.

negatives.”<sup>194</sup> Marion Nestle advocates “erect[ing] a higher and stronger ‘firewall’ between Congress and regulatory agencies” in order to help public health and give companies an equal-playing field.<sup>195</sup> Many of her suggestions, such as placing barriers on the ability of government officials to take jobs in the food industry, require regulatory agencies to work more independently.<sup>196</sup> If the government does not intervene, “[food companies] cannot—and will not—stop making nutritionally questionable food products and marketing them to children.”<sup>197</sup>

Among the advocates for maintaining a non-binding, voluntary approach to nutrient labeling, NuVal developer David Katz and representatives from the Whole Grains Council and Unilever insist that allowing the private sector to experiment with different schemes is the best way to see what works best and to keep up with advances in food science.<sup>198</sup> Unfortunately, it is impossible to trust industry leaders to act in the interest of public health over making sales, as shown in 2009 by the emergence of the Smart Choices logo on children’s breakfast cereals such as Froot Loops, Cocoa Krispies, Frosted Flakes, Lucky Charms, and Cocoa Puffs.<sup>199</sup> In order for the food industry not to fall victim to the same results as self-regulatory efforts made by the tobacco and alcohol industries, the government must “employ independent nutrition experts, with no ties to the food industry, to establish uniform standards.”<sup>200</sup>

*B. Ill-Fated Attempts at Self-Regulation—Food Manufacturers Incentivized to Help Themselves, Not Parents*

1. Push for Change Meets Industry Push Back

The Center for Science in the Public Interest (“CSPI”), a strong supporter of FOP labeling as a means to offer consumers understandable summaries of important information, has been the most vocal advocate for increased regulation of nutrition labeling.<sup>201</sup> Back in 2006, as an onslaught of inconsistent nutritional messages were being pasted on packages and confusing consumers, the CSPI petitioned the FDA to create a mandatory “science-based system” that would do away with private label schemes and focus on uniformity and consistency.<sup>202</sup> Reactions to increased government regulation and development of uniform, mandatory guidelines were mixed, with many industry representatives

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<sup>194</sup> McCabe, *supra* note 36, at 500.

<sup>195</sup> Manning, *supra* note 12, at 1256-57 (citing MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 368 (rev. ed. 2007)).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Lytton, *supra* note 57, at 105.

<sup>199</sup> *Id.* at 107.

<sup>200</sup> Manning, *supra* note 12, at 1256-57.

<sup>201</sup> Lytton, *supra* note 57, at 104.

<sup>202</sup> *Id.*

acknowledging a need for improvement but rebuking proposals to strengthen government policies and guidance.<sup>203</sup> Those arguing against new government standards purport that current guidelines are clear and sufficient and enforcement mechanisms can handle anyone who strays from these guidelines because the FDCA creates a cause of action for claims that are false and misleading.<sup>204</sup> While these critics may argue that the use of dubious health claims to market products aimed at children can be challenged through the judicial system, the FTC's jurisdiction over unfair and deceptive advertising does not even scratch the surface of the problem because there is neither sufficient funding nor proper staffing to prosecute all the violations.<sup>205</sup>

*The Lancet*, a leading medical journal, recently published a summary of successful science-based steps to fight childhood obesity.<sup>206</sup> These steps included implementing taxes on unhealthy foods, limiting marketing of such foods, using FOP labels similar to traffic lights, and creating programs to encourage activity while dissuading consumption of sugary drinks and television watching.<sup>207</sup> Unfortunately, the trend of the food industry pressuring Congress to block meaningful reform is a barrier to accomplishing any of these tasks.<sup>208</sup> The IOM has concluded—and recent studies confirm—that FOP labels containing warnings about nutrients to avoid are more effective in guiding consumer choice than those using positive claims aimed at getting consumers to buy.<sup>209</sup> However, companies want to do everything they can to avoid an FOP system resembling traffic lights because they prefer emphasizing the good in warning consumers of the bad.<sup>210</sup> The problem is that the system backed by the food industry will continue to allow them to use marketing deceptively to avoid actually warning consumers so that parents can stop purchasing unhealthy items disguised as “better choices.”<sup>211</sup> After the IOM released its report on FOP labeling in October 2011, the GMA was quick to release a statement contending “food and beverage companies have developed a real-world program that delivers real value to real consumers in real time.” The

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<sup>203</sup> *Id.* at 105.

<sup>204</sup> *Id.*

<sup>205</sup> Pomeranz, *supra* note 13, at 524.

<sup>206</sup> *Childhood Obesity*, THE LANCET (May 6, 2010), [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(10\)60171-7/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(10)60171-7/abstract).

<sup>207</sup> Marion Nestle, *Looking Ahead: 2012 Food Politics*, THE ATLANTIC (Jan. 4, 2012), <http://www.theatlantic.com/health/archive/2012/01/looking-ahead-2012-food-politics/250766/>; see also *Childhood Obesity*, THE LANCET (May 6, 2010), [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(10\)60171-7/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(10)60171-7/abstract).

<sup>208</sup> Nestle, *supra* note 207.

<sup>209</sup> Nestle, *supra* note 135; see also Marion Nestle, *Guess What: Traffic Light Labels Work*, FOOD POLITICS (Jan. 27, 2012), <http://www.foodpolitics.com/2012/01/guess-what-traffic-light-labels-work/>.

<sup>210</sup> *Id.*; see also Marion Nestle, *Food Industry Thinks Name Change Will Disguise Bad Labeling Scheme*, FOOD POLITICS (Sept. 27, 2011), <http://www.foodpolitics.com/2011/09/food-industry-thinks-name-change-will-disguise-bad-labeling-scheme/>; Marion Nestle, *IOM Releases Tough Report On Front-of-Package Labeling*, FOOD POLITICS (Oct. 20, 2011), <http://www.foodpolitics.com/2011/10/iom-releases-tough-report-on-front-of-package-labeling/>.

<sup>211</sup> Nestle, *Food Industry Thinks Name Change Will Disguise Bad Labeling Scheme*, *supra* note 210.

statement goes on to express the GMA's concern with the "untested, interpretive approach" suggested by the IOM and asserts that consumers prefer the food industry's "Facts Up Front" scheme.<sup>212</sup>

## 2. Interagency Working Group – Why It's Not "Working"

An increasing number of complaints about misleading labels prompted the government to initiate an examination of how to provide a more complete picture of the health benefits associated with food products.<sup>213</sup> In 2009, as part of an effort to promote children's health and respond to the need for standardized, reliable guidelines for FOP nutrition labeling, Congress instructed the FDA, FTC, CDC, and USDA to create the Interagency Working Group ("IWG") of nutrition, health, and marketing experts to come up with uniform standards for marketing food and beverages toward children.<sup>214</sup> Accordingly, the IWG drafted a proposal of *voluntary* principles—not proposed government regulations—for nutritional food marketing to children ages two to seventeen and sought public comment on its nutrition principles and its definitions of marketing to children and adolescents.<sup>215</sup> The aim of these recommendations is two-fold: to increase children's consumption of nutritious foods while decreasing consumption of foods which have an abundance of sodium, saturated fat, trans fat, and added sugars.<sup>216</sup> In its proposal, the IWG states that by 2016, food products marketed to children must: "(A) make a meaningful contribution to a healthful diet;<sup>217</sup> and (B) minimize the content of nutrients that could have a negative impact on health and weight."<sup>218</sup>

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<sup>212</sup> Nestle, *IOM Releases Tough Report On Front-of-Package Labeling*, *supra* note 210.; *Grocery Manufacturers Association Statement in Response to the Institute of Medicine's Committee on Examination of Front-of-Package Nutrition Rating Systems and Symbols Report*, GMA (Oct. 20, 2011) (on file with author), available at <http://www.gmaonline.org/news-events/newsroom/gma-statement-in-response-to-the-iom-front-of-package-nutrition-rating-syst/>.

<sup>213</sup> Hamburg, *supra* note 82.

<sup>214</sup> Mary Rothschild, *Feds Propose Limits for Marketing Food to Kids*, FOOD SAFETY NEWS (Apr. 29, 2011), <http://www.foodsafetynews.com/2011/04/feds-urge-limits-on-food-ads-aimed-at-kids/>; Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat 524. This Act described the IWG's role "to conduct a study and develop recommendations for standards for the marketing of food when such marketing targets children who are 17 years old or younger or when such food represents a significant component of the diets of children." *Id.*; Bernice Yeung, *U.S. Guidelines on Food Marketing To Kids Stalls*, PREVENTION INSTITUTE (Jan. 27, 2012), <http://www.preventioninstitute.org/press/pi-in-the-news/798-qus-guidelines-on-food-marketing-to-kids-stallsq-12712.html>. This group was created due to the fact that "\$1.6 billion is spent annually on ads targeting kids through TV commercials, social media, mobile phones and recently via computer-based 'advergames,' or food company-branded online games."

<sup>215</sup> *Preliminary Proposed Nutrition Principles*, *supra* note 43.

<sup>216</sup> *Id.* at 3. The IWG was directed to consider: "(1) positive and negative contributions of nutrients, ingredients, and food (including calories, portion size, saturated fat, *trans* fat, sodium, added sugars, and the presence of nutrients, fruits, vegetables, and whole grains) to the diets of such children; and (2) evidence concerning the role of consumption of nutrients, ingredients, and foods in preventing or promoting the development of obesity among such children."

<sup>217</sup> *Id.* at 16. The IWG proposes two alternative options to meet this goal. The first requires that individual foods contain at least 50% by weight of one or more of these items: fruit; vegetable; whole grain; low-fat milk products; fish; extra lean meat or poultry; eggs; nuts and seeds; or beans. The alternate option is for individual foods to contain one, or a proportionate combination of more than one,

Unfortunately, recent developments will postpone the release of the IWG's nutrition standards for marketing to children.<sup>219</sup> Congress requested the IWG come up with these standards, but then amended the appropriations bill to require a cost-benefit analysis before their final release.<sup>220</sup> Executive Order 13563 says that an agency may "propose or adopt a regulation only . . . [if] its benefits justify its costs; tailor its regulations to impose the least burden on society; select . . . approaches that maximize net benefits; . . . specify performance objectives; and identify . . . alternatives."<sup>221</sup> It seems counterintuitive to add this requirement which will further delay the IWG's report.<sup>222</sup>

For two years, experts from four different agencies worked to satisfy Congress' mandate, and when they were finally close to reporting their findings in late 2011, industry lobbyists persuaded Congress to add this requirement.<sup>223</sup> The Nutrition Policy Director for the CSPI, Margo Wootan, contends that performing a cost-benefit analysis makes sense for regulations mandating specific action from companies, but "there is no cost associated with something that is totally voluntary."<sup>224</sup> This begs the question: how can Congress require an executive order intended for proposed agency regulations to apply to a report that "provides no basis for law enforcement action?"<sup>225</sup> Other health advocates have tried to explain to industry leaders that these are merely guidelines being proposed to Congress, as opposed to hard rules.<sup>226</sup> While Congress' suppression of the FTC's voluntary guidelines—at the behest of pressure from Big Food—does not rise to

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per RACC, of the following: 0.5 cups fruit or fruit juice; 0.6 cups vegetables or vegetable juice; 0.75 oz equivalent of 100% whole grain; 0.75 cups fat-free or low-fat (1%) milk or yogurt; 1 oz fat-free or low-fat (1%) natural cheese; 1.5 oz fat-free or low-fat (1%) processed cheese 1.4 oz meat equivalent of fish or extra lean meat or poultry; 0.3 cups of cooked dry beans; 0.7 oz nuts or seeds; 1 egg or egg equivalent. *Id.*

<sup>218</sup> *Id.* The proposal sets out maximum amounts of saturated fat, trans fat, added sugar, and sodium that foods marketed to children are allowed to have. *Id.*

<sup>219</sup> Marion Nestle, *Congress Caves in Again. Delays IWG Recommendations*, FOOD POLITICS (Dec. 17, 2011), <http://www.foodpolitics.com/2011/12/congress-caves-in-again-delays-iwg-recommendations>.

<sup>220</sup> *Id.*; see also Nestle, *supra* note 209.

<sup>221</sup> *Id.* at 2.

<sup>222</sup> *Id.*

<sup>223</sup> Simon, *supra* note 193. This Executive Order relates back to a deregulation policy implemented during the Reagan administration Huffington Post Washington correspondent Dan Froomkin explains that "[s]ince Ronald Reagan opened the OIRA office in 1981, Republicans have used it to particular advantage to pursue an anti-regulatory agenda, defanging environmental rules on things like water runoff and climate change – even blocking attempts to collect information that might lead to regulations." *Id.*

<sup>224</sup> *Id.* at 1.

<sup>225</sup> *Id.* at 2.

<sup>226</sup> *Id.* In his blog, David Vladeck, director of the Bureau of Consumer Protection, responded to the industry uproar over "suppression of unprecedented amounts of advertising" to children by explaining that the FTC is merely reporting to Congress, which "provides no basis for law enforcement action." He further explained: "This is a report to Congress, not a rulemaking proceeding, so there's no proposed government regulation . . . A report is not a law, a regulation, or an order, and it can't be enforced." *Id.*

the same level as Congress superseding the regulatory process, as was the case in the pizza-as-vegetable debacle, it is just as wrong.<sup>227</sup>

The IWG has met with opposition from food manufacturers as well as advertising companies.<sup>228</sup> Dan Jaffe, Executive Vice President of Government Relations for the Association of National Advertisers, calls the IWG's guidelines "overly restrictive and inappropriate" because out of "the 100 most popular foods in this country, 88 would not have made the cut, including whole wheat bread, most yogurts, virtually all cereals and many things that parents would be thrilled for their kids to be asking to eat, particularly those who are health conscious."<sup>229</sup> However, Jaffe neglects to mention that the least healthy, high-sugared cereals are the category of packaged food most fiercely targeting children.<sup>230</sup> The Rudd Center's study on cereal concluded that "from 2008 to 2011, cereal companies increased advertising to children for many of their least nutritious products."<sup>231</sup> Furthermore, "[t]he cereals marketed to children fail every reasonable nutrition test, yet according to the food industry are 'better-for-you' foods."<sup>232</sup> The study further reveals that "[p]roducts with poor nutrition ratings such as Lucky Charms, Reese's Puffs, and Cookie Crisp average three to four health claims on every box" and "[m]ost cereals with the worst nutrition ratings are classified as 'better-for-you' or 'Smart Choices' by the companies."<sup>233</sup> The Sensible Food Policy Coalition,

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<sup>227</sup> *Id.*; see also Michele Simon, *School Food Politics: What's Missing From the Pizza-as-Vegetable Reporting*, APPETITE FOR PROFIT (Nov. 17, 2011), <http://www.appetiteforprofit.com/2011/11/17/whats-missing-from-the-pizza-as-vegetable-reporting/>; Tom Philpott, *Everyone's Favorite Vegetable, Frozen Pizza*, MOTHER JONES (Nov. 15, 2011), <http://www.motherjones.com/tom-philpott/2011/11/school-lunch-frozen-pizza-tomato-paste>. Congress instructed the USDA to improve nutrition standards for food in schools back in 2004, and the Institute of Medicine reported its science-based recommendations to the USDA in 2009. After proposing regulations and taking comments from the public, the USDA reported its final regulations. The guidelines, which came out in January 2011, limited the amount of 'starchy vegetables,' like potatoes, to be served while increasing the amount of dark green and red/orange vegetables. Furthermore, the new guidelines made clear that the two ounces of tomato paste coating frozen pizzas will *not* count as a vegetable. By October 2011, the Senate amended its agricultural appropriations bill to rescind the limit on potatoes and Big Food soon began attacking the pizza-as-vegetable bar. Unfortunately, Congress stepped in and essentially lobbied for Big Food by releasing a proposed spending bill that would allow tomato paste on pizzas to continue to count as a vegetable, despite the USDA's attempt to change this. *Id.*

<sup>228</sup> Bernice Yeung, *U.S. Guidelines on Food Marketing to Kids Stalls*, PREVENTION INSTITUTE (Jan. 27, 2012), <http://www.preventioninstitute.org/press/pi-in-the-news/798-qus-guidelines-on-food-marketing-to-kids-stallsq-12712.html>.

<sup>229</sup> *Id.*

<sup>230</sup> Jennifer L. Harris, et al., YALE RUDD CENTER FOR FOOD POL'Y & OBESITY, CEREAL F.A.C.T.S.: A SPOONFUL OF PROGRESS IN A BOWL FULL OF UNHEALTHY MARKETING TO CHILDREN (2012), [http://www.cerealfacts.org/media/Cereal\\_FACTS\\_Report\\_Summary.pdf](http://www.cerealfacts.org/media/Cereal_FACTS_Report_Summary.pdf).

<sup>231</sup> *Id.* Cereal manufacturers have made small changes, if any, in reformulating their products to be healthier for children. These companies manufacture cereals that receive good nutrition scores, but few are marketed to children despite research showing that children will eat healthier cereals. *Id.*

<sup>232</sup> Manocha, Ramesh, MD, *The Facts About Cereal Nutrition and Food Marketing to Children*, available at <http://www.generationnext.com.au/2010/02/the-facts-about-cereal-nutrition-for-children/>.

<sup>233</sup> Jennifer L. Harris et al., YALE RUDD CENTER FOR FOOD POL'Y & OBESITY, CEREAL F.A.C.T.S.: LIMITED PROGRESS IN THE NUTRITION QUALITY AND MARKETING OF CHILDREN'S CEREALS (2012), [http://www.cerealfacts.org/media/Cereal\\_FACTS\\_Report\\_Summary\\_2009.pdf](http://www.cerealfacts.org/media/Cereal_FACTS_Report_Summary_2009.pdf). Furthermore, a study by public health experts found that children ate more unhealthy snacks and less fruits and vegetables "after

consisting of food manufacturers, also launched a campaign to “Keep the Government Out of Your Kitchen.”<sup>234</sup> Food manufacturers contend that the industry already self-regulates its advertising to children through organizations like the Council of Better Business Bureaus’ Children’s Food and Beverage Advertising Initiative.<sup>235</sup> C. Lee Peeler, the Vice President for the Council of Better Business Bureaus, touts the industry for “[going] to great lengths to improve its products” and asserts that self-regulation has been successful.<sup>236</sup> However, the Council of Better Business Bureaus claims that eleven of the thirteen cereals advertised most to children qualify as “better-for-you,” “Smart Choices” despite the fact that none of these cereals qualifies for USDA Women, Infants and Children program’s good package, nor could any of these cereals be advertised to children on television in the United Kingdom.<sup>237</sup>

#### IV. RECOMMENDATIONS

It is important to create realistic goals for the government and the food industry to regulate health claims. On the one hand, Marion Nestle asserts that advocates for healthier children should focus more on dissuading people from buying “food products” and less on wasteful “slightly better for you” determinations.<sup>238</sup> There is no doubt that eating an abundance of fresh, unprocessed food would be ideal for improving the health of children, but busy families often rely on packaged foods for their ease and convenience; therefore, to reach the public, it is essential to maintain a realistic approach to eating healthy.<sup>239</sup> Parents have little free time and most young people crave processed snack foods and carbonated beverages marketed toward them; in consideration of the foregoing, parents who want to satisfy their children with healthier options deserve FOP information that accurately steers them to products that are more nutritious.<sup>240</sup>

##### *A. Use an Objective Body to Develop Uniform Mandatory Standards for FOP Labeling*

Instead of improving the nutritional content of food and beverages, manufacturers have focused efforts on finding loopholes and rebranding the same

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playing unhealthy food advergaming,” thus showing that junk food companies encourage poor eating habits, which put children at risk for obesity. Jennifer L. Harris, et al., *US Food Company Branded Advergaming on the Internet: Children’s Exposure and Effects on Snack Consumption*, 6 *Journal of Children and Media* 1 (2012), available at [http://www.yaleruddcenter.org/resources/upload/docs/what\\_advertising/AdvergamingSnackConsumption\\_JCM\\_2.12.pdf](http://www.yaleruddcenter.org/resources/upload/docs/what_advertising/AdvergamingSnackConsumption_JCM_2.12.pdf).

<sup>234</sup> Yeung, *supra* note 228.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Harris et al., *supra* note 233.

<sup>238</sup> *Grocery Chains Adopt Healthy Food Ratings*, *supra* note 116.

<sup>239</sup> See Sims et. al., *supra* note 8.

<sup>240</sup> *Id.*

products—with little or no changes—as “healthier.”<sup>241</sup> If companies choose to use FOP labels, they should be required to use them as a tool to help parents make better buying decisions, not as a tool to sell more of the same unhealthy products.<sup>242</sup> As such, the government should use an objective body—such as the IOM—to develop uniform standards for FOP labels on children’s food products and regulatory agencies should strictly enforce these standards.<sup>243</sup>

While the FDA seems to be listening to proponents who have called for a more child-centered approach,<sup>244</sup> parents and child-advocates must question the potential downside of giving too much unabated power to federal agencies to decide and enforce nutritional FOP label requirements for children. One of the main problems with charging the FDA or any governmental agency with developing mandatory rules is that political considerations which go beyond food science are bound to play a role in deciding the federal nutrition standards.<sup>245</sup> In some of the worst examples, Marion Nestle recalls food industry lobbying campaigns, giving funding to influence “independent” experts on government advisory panels and using libel litigation to quell critics.<sup>246</sup>

Instead of listening to industry leaders and politically motivated officials, government agencies and food manufacturers should be focusing more attention on well-founded research and insight from independent medical professional societies and public health experts.<sup>247</sup> The FDA needs to turn the IOM’s advice about labels into actual regulations.<sup>248</sup> On FOP labels, the IOM advises allowing only these four items: calories, saturated and trans fat, sodium, and sugars.<sup>249</sup> In order to show the evaluation of these items, the IOM recommends following a point system that is depicted using check marks or stars to help consumers understand health ratings.<sup>250</sup> Unlike “Facts Up Front,” which allows products to emphasize

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<sup>241</sup> *Id.*

<sup>242</sup> Nestle, *IOM Releases Tough Report On Front-of-Package Labeling*, *supra* note 212.

<sup>243</sup> Sims et. al., *supra* note 8.

<sup>244</sup> Javitt, *supra* note 18.

<sup>245</sup> Lytton, *supra* note 57, at 45 (citing Marion Nestle, *FOOD POLITICS*, where Nestle explains how the food industry has successfully thwarted changes to government dietary recommendations if they would negatively impact sales); *see also* Yeung, *supra* note 228. The top 10 industry donors made about \$2.3 million in political contributions in 2011. *Id.*

<sup>246</sup> Lytton, *supra* note 57, at 45, citing Marion Nestle, *FOOD POLITICS*.

<sup>247</sup> MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 93-136 (rev. ed. 2007). While Nestle first warns against the undue influence of food lobbyists on elected officials and government regulators, she also brings to light certain troubling connections between nutrition professionals and food companies. Nestle carefully points out that food companies also co-opt nutrition professionals—by hiring them as consultants or giving them research grants—in an effort to influence dietary advice to the public. Nestle offers recommendations for minimizing conflicts of interest, such as requiring disclosure of sponsorship. *Id.*

<sup>248</sup> Nestle, *IOM Releases Tough Report On Front-of-Package Labeling*, *supra* note 212.

<sup>249</sup> Sims et. al., *supra* note 9.

<sup>250</sup> Nestle, *supra* note 209; Nestle, *IOM Releases Tough Report On Front-of-Package Labeling*, *supra* note 212. Products can get zero, one, two, or three points and the FOP label would portray this with the respective number of checks or stars. *Id.*

“healthy” nutrients, the IOM’s suggests only labeling amounts of nutrients to limit.<sup>251</sup> The IOM did not express an opinion about the traffic-light labeling system, but the endorsement of checks or stars highlights a system similar to traffic-lights.<sup>252</sup>

*B. Launch a Supporting Information Campaign Aimed at Motivating Parents*

Many parents lack the time and knowledge to scrutinize labels in hopes of choosing more nutritious foods for their children.<sup>253</sup> While almost all parents welcome the idea of feeding their children a healthy, balanced diet, this desire does not always lead to action due to the countervailing interest in assuaging children’s requests for certain products.<sup>254</sup> Parents also embrace the idea of putting nutrition claims on the FOP labels so that they can make quick decisions about healthier products, but based on the track record of manufacturers’ deceptive FOP labels in past years, parents should be hesitant to trust “better for you” claims without regulations in place.<sup>255</sup> The U.K.’s traffic light system appears at first glance to solve this problem, helping parents unable or unwilling to scrutinize confusing nutrition labels and seeking clear information about whether a product is “good” or “bad”—but the problem is that truthful information does not lend itself to labeling a product as overall “good” or “bad.”<sup>256</sup> An informational campaign would help parents to make decisions based on truthful nutrient-specific information.<sup>257</sup>

The NLEA directs the FDA to educate consumers about nutritional labeling in order to improve the public’s dietary practices.<sup>258</sup> Back in 2004, the FDA’s Obesity Working Group (“OWG”) recommended partnering with youth-oriented organizations, such as the Girl Scouts and the National Association of State Universities and Land Grant Colleges, to educate consumers about obesity and promote healthier nutritional decision-making.<sup>259</sup> As argued by Gail H. Javitt, the FDA could use press releases, brochures, fact sheets, radio and television interviews, and the Internet to educate consumers about nutritional content of foods targeted at children.<sup>260</sup> Another focus of this campaign should be to inform

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<sup>251</sup> Nestle, *supra* note 209.

<sup>252</sup> *Id.*

<sup>253</sup> FOOD STANDARDS AGENCY, FOOD PROMOTION AND MARKETING TO CHILDREN: VIEWS OF LOW INCOME CONSUMERS, QUALITATIVE RESEARCH REPORT (Mar. 2004), available at <http://www.food.gov.uk/multimedia/pdfs/foodpromoreport.pdf>.

<sup>254</sup> *Id.*

<sup>255</sup> Nestle, *IOM Releases Tough Report On Front-of-Package Labeling*, *supra* note 210.

<sup>256</sup> FOOD STANDARDS AGENCY, *supra* note 253.

<sup>257</sup> *Id.*

<sup>258</sup> Javitt, *supra* note 18; See also Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, § 2(c), 104 Stat. 2352.

<sup>259</sup> *Calories Count: Report of the Working Group on Obesity*, U.S. FOOD AND DRUG ADMINISTRATION (Mar. 12, 2004), available at <http://www.fda.gov/Food/LabelingNutrition/ReportsResearch/ucm081770.htm>.

<sup>260</sup> Javitt, *supra* note 18, at 359.

consumers of appropriate serving sizes by using visuals to more clearly represent a single serving.<sup>261</sup> If parents misunderstand or misjudge the proper serving size for a product—e.g.,  $\frac{3}{4}$  cup of cereal equals one serving—it will completely undercut the value of the nutritional information being conveyed.<sup>262</sup>

*C. Policing the Regulations: Create More Agency Accountability*

There is no doubt that the federal government has had some shortcomings in its quest to serve the interests of both consumers and manufacturers, but abandoning the FDA and using only state-based consumer fraud litigation as the avenue for regulating labeling is unwise.<sup>263</sup> A more appropriate solution is to continue to use governmental agencies as tools to monitor labeling practices and educate consumers, but, at the same time, to create and strengthen agency-forcing measures to provide a check on politicization or inaction of agencies.<sup>264</sup>

Some critics claim the decline in the legitimacy and efficacy of the FDA in recent years was due to the Bush Administration's politicization of the agency at the expense of science and the focus on serving political constituencies.<sup>265</sup> As a result of serving the interests of its constituencies over the public at large, as the argument goes, the FDA has lost respect from the courts and its actions will no longer enjoy the high level of deference it once experienced.<sup>266</sup> However, there is more to the decline of the FDA than just "a handful of ill-considered, politically motivated decisions."<sup>267</sup> Vladeck points to additional factors such as eroding funds and increasing responsibilities for making the FDA a "wounded agency."<sup>268</sup>

In order to restore the power and respect of federal regulatory agencies, each agency needs to publicly commit to strictly enforcing these new FOP label standards. Taking immediate action against manufacturers who attempt to deceive consumers through labeling and advertising will set a strong example to other companies that such infractions will not slip through the cracks.<sup>269</sup>

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<sup>261</sup> FOOD STANDARDS AGENCY, *supra* note 253.

<sup>262</sup> *Id.*

<sup>263</sup> Josh Ashley, *A Bittersweet Deal for Consumers: The Unnatural Application of Preemption to High Fructose Corn Syrup Labeling Claims*, 6 J. FOOD L. & POL'Y 235, 265-66 (2010) ("Federal encroachment on the states' police powers in the labeling field has left confusion and stagnation in its wake. The federal leviathan has certainly bitten off more than it can chew.")

<sup>264</sup> James T. O'Reilly, *Losing Deference in the FDA's Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939 (2008).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> David C. Vladeck, *The FDA and Deference Lost: A Self-Inflicted Wound or the Product of a Wounded Agency? A Response to Professor O'Reilly*, 93 CORNELL L. REV. 981, 983 (2008).

<sup>268</sup> *Id.* Vladeck blames Congress for imposing new responsibilities on the FDA but neglecting to offer it the resources necessary to meet those responsibilities. *Id.*

<sup>269</sup> *Id.* at 1001.

## CONCLUSION

Litigation, pressure from regulatory agencies, and emphasis on healthier foods for our nation's youth have scared the food industry into amending labeling and marketing techniques to rebrand products as "healthier" choices,<sup>270</sup> but public health advocates should not be so quick to claim victory as many of these "better for you" products offer only slight nutritional improvements, if any at all.<sup>271</sup> Furthermore, with lenient regulation over these nutrition labels and marketing claims, the food industry is deceiving consumers into choosing products that may not even meet recommended dietary standards.<sup>272</sup> Many campaigns and programs aim their messages at parents, urging them to take a proactive role in teaching children the fundamentals of healthy eating.<sup>273</sup> However, food and beverage companies are aware of this trend and are using it to target and deceive parents into purchasing products that tout what are often dubious health claims.<sup>274</sup> Unfortunately, "Congress is putting the industry's interests before children and family health."<sup>275</sup> Federal agencies must adopt and enforce uniform FOP labeling standards developed by an independent, objective body—such as the IOM.<sup>276</sup>

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<sup>270</sup> Rothenberg, *supra* note 15, at 203.

<sup>271</sup> Ruiz, *supra* note 112.

<sup>272</sup> *Id.*

<sup>273</sup> *Childhood Obesity*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ASSISTANT SECRETARY FOR PLANNING AND EVALUATION: CHILD OBESITY, available at [http://aspe.hhs.gov/health/reports/child\\_obesity/#\\_ftn22](http://aspe.hhs.gov/health/reports/child_obesity/#_ftn22) (last visited Mar. 9, 2012).

<sup>274</sup> Rothschild, *supra* note 1; French, Simone A. French et al., *Environmental Influences on Eating and Physical Activity*, 22 ANN. REV. PUB. HEALTH 309 (2001). People are coming into contact with labels constantly so we can potentially use them to motivate consumer behavior.

<sup>275</sup> Yeung, *supra* note 228.

<sup>276</sup> Harris et al., *supra* note 232.