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I'm Not Lovin' It: Re-Thinking Fast Food Advertising

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## I'm Not Lovin' It: Re-Thinking Fast Food Advertising

Brody Shea;\* Michael S. Sinha\*\*

In 1971, the Federal Trade Commission (“FTC”) and the Food and Drug Administration (“FDA”) agreed to prevent injury and deception to the consumer in advertising, detailing their respective roles in a Memorandum of Understanding (“MOU”).<sup>1</sup> The MOU proscribes that the FTC regulates truth in advertising relating to foods, drugs, devices and cosmetics while the FDA controls labeling and the misbranding of foods, drugs, devices, and cosmetics shipped in interstate commerce.<sup>2</sup> The MOU has been amended and an addendum added since 1971, but the material provisions have remained consistent for over a half-century.<sup>3</sup>

Importantly, the FDA and the FTC have varying goals and differing structures. The FDA is part of the Executive Branch and is primarily responsible for the protection of public health via the regulation of certain health-related products, so that those products can achieve a certain efficacy or social “value.”<sup>4</sup> On the other hand, the FTC is an independent agency that interacts with all three branches of the federal government, ensuring the integrity of the market process rather than focusing on a product’s specific social “value.”<sup>5</sup> Typically, the FDA ensures compliance on the front end by approving consumer disclosures in advance while the FTC provides back end relief by regulating specific claims that have already been advertised.<sup>6</sup>

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<sup>1</sup> *Memorandum of Understanding Between the Federal Trade Commission and the Food and Drug Administration*, FED. TRADE COMM’N, <https://www.ftc.gov/legal-library/browse/cooperation-agreements/memorandum-understanding-between-federal-trade-commission-food-drug-administration> (last visited Dec. 7. 2023).

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

<sup>3</sup> FDA ADVERT. & PROMOTION MAN. §130, §331 (J.W. Schomisch ed., Mar. 2021).

<sup>4</sup> Thomas B. Leary, *The Ongoing Dialogue Between the Food and Drug Administration and the Federal Trade Commission*, 59 FOOD & DRUG L.J. 209, 209 (2004).

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

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

Ultimately, the FDA seeks to educate and inform the consumer about public health while the FTC ensures that the consumer is not deceived.

The MOU could not have anticipated the change in advertising practices or the exponential rise of fast food restaurants. In 1970, there were 1,500 McDonald's restaurants,<sup>7</sup> whereas today there are more than 38,000 locations in over 100 countries.<sup>8</sup> McDonald's advertising in the 1970s did not prominently feature food products; instead, their advertisements centered around themes such as family unity, providing an affordable dining experience, or encouraging consumers that "[they] deserve a break today."<sup>9</sup> Additionally, McDonald's advertising used to feature familiar characters such as Ronald McDonald, the Hamburglar, and Grimace, who helped portray McDonald's as the ultimate consumer experience.<sup>10</sup> Today, McDonald's advertising prominently features food items, typically with steam emanating from the burger patty, cheese perfectly melted, and each ingredient in prominent position.<sup>11</sup> Further, in 1967, McDonald's spent \$2.3 million on advertising,<sup>12</sup> which rose significantly to \$311.6 million in 1985,<sup>13</sup> and continued to rise to \$638 million in 2022.<sup>14</sup> The increased convenience and prevalence of fast food have contributed to a decline in public health.

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<sup>7</sup> *The History of McD's*, PLOSLIN, <http://www.plosin.com/beatbegins/projects/levin/history.html#:~:text=Starting%20in%201955%2C%20there%20were,%3B%20and%20by%201980%2C%206200> (last visited Dec. 7, 2023).

<sup>8</sup> Liam Gravvat, *Number of McDonald's Locations in the United States, North America and World in 2022*, USA TODAY (July 20, 2022), <https://www.usatoday.com/story/money/business/2022/07/30/how-many-mcdonalds-us-world/10123086002/#:~:text=How%20many%20McDonald's%20are%20there%20in%20the%20world%3F,planet's%20countries%20as%20of%202022>.

<sup>9</sup> Greg Cain, *Great McDonald's Commercials Throughout History*, HUB PAGES (Sept. 5, 2022), <https://discover.hubpages.com/entertainment/Great-McDonalds-Commercials-Throughout-History>.

<sup>10</sup> *Id.*

<sup>11</sup> *The Cheese: Quarter Pounder*, MCDONALD'S (Jan. 28, 2020), <https://www.youtube.com/watch?v=2alwcW6Bvso>.

<sup>12</sup> *How McDonald's Became the Leader in the Fast Food Industry*, PROFIT WORKS, <https://profitworks.ca/blog/541-how-mcdonalds-became-the-leader-fast-food-industry-marketing-strategy> (last visited Dec. 7, 2023).

<sup>13</sup> Philip H. Dougherty, *Advertising: Author Offers Details of McDonald's Switch*, N.Y. TIMES (July 15, 1986), <https://www.nytimes.com/1986/07/15/business/advertising-author-offers-details-of-mcdonald-s-switch.html>.

<sup>14</sup> *Advertising Spending of Selected Restaurant Chains in the United States in 2022*, STATISTA, <https://www.statista.com/statistics/261957/ad-spend-of-selected-restaurants-in-the-us/#:~:text=In%202022%2C%20Domino's%20ranked%20as,followed%20with%20538%20million%20dollars> (last visited Dec. 7, 2023).

When the MOU was enacted, obesity and fast food consumption were not major public health concerns. Yet since 1971, America has experienced an obesity epidemic whereby the prevalence of obesity among American adults rose slightly from 1971 to 1980, followed by a rapid rise in obesity that continued for at least 20 years.<sup>15</sup> Following this rapid rise, the prevalence of obesity continued to rise in both genders from 1999 to at least 2016.<sup>16</sup> A multitude of factors contribute to obesity such as personal knowledge, the surrounding environment, genetics, and a lack of exercise.<sup>17</sup> Fast food is clearly a contributing factor as well, because fast food products are ultra-processed foods that are high in calories, salt, sugar, and fat.<sup>18</sup> During relevant periods where the obesity rate increased, so too did the frequency that the consumer ate at fast food restaurants.<sup>19</sup> Because of fast food's causative relationship to obesity, fast food should not be regulated under the same advertising standards as drugs, devices and cosmetics.

The FTC has regulatory authority over fast food advertising while the FDA regulates fast food, which creates a proverbial fork in the road. The fork in the road widens when considering the FDA has an active role in curbing the obesity epidemic through consumer education<sup>20</sup> while the FTC is not concerned with public health, but rather focuses on consumer deception and misinformation.<sup>21</sup> Therefore, to curb the obesity epidemic and educate the American public, the MOU between the FTC and FDA should be amended so the FDA gains primary responsibility over fast food advertising.

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<sup>15</sup> Norman J. Temple, *The Origins of the Obesity Epidemic in the USA-Lessons for Today*, CTR. FOR SCI. (2022), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9611578/pdf/nutrients-14-04253.pdf>.

<sup>16</sup> *Id.*

<sup>17</sup> *Overweight & Obesity: Causes of Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/obesity/basics/causes.html#:~:text=Many%20factors%20can%20contribute%20to,medications%20also%20play%20a%20role> (last visited Dec. 7, 2023).

<sup>18</sup> Temple, *supra* note 15.

<sup>19</sup> *Id.*

<sup>20</sup> See Leary, *supra* note 4, at 209.

<sup>21</sup> *Id.*

This paper also proposes solutions to fast food advertisements, aimed at better educating and reminding the consumer of the negative consequences associated with fast food. Part I of this paper will discuss the scope and regulation of the FTC, previous enforcement proceedings against fast food advertisements, and current litigation relating to fast food advertising. Part II will then discuss potential regulations the FDA could enforce if the agency assumed regulatory authority over fast food advertising. Part III will be broken down into three sections detailing solutions: disclosing negative health reminders during advertisements, prohibiting advertisements of unrealistic products, and disincentivizing fast food advertisements in general.

## **I. THE SCOPE AND REGULATION OF THE FEDERAL TRADE COMMISSION**

The FTC enforces truth in advertising rules whereby advertising must be truthful and non-deceptive, must be supported by evidence, and cannot be unfair.<sup>22</sup> Typically, the FTC will view an advertisement from the perspective of a “reasonable consumer,” then determine whether the words, phrases, and pictures in an advertisement may mislead or deceive the reasonable consumer.<sup>23</sup> The FTC regulates a broad range of products, including jewelry, automobiles, clothing, dietary supplements, and fast food.<sup>24</sup> Each product is held to the same truth in advertising standard despite the different health and safety risks of each product.<sup>25</sup>

Once the FTC determines an advertisement violates truth in advertising standards, then the Commission will assert a civil claim in federal court seeking injunctions and monetary relief.<sup>26</sup> Once the FTC initiates a claim, the investigation and lawsuit will typically end with a

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<sup>22</sup> *Advertising FAQ's: A Guide for Small Businesses*, FED. TRADE COMM'N, <https://www.ftc.gov/business-guidance/resources/advertising-faqs-guide-small-business> (last visited Dec. 7, 2023).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Heather Mandelkehr, *When Toning Shoes Strengthen Nothing More than Likelihood of Lawsuit: Why the Federal Trade Commission Needs Guidelines Regarding Proper Substantiation of Fitness Advertisements*, 20 JEFFREY S. MOORAD SPORTS L.J. 297, 300 (2013).

consent order that requires the advertiser to cease the offending advertisement and pay a fine.<sup>27</sup>

Previously, the FTC factored in halting deceptive advertising of harmful products in the tobacco industry<sup>28</sup> and the weight loss supplement industry.<sup>29</sup>

Within the tobacco industry, R.J. Reynolds, the second largest cigarette manufacturer in the United States, advertised a Joe Camel advertisement for eleven years until pressure from the FTC and various state attorney generals led to a Master Settlement Agreement that, among other things, banned the use of cartoon characters, such as Joe Camel, in advertising.<sup>30</sup> Within the weight loss supplement industry, Sale Slash marketed “bogus weight-loss products” that used unauthorized statements from celebrities such as Oprah Winfrey for at least three years<sup>31</sup> until the FTC obtained a court order halting Sale’s Slash operation.<sup>32</sup> The FTC must rely on evidence and data to prove a violation of the truth in advertising standards, which permits “seller behavior that not only is strongly objectionable but [could also] cause substantial harm that could not be detected in the time frame encompassed by FTC advertising litigation.”<sup>33</sup> Ultimately, the FTC allows advertising to be deceptive until it can gather evidence and data to prove that advertising, like Joe Camel or “bogus weight-loss products”, violated truth in advertising standards. Another instance of the FTC initially permitting deceptive advertising occurred in the fast food industry.

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<sup>27</sup> *Id.*

<sup>28</sup> See Walter J. Jones & Gerard A. Silvestri, *The Master Settlement Agreement and Its Impact on Tobacco use 10 Years Later*, 137 CHEST J. 692, 692 (2010).

<sup>29</sup> *FTC Halts Deceptive Marketing of Bogus Weight-Loss Products*, FED. TRADE COMM’N (May 4, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/05/ftc-halts-deceptive-marketing-bogus-weight-loss-products>.

<sup>30</sup> Jones & Silvestri, *supra* note 28, at 698 (noting that Master Settlement Agreement also required payment of \$206 billion from tobacco companies to the states, a \$1.5 billion payment from tobacco companies to state antismoking measures and enforced permanent limitations on cigarette advertising).

<sup>31</sup> Complaint for Permanent Injunction and Other Equitable Relief, 8 (Apr. 27, 2015) available at [https://www.ftc.gov/system/files/documents/cases/sales\\_slash\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/sales_slash_complaint.pdf).

<sup>32</sup> FED. TRADE COMM’N, *supra* note 29.

<sup>33</sup> John E. Calfee, *The Historical Significance of Joe Camel*, AEI (Oct. 1, 2000), <https://www.aei.org/articles/the-historical-significance-of-joe-camel/>.

### A. *Kentucky Fried Chicken*

FTC enforcement proceedings against fast food restaurants are rare. However, the FTC's proceeding against Kentucky Fried Chicken ("KFC") sets a clear precedent for what *not to do* in fast food advertising.

In November 2003, KFC launched an advertising campaign that claimed its food was healthy, which received immediate backlash.<sup>34</sup> One such advertisement featured a woman slamming a bucket of fried chicken in front of her husband and then exclaiming "[r]emember how we talked about eating better? Well, it starts today!"<sup>35</sup> The advertisement then stated that "[t]wo KFC breasts have less fat than a [Burger King] Whopper." While technically true, this statement fails to indicate that two KFC breasts have more than three times the trans fat and cholesterol, more than twice the sodium, and more calories than a Burger King Whopper.<sup>36</sup> The other controversial advertisement depicted a man who appears shocked to see his friend's sleek and healthy figure.<sup>37</sup> The friend then implies that his slimmer figure is a result of eating KFC.<sup>38</sup> The advertisement then states that "[o]ne Original [KFC] Recipe chicken breast has just 11 grams of carbohydrates and packs 40 grams of protein. So, if you're watching carbs and going high protein, go KFC."<sup>39</sup> However, prominent low carbohydrate weight loss programs clearly advise refraining from any fried foods, including the chicken served at KFC.<sup>40</sup>

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<sup>34</sup> Stuart Elliot, *KFC Settles Charges over Commercials*, N.Y. TIMES (June 4, 2004), <https://www.nytimes.com/2003/10/28/business/media-business-advertising-with-obesity-many-minds-kfc-pushes-theme-that-its.html>.

<sup>35</sup> *KFC's Claims That Fried Chicken Is a Way to Eat Better Don't Fly*, FED. TRADE COMM'N (June 3, 2004), <https://www.ftc.gov/news-events/news/press-releases/2004/06/kfcs-claims-fried-chicken-way-eat-better-dont-fly>.

<sup>36</sup> *Id.*

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

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

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



The FTC did not force KFC to halt these advertisements; rather, KFC chose to end these advertisements after only a month, partly due to public backlash.<sup>41</sup> Notably, the Center for Science in the Public Interest (“CSPI”) pressured KFC and then petitioned the FTC to take action against these advertisements.<sup>42</sup> After seven more months, the FTC and KFC reached a settlement agreement that prohibited KFC “from making these or similar claims about the nutritional value, weight-loss benefits, or other health benefits of its chicken products and meals unless the company can substantiate the claims.”<sup>43</sup> Ultimately, the settlement agreement slapped KFC on the wrists because KFC pulled the commercials on their own accord and the FTC did not fine them.<sup>44</sup>

KFC’s advertisements clearly violated FTC truth in advertising standards and remains an outlier. Today, fast food advertisements are far more subtle and describe the fast food product in very clear and exact terms. For example, a recent McDonald’s advertisement featured an action figure-like model of Travis Scott promoting his featured meal, whereby Scott states, “here is a quarter pounder with lettuce, pickle, onions, ketchup, mustard, and bacon. And here [are] my fries that I sometimes dip into barbeque sauce.”<sup>45</sup> Simple and subtle advertising “nudges” the consumer to gravitate towards fast food consumption by briefly displaying a desirable product, which is a successful marketing tactic.<sup>46</sup> Therefore, it is now rare for fast food advertisements to make unnecessary and untruthful claims about their products.

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<sup>41</sup> *FTC Settle with Kentucky Fried Chicken*, NBC NEWS (June 3, 2004), <https://www.nbcnews.com/id/wbna5129751>.

<sup>42</sup> *KFC Ad Campaign Draws Fire from CSPI*, CTR. FOR SCI. IN THE PUB. INTEREST (Nov. 7, 2003), <https://www.cspinet.org/new/200311073.html>.

<sup>43</sup> FED. TRADE COMM’N, *supra* note 29.

<sup>44</sup> NBC NEWS, *supra* note 41.

<sup>45</sup> Full Nelson, *The Travis Scott Meal – McDonald’s Official Commercial*, (Sept. 8, 2020), <https://www.youtube.com/watch?v=cYATyMUM0RI>.

<sup>46</sup> Ali Alajmi, *Affordances and Outcomes of Targeted Fast-Food Advertising in Kuwaiti Facebook*, in Thesis Submitted to the Temple University Graduate Board (May 2021), available at [https://scholarshare.temple.edu/bitstream/handle/20.500.12613/6477/Alajmi\\_temple\\_0225M\\_14534.pdf?sequence=1&isAllowed=y](https://scholarshare.temple.edu/bitstream/handle/20.500.12613/6477/Alajmi_temple_0225M_14534.pdf?sequence=1&isAllowed=y).

Fast food advertisements may not make unsubstantiated claims but often promote an unrealistic product. Notably, the FTC has not initiated any cases based on allegations that fast food advertisements promote a product that is more attractive than the product sold in stores.<sup>47</sup> The FTC is unlikely to initiate cases concerning unrealistic fast food advertisements because consumers can easily evaluate a fast food products for themselves, the product is inexpensive, and the product is frequently purchased despite unrealistic advertising.<sup>48</sup> Essentially, fast food advertisements feature attractive products because the “reasonable consumer” should know that the attractive product is unrealistic. However, some consumers find this practice deceptive and have sought remedy.

Consumers have been largely unsuccessful when challenging potentially deceptive fast food advertising. One such lawsuit alleged that McDonald’s and Wendy’s advertisements misled consumers by displaying bigger, and juicier burgers than their restaurants actually served.<sup>49</sup> The written complaint contained juxtaposed cropped photos of several burgers from different McDonald’s and Wendy’s advertisements side-by-side with photos of burgers that customers actually received from the restaurants.<sup>50</sup> Federal Judge Hector Gonzales of the Eastern District of New York dismissed the lawsuit and determined the advertisements were not misleading.<sup>51</sup> Judge Gonzales reasoned that efforts by McDonald’s and Wendy’s “to present appetizing images

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<sup>47</sup> *Fast Food Fare Isn’t Picture Perfect*, CONSUMER REPS. (Feb. 2014), <https://www.consumerreports.org/cro/magazine/2014/02/fast-food-not-as-pictured/index.htm>.

<sup>48</sup> *Id.*

<sup>49</sup> Dee-Ann Durbin, *Federal Judge Dismisses False Advertising Claims Against Wendy’s, McDonald’s*, AP NEWS (Oct. 3, 2023), <https://apnews.com/article/mcdonalds-wendys-false-advertising-lawsuit-9b60d8ff04b52635a14dcdef5a44d68f>

<sup>50</sup> Johnny Diaz, *False Advertising Suit Against McDonald’s and Wendy’s Is Dismissed*, N.Y. TIMES (Oct. 5, 2023), <https://www.nytimes.com/2023/10/04/business/wendys-mcdonalds-burgers-lawsuit.html>.

<sup>51</sup> *Id.*

of their products are not different than other companies' use of visually appealing images to foster positive associations with their products."<sup>52</sup>

Another similar lawsuit alleges that Burger King's advertisements depict a product that contains 35% more meat than the actual product in store.<sup>53</sup> Federal Judge Roy Altman of the Southern District of Florida permitted this lawsuit to proceed in August 2023.<sup>54</sup> The plaintiffs must now convince a jury that Burger King's advertisements were intentionally deceptive by conveying a specific statement of fact.<sup>55</sup> Therefore, the plaintiffs will not just argue that the product received in store did not look as appetizing as in the advertisement, because that claim would be considered "puffery".<sup>56</sup> Puffery is not considered false advertising because it is intended to attract more consumers rather than intentionally deceiving them.<sup>57</sup> The line between pure puffery and a clear factual statement is fuzzy, yet the FTC has not attempted to clarify the difference. Instead, consumers who feel deceived by fast food advertisements are constrained to class action lawsuits, which are weak forums for creating substantive change in advertising.

In fact, class actions were never designed to address deceptive advertising. Rule 23 of the Federal Rules of Civil Procedure notes that class actions are designed for shareholders against a corporation, bondholders against the bond's municipality, or discrimination actions brought by the discriminated class.<sup>58</sup> Some plaintiffs' attorneys have even built their whole practice around filing class action suits, and typically the goal is not to litigate but to extract a settlement with a

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<sup>52</sup> *Id.*

<sup>53</sup> Jeff Neal, *Where's the Beef? Lecturer Louis Tompros Discusses a recent lawsuit against a fast-food giant and the role class actions play in the U.S. legal system*, HARV. L. TODAY (Sept. 13, 2023), <https://hls.harvard.edu/today/harvard-law-expert-explains-the-burger-king-false-advertising-lawsuit/>.

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

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Stacey M. Lantagne, *A Matter of National Importance: The Persistent Inefficiency of Deceptive Advertising Class Actions*, 8 J. BUS. & TECH. L. 117, 152 (2013), available at <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1190&context=jbtl>.

hefty portion allotted to attorneys' fees.<sup>59</sup> Further, the harm to each individual buyer in a deceptive advertising food claim is negligible, which suggests that the true purpose of class actions are to deter large corporate action as opposed to compensating the harmed individual.<sup>60</sup> Yet, most of these class actions are aimed at industries that are already government-regulated, such as the fast food industry.<sup>61</sup> The FTC could bring the equivalent of a class action on behalf of consumers alleging injury as a result of potentially deceptive fast food advertising, but the Commission does not think that fast food advertising rises to the appropriate level of deception. Therefore, the solution to deterring potentially deceptive advertising is not through a class action lawsuit, but through more government regulation.

The MOU should be amended, such that the FDA has primary responsibility for regulating fast food advertisements. The FTC should continue to ensure that fast food advertising is truthful, non-deceptive, substantiated by evidence, and fair. These are worthy goals because they ensure that fast food advertising cannot make blatantly untrue health claims, such as KFC's advertisements. However, fast food advertisements should also be regulated by the FDA to further the agency's goals of educating the consumer. In this pursuit, the FDA should work with organizations such as the Center for Science in the Public Interest, which effectively pressured KFC as mentioned *supra*, and any other organizations whose goals and values align with creating a healthy population, to ensure that fast food advertisements do not harm the public health.

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<sup>59</sup> *Id.* at 125-26.

<sup>60</sup> *Id.* at 154.

<sup>61</sup> *Id.*

## II. FDA REGULATIONS

The FDA should provide solutions such as disclosing negative health reminders during fast food advertisements, prohibiting advertisements of unrealistic fast food products, and disincentivizing fast food advertisements in general.

### *a. Disclosure as a Reminder, not a Warning:*

After viewing a fast food advertisement, consumers are not informed, educated or persuaded to make healthier choices. The consumer needs to be reminded of the negative health consequences of fast food at the initial point of sale.

Consumers generally have access to fast food nutritional information only when physically present in a fast food restaurant. In 2010, President Barack Obama enacted § 4205 of the Patient Protection and Affordable Care Act, requiring restaurants with 20 or more chains to include the calorie count of each item on menus, to post a graphic of suggested daily caloric intake, and to provide supplemental nutrition information on request.<sup>62</sup> “Major chains” are considered restaurants with 20 or more locations and collectively represent 55% of all food-away-from home visits,<sup>63</sup> so the calorie posting requirement is now highly visible to the American public. Further, the statute sought to advance the FDA’s goals by persuading “Americans to make healthier choices, including purchasing less caloric food options, thus reducing obesity and solving many of the current national health problems.”<sup>64</sup> The calorie posting requirement led to various restaurants pushing back and lobbying, which successfully

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<sup>62</sup> Patient Protection and Affordable Care Act §4205 (2010).

<sup>63</sup> Rosanna Mentzer et al., *Will Calorie Labeling in Restaurants Make a Difference*, USDA (Mar. 14, 2011), <https://www.ers.usda.gov/amber-waves/2011/march/will-calorie-labeling/#:~:text=The%20Patient%20Protection%20and%20Affordable,have%20made%20such%20labeling%20mandatory>.

<sup>64</sup> Sheri Kindel, *The Impact of Calorie Disclosure Regulations on the Consumer and Business Sector*, 10 OHIO ST. BUS. L.J. 245, 246 (2015).

delayed mandatory implementation until 2018.<sup>65</sup> Today, all major chains post calorie counts on menus, but the effectiveness of calorie counts on menus may be limited.

In fact, a decade's worth of data shows that calorie counts on menus have not significantly changed obesity rates or consumer health.<sup>66</sup> Starting as early as 2006, several cities and states, including New York and California, required calorie posting requirements on menus.<sup>67</sup> By 2012, all McDonald's restaurants posted calorie counts, likely to conform with eventual implementation of § 4205.<sup>68</sup> In the years since, most studies have determined that there is not much of a difference when consumers order from a menu with calories, and when there is, there is a slight reduction of about 25 to 100 calories per meal.<sup>69</sup> Further, consumers who altered their choices because of calories on the menu were already eating healthier food as compared to consumers who were not influenced by calories on the menu.<sup>70</sup> The effectiveness of the calorie labeling requirement may be increased if coupled with a similar requirement that applied to fast food advertisements.

Consumers need to be reminded of the unhealthy consequences of fast food before they enter the store, approach the drive-thru, or order through a delivery service. Each day, the average American consumer views approximately five fast food television advertisements.<sup>71</sup> Additionally, this figure does not account for fast food advertisements viewed on other venues,

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<sup>65</sup> *Calorie Counts on Chain Restaurant Menus Become Mandatory on Monday, result of 15-year-long campaign*, CTR. FOR SCI. IN THE PUB. INTEREST (May 2, 2018), <https://www.cspinet.org/news/calorie-counts-chain-restaurant-menus-become-mandatory-monday-result-15-year-long-campaign>.

<sup>66</sup> Kindel, *supra* note 64, at 249.

<sup>67</sup> *Id.* at 251.

<sup>68</sup> Stephanie Strom, *McDonald's Menu to Post Calorie Data*, N.Y. TIMES (Sept. 12, 2012), <https://www.nytimes.com/2012/09/13/business/mcdonalds-to-start-posting-calorie-counts.html>.

<sup>69</sup> Jacqueline Stenson, *Calorie Counts on Menus: Have they helped?*, NBC NEWS (June 11, 2022), <https://www.nbcnews.com/health/health-news/calorie-counts-menus-helped-rcna29276>.

<sup>70</sup> Leah Goggins, *Listing Calorie Counts on Restaurant Menus Might Not Help Us Eat Healthier, According to New Research*, EATING WELL (July 14, 2023), <https://www.eatingwell.com/article/8057955/calorie-counts-menus-healthier-choices-research/>.

<sup>71</sup> *Fast food advertising: Billions in spending, continued high exposure by youth*, in UCONN RUDD CTR. FOR FOOD POL'Y & OBESITY (2021), available at <https://media.ruddcenter.uconn.edu/PDFs/FACTS2021.pdf>.

such as social media, which has seen exponential growth in fast food advertising in recent years.<sup>72</sup> Fast food advertising is designed to reach a wide range of people and age-levels through various mediums, with the goal of persuading consumers to buy their products.<sup>73</sup> If advertising persuades consumers to buy a given product, consumers are less likely to be deterred from such an order by a calorie label on the menu, especially those with less healthy eating habits. However, an advertisement that simply reminds the consumer of the unhealthiness of a fast food product may deter some consumers during the initial point of sale.

Every person is different and not all healthy eating decisions are determined by nutritional information. For instance, knowing that a bucket of Kentucky Fried Chicken contains the highest cholesterol levels in the fast food industry<sup>74</sup> may alter the decision making of consumer's with heightened cholesterol levels but may not alter the decision making of those consumers with normal cholesterol levels. Additionally, consumers may react differently to a disclosure that a McDonald's Big Mac contains 520 calories and 25% of the daily recommended calorie intake<sup>75</sup> compared to a disclosure that a "Big Mac contains 25 grams of fat and over 40% of the daily recommended fat intake."<sup>76</sup> Both measures disclose a Big Mac's unhealthy nutritional information, but some consumers may not think 25 grams of fat or 520 calories are unhealthy measures because consumer's nutritional preferences are constantly changing.<sup>77</sup> Since

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<sup>72</sup> *Fast Food Facts in BRIEF*, FAST FOOD F.A.C.T.S,

[https://www.fastfoodmarketing.org/fast\\_food\\_facts\\_in\\_brief.aspx](https://www.fastfoodmarketing.org/fast_food_facts_in_brief.aspx), last visited (Feb. 2, 2024).

<sup>73</sup> *How Can Advertisements Influence Your Food Choices*, CTR. FOR NUTR. IN SCH. (Jan. 22, 2020), <https://cns.ucdavis.edu/news/how-can-advertisements-influence-your-food-choices>.

<sup>74</sup> Dan Myers, *The 12 Most Cholesterol-Laden Fast Food Items*, DAILY MEAL (July 12, 2016), <https://www.thedailymeal.com/eat/10-most-cholesterol-laden-fast-food-items-slideshow/>

<sup>75</sup> Honor Whiteman, *How a Big Mac affects your body in 1 hour*, MED. NEWS TODAY (Sept. 25, 2015), <https://www.medicalnewstoday.com/articles/300046#:~:text=A%20Big%20Mac%20contains%20540,the%20recommended%20daily%20fat%20intake>.

<sup>76</sup> *Id.*

<sup>77</sup> See Nicholas Robinson, *Calorie Counting "not important" for Consumers*, THE MORNING ADVERT. (Mar. 9, 2016), <https://www.morningadvertiser.co.uk/Article/2016/03/09/Calories-not-important-to-consumers-new-research-says> (noting that historically fat has been the 'food villain' but that sugar has taken the role, while calories may present a varying depiction of nutritional content).

each fast food product presents different negative health consequences, the consumer needs to be reminded of the unhealthy consequences of fast food in a consistent manner.

Fast food advertisements should disclose that fast food is not good for a quality diet or for living a sustainable lifestyle.<sup>78</sup> After displaying a product, a fast food advertisement could then state that the product does not support a healthy diet because it is a highly processed food and contributes to the rising obesity rate in the United States.<sup>79</sup> Further, another disclosure could state that excessive consumption of fast food is not consistent with living a sustainable lifestyle because fast food leads to an increased risk of heart disease.<sup>80</sup> This approach is not specific but could be applied uniformly across all fast food advertisements. Additionally, this approach does not resemble prescription drug advertising, which often disclaims a laundry list of possible side effects and warnings.<sup>81</sup> Rather, the proposed approach recognizes that a consumer can easily learn the side effects of fast food consumption—a reminder, and not a warning, of unhealthy side effects is more appropriate. Therefore, reminding the consumer that fast food is not beneficial for a healthy diet, or a sustainable lifestyle advances the FDA’s goal of encouraging consumers to make healthy choices.

Currently, fast food nutritional information is convenient only when consumers are physically present in a fast food restaurant. Since the average consumer may view up to five fast food advertisements per day, disclosure during an advertisement that fast food is not beneficial

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<sup>78</sup> *Stop Counting Calories: Put the focus on food quality and healthy lifestyle practices to attain a healthy weight*, HARV. HEALTH PUBL’G (Oct. 1, 2020), <https://www.health.harvard.edu/staying-healthy/stop-counting-calories>.

<sup>79</sup> *Id.*

<sup>80</sup> Faith Geiger, *The Worst McDonald’s Menu Item Health Experts Say You Should Never Order—It’s Over 1300 Calories!*, SHE FINDS (May 28, 2023), <https://www.shefinds.com/collections/mcdonalds-big-mac-health-effects/#slide-2>.

<sup>81</sup> Alan Yu, *Ads Focused on a Few Drug Risks Might Make Them Memorable*, NPR (Feb. 21, 2014), <https://www.npr.org/sections/health-shots/2014/02/20/280260458/ads-focused-on-a-few-drug-risks-might-make-them-memorable>.



for a healthy diet or a sustainable lifestyle would effectively remind consumers of the harmful consequences of fast food before the consumer chooses to eat it. This approach, coupled with the calorie labeling standard, furthers the FDA's goal of persuading, informing, and educating the consumer to make healthy choices.

***b. Shifting the Focus from Reasonable Consumer to American Public:***

The reasonable consumer understands that fast food advertisements are unrealistic, but advertising unrealistic products may still psychologically affect the reasonable consumer. As a result, fast food advertisements glamorize a product at the expense of public health.

Current FTC standards allow fast food advertisements to be unrealistic. Typically, fast food restaurants deploy a variety of techniques to visually enhance their products, such as using undercooked meat, glue, tweezers, blowtorches, paint, oil and glycerin.<sup>82</sup> The FTC allows such advertising because “[c]onsumers frequently purchase food, it’s relatively inexpensive, and it’s fairly easy for a consumer—without any specialized training—to evaluate whether the food they get looks enough like the food in the [advertisement] to justify purchasing it again.”<sup>83</sup> When consumers previously challenged potentially misleading food advertisements, Judge Gonzalez, as mentioned *supra*, dismissed the consumer’s claim and reasoned that appetizing images are permissible to foster positive associations with fast food products.<sup>84</sup> Essentially, unrealistic fast food advertising is permissible because other FTC regulated advertising, such as for clothing and jewelry, also use enhancements to ensure models look appealing before promoting those

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<sup>82</sup> Katie Little, *Why Restaurant Meals Don't Look Like the Ads*, CNBC (May 19, 2014), <https://www.cnbc.com/2014/05/19/why-restaurant-meals-dont-look-like-the-ads.html>.

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

<sup>84</sup> Diaz, *supra* note 50.

products.<sup>85</sup> However, fast food, unlike jewelry and clothing, is an ingestible product that negatively affects public health.

Unrealistic advertisements portray an attractive product, which may cause consumers to perceive the product as healthier.<sup>86</sup> To illustrate this point, a marketing study at the University of Southern California (“USC”) gave 4,300 subjects the choice between the same food, but one option was “neat and pretty”, and the other “ugly”.<sup>87</sup> The participants consistently perceived the same food as more natural when it looked prettier, leading participants to expect the pretty food to be more nutritious, less fatty and contain fewer calories.<sup>88</sup> The study concluded that such bias can affect consumer choices and willingness to pay for food.<sup>89</sup> Therefore, unrealistic food advertisements that depict a “pretty” product may influence a reasonable consumer’s health expectations of fast food products.

Further, unrealistic fast food advertisements manipulate a consumer’s emotional expectancy of fast food. A University of Michigan study evaluated 718 participants who watched various advertisements, including fast food advertisements, and then completed a questionnaire that addressed their beliefs and feelings after watching the advertisements.<sup>90</sup> Of those participants without a prior food addiction, watching fast food advertisements increased their positive food expectancies, meaning they expected to feel relaxed, cheerful, or glad as a result of consuming fast food.<sup>91</sup> For those participants with higher food addiction symptoms, their beliefs surrounding fast food were much stronger before the study so the fast food advertisements did

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<sup>85</sup> Maryalene LaPonsie, *How They Make Fast Food Look So Good*, MONEY TALKS NEWS (Oct. 17, 2018), <https://www.moneytalksnews.com/how-they-make-fast-food-look-good/>.

<sup>86</sup> Linda Hage, *Why Consumers Think Prettier Food is Healthier*, 85 J. OF MKTG. 129, 134-39 (Mar. 2021).

<sup>87</sup> *Id.* at 134.

<sup>88</sup> *Id.* at 137.

<sup>89</sup> *Id.*

<sup>90</sup> Jenna R. Cummings, Lindzey V. Hoover & Ashley N. Gearhardt, *A randomized experiment on the effects of food advertisements on food-related emotional expectancies in adults*, 28 J. OF HEALTH PSYCH. 929, 932-37 (Sept. 2023).

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

not have a statistically significant effect on their emotions.<sup>92</sup> Therefore, unrealistic fast food advertisements may alter emotional expectancies for the reasonable consumer.

Unrealistic fast food advertisements may also manipulate a hungry consumer. The results of the USC and Michigan study indicate that unrealistic fast food advertisements may have a subtle, psychological effect on the consumer, but these studies did not factor in participants who were hungry before viewing food. Specifically, watching fast food advertisements when hungry is similar to the general adage that you should not go grocery shopping when hungry. A study by researchers at Cornell University asked participants to not eat for five hours before grocery shopping, then gave half the participants food to satiate their hunger before shopping.<sup>93</sup> The study concluded that those participants who were hungry bought more food high in calories, which was not surprising to nutritional experts because humans are biologically predisposed to choose high calorie food after a long fast.<sup>94</sup> Although food advertisements differ from grocery shopping, it is reasonable to assume that the reasonable consumer may be hungry and predisposed to choosing high calorie food when viewing a fast food advertisement, especially when consumers view, on average, five fast food advertisements per day.

The FTC's truth in advertising standards do not account for subtle psychological effects on the reasonable consumer. The FTC reasons that the reasonable consumer can determine for themselves whether a fast food advertisement is realistic because fast food is cheap and convenient.<sup>95</sup> However, it is unreasonable to assume that a hungry consumer will throw away a fast food product if the product does not match the advertisement. Further, families that are food

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

<sup>93</sup> Genevra Pittman, *No, really – don't shop when you're hungry: study*, REUTERS (May 6, 2013), <https://www.reuters.com/article/us-shop-hungry-idUSBRE9450TF20130506/>.

<sup>94</sup> *Id.*

<sup>95</sup> Little, *supra* note 82.

insecure, close to 14% in the United States,<sup>96</sup> may be driven to eat fast food based on advertisements but may not have the financial resources to skip a meal simply because of unrealistic advertising. Therefore, fast food advertising should be held to a different standard because food is an inherent human need, and unhealthy food negatively affects the public health.

To promote public health, the FDA should prohibit fast food advertising that is unrealistic. To some extent, fast food advertising has always featured unrealistic images of fast food, but current fast food advertisements dramatically present unrealistic products for longer periods of time and in higher definition.<sup>97</sup> The FDA could require that all fast food advertisements closely resemble the product received in the store, meaning that advertisements could not employ non-culinary techniques such as using undercooked meat, glue, tweezers, blowtorches, paint, oil or glycerin.<sup>98</sup>

Some may argue that this method restricts speech, but commercial speech, such as fast food advertising, may be restricted by a compelling state interest, like combating obesity and promoting public health.<sup>99</sup> If the FDA restricted unrealistic advertising, then fast food advertisers may not decide to advertise the real products since the in-store versions are not as appealing. Instead, advertisers may shift their focus to promoting different themes during fast food advertisements. This approach would not be burdensome, as many of these companies already produce less misleading advertisements in other countries. For instance, a recent British McDonald's advertising campaign does not show McDonald's food or the restaurant but rather tells the story of a group of office workers who all conspire to head to McDonald's by

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<sup>96</sup> Maria Godoy, *Millions of American Families Struggle to get Food on the Table, Report Finds*, NPR (Oct. 26, 2023), <https://www.npr.org/sections/health-shots/2023/10/26/1208760054/food-insecurity-families-struggle-hunger-poverty#:~:text=The%20report%20found%20that%2044.2,nearly%2045%20percent%20from%202021.>

<sup>97</sup> This assertion is based off watching several McDonald's advertisements on YouTube from 1980 to present day.

<sup>98</sup> Little, *supra* note 82.

<sup>99</sup> See *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 565 (1980).

communicating their intention with a mere eyebrow wiggle.<sup>100</sup> Such advertising would be more beneficial for the consumer because the consumer still has the right to choose McDonald's but will not be as psychologically swayed by an unrealistic food product.

Even though the reasonable consumer may understand that fast food advertisements are unrealistic, such advertisements still psychologically affect them. As such, the FDA should assume regulation of fast food advertisements and require those advertisements reflect the product sold in the store. Further, commercial speech, such as fast food advertising, may be limited by a compelling interest, such as limiting obesity.

### ***C. Limiting Fast Food Advertisements:***

Fast food advertising expenditures are fully subsidized by the American public since fast food advertisements are treated as deductible from corporate profits under U.S. tax law.<sup>101</sup> The purpose of deducting advertisements as a tax write-off is to help advertisers bring in new consumers and keep existing ones.<sup>102</sup> The FDA and other entities like the Center for Science in the Public Interest should lobby Congress to eliminate tax incentives for fast food advertising because fast food restaurants should not be incentivized to retain new consumers or keep existing ones.

Fast food restaurants should not be incentivized to attract new consumers. Domino's Pizza clearly benefits from advertising—the company spent \$191.1 million on advertising in 2012<sup>103</sup> as compared to \$774 million in 2022.<sup>104</sup> Domino's advertisements may attract consumers

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<sup>100</sup> *New McDonald's Ad doesn't Show its Restaurants or any of its Food*, THE DRUM (Jan. 13, 2023), <https://www.thedrum.com/news/2023/01/13/new-mcdonald-s-ad-doesn-t-show-its-restaurants-or-any-its-food>.

<sup>101</sup> Bradley A. Harsch, *Consumerism and Environmental Policy: Moving Past Consumer Culture*, 26 ECOLOGY L.Q. 543, 603 (1999).

<sup>102</sup> *Small Business Advertising and Marketing Costs may be Tax Deductible*, IRS (Oct. 27, 2021), <https://www.irs.gov/newsroom/small-business-advertising-and-marketing-costs-may-be-tax-deductible>.

<sup>103</sup> *Advertising Spending*, FAST FOOD FACTS (2021), <https://www.fastfoodmarketing.org/media/RankingTable1.pdf>.

<sup>104</sup> STATISTA, *supra* note 14.

away from other pizza competitors, such as Papa John's or Pizza Hut, or attract consumers who are completely new to the fast food industry. If Domino's successfully attracts consumers away from Papa John's or Pizza Hut, that means the consumer became dissatisfied with those companies and wanted a different option but still chose a fast food option in Domino's. Further, if Domino's attracts new consumers to the fast food industry, that means the consumer is actively choosing fast food over a previous option. Fast food is often highly processed and contributes to obesity, yet fast food advertising still incentivizes restaurants to attract new consumers at the expense of public health.

When fast food restaurants retain existing consumers, the obesity epidemic moves from one generation to the next. McDonald's has marketed their signature product, the Big Mac, since 1974 by presenting a catchy jingle and detailing the product's ingredients.<sup>105</sup> The product has become so recognizable over the years that McDonald's, in 2017, aired a Big Mac commercial that panned over the product and stated, "[w]e don't need to tell you what you are looking at, or what makes it so delicious . . . we don't even need to tell you its name. You know where to get it."<sup>106</sup> By airing an advertisement of this nature, McDonald's did not try and attract new consumers but rather sought to entice their existing consumer base. Additionally, McDonald's creates a "nostalgic draw" for existing consumers since their promotions, such as the Happy Meal, have been ongoing for decades.<sup>107</sup> Such advertisements should not be tax deductible because they encourage existing consumers to continue eating unhealthy fast food products.

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<sup>105</sup> Bionic Disco, *McDonald's Big Mac Jingle Commercial*, (Feb. 8, 2016), <https://www.youtube.com/watch?v=yEBCV0ic6Tc>.

<sup>106</sup> Trend Media Pacific, *McDonald's Big Mac Ad*, (May 10, 2017), <https://www.youtube.com/watch?v=UNL0gaANWbk>.

<sup>107</sup> *Despite Sellouts, There's Still Mass Interest in McDonald's Happy Meals*, CIVIC SCI. (Oct. 19, 2022), <https://civicscience.com/despite-sellouts-theres-still-mass-interest-in-mcdonalds-adult-happy-meals/>.

Legislation to limit incentives for fast food advertising should mirror existing legislation that cut incentives for drug prescription advertising as part of the Tax Cuts and Jobs Act of 2017.<sup>108</sup> Proposed bills to further cut incentives for drug prescription advertising have been introduced in 2009, 2015, 2016, 2018, 2019, and 2022.<sup>109</sup> The bills argue that direct to consumer advertising of prescription drugs has risen substantially since 1997 to the present day, while taxpayers continue to fund a “never-ending carousel of prescription ad[vertisements].”<sup>110</sup> Such legislation has not become law, likely because prescription drug advertisements have some benefits, such as educating consumers about health issues they can raise with their doctor.<sup>111</sup> Unlike prescription drug advertising, fast food advertisements do not currently educate consumers about health issues but instead promote an unrealistic image of a product to entice consumers. Further, in 2019, 274 fast food restaurants spent over \$5 billion on advertisements, but 10 restaurants spent 64% of that total,<sup>112</sup> indicating that a select group of fast food restaurants dominate fast food advertisements and contribute to the market prowess many fast food restaurants maintain. Lastly, fast food advertisements emphasize price if there is a promotion, but recent fast food advertisements do not usually indicate a certain pricing point.<sup>113</sup> Subway, for

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<sup>108</sup> Michael S. Sinha & Aaron S. Kesselheim, *The Tax Cuts and Jobs Act of 2017 and the Pharmaceutical Industry*, 46 J. L. MED. & ETHICS 806 (2018).

<sup>109</sup> Alex Muresianu, *Denying Deductions for Pharma Ads is Bad Tax Policy*, TAX FOUND. (Apr. 12, 2021), <https://taxfoundation.org/blog/end-taxpayer-subsidies-for-drug-ads-act/>.

<sup>110</sup> *Slotkin Introduces Bill to Close Tax Loophole for Big Drug Companies*, HOUSE GOV. (Jan. 19, 2022), <https://slotkin.house.gov/media/press-releases/slotkin-introduces-bill-close-tax-loophole-big-drug-companies>.

<sup>111</sup> Beth Snyder Bulik, *DTC Tax Deductions Back on the Chopping Block—and this time, the Ax Might Just Fall*, FIERCE PHARMA (Jan. 18, 2019), <https://www.fiercepharma.com/marketing/dtc-ad-deductions-are-back-agenda-washington-time-a-who-s-who-list-co-signers>; C. Lee Ventola, *Direct-to-Consumer Pharmaceutical Advertising*, PUB. MED. CENTRAL, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3278148/#:~:text=Encourages%20product%20competition%20and%20lower%20prices.&text=Supporters%20of%20DTCPA%20also%20claim,to%20lower%20prescription%20drug%20prices>.

<sup>112</sup> Out of 274 fast food restaurants, top 10 restaurants spent 64% of all total advertising. FAST FOOD FACTS, *supra* note 103.

<sup>113</sup> For example, Wendy’s promotes a “\$5 biggie bag” and emphasize their price on the advertisement. When promoting their signature product, “The Baconator”, the advertisement makes no mention of price.

example, advertised their “\$5 footlong” promotion in 2008 to great success, but by 2012 sales decreased, which ended the “\$5 footlong” jingle and any similar efforts by Subway to promote pricing through advertisements.<sup>114</sup> Additionally, fast food consumers are concerned with pricing, but other factors such as convenience, food environment, and family dynamics also play a role in consumer decision-making.<sup>115</sup> Therefore, fast food advertisements should not receive tax breaks because advertisements do not educate the consumer, increase competition, or influence consumer decisions based on price.

Fast food advertisements should be limited because fast food contributes to rising obesity rates and negatively affects the public health. Additionally, fast food advertisements should not receive tax benefits because fast food restaurants should not be incentivized to retain new or existing consumers.

### **CONCLUSION**

The MOU between the FTC and the FDA should be amended to address the obesity epidemic in America. Fast food contributes to the rise in obesity, yet fast food advertisements continue to be regulated under the “reasonable consumer” standard employed by the FTC. If the FDA assumed more regulatory control of fast food advertisements, then those advertisements could disclose negative health consequences of fast food, which could educate, inform, and persuade consumers to make healthier decisions. Further, the FDA could ensure that consumers are not psychologically manipulated by fast food advertisements by prohibiting unrealistic advertising. Lastly, tax benefits for fast food advertisements should be eliminated because there

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<sup>114</sup> Zachary Crockett, *The Rise and Demise of Subway’s \$5 Dollar Footlong Promotion*, THE HUSTLE (Feb. 28, 2021), <https://thehustle.co/the-rise-and-demise-of-subways-5-footlong-promotion/>.

<sup>115</sup> Ilya Rahkovsky, Young Jo & Andrea Carlson, *What Drives Consumers to Purchase Convenience Foods?*, USDA (July 24, 2018), <https://www.usda.gov/media/blog/2018/07/24/what-drives-consumers-purchase-convenience-foods>.



should not be an incentive for fast food restaurants to entice new consumers or to retain existing consumers.