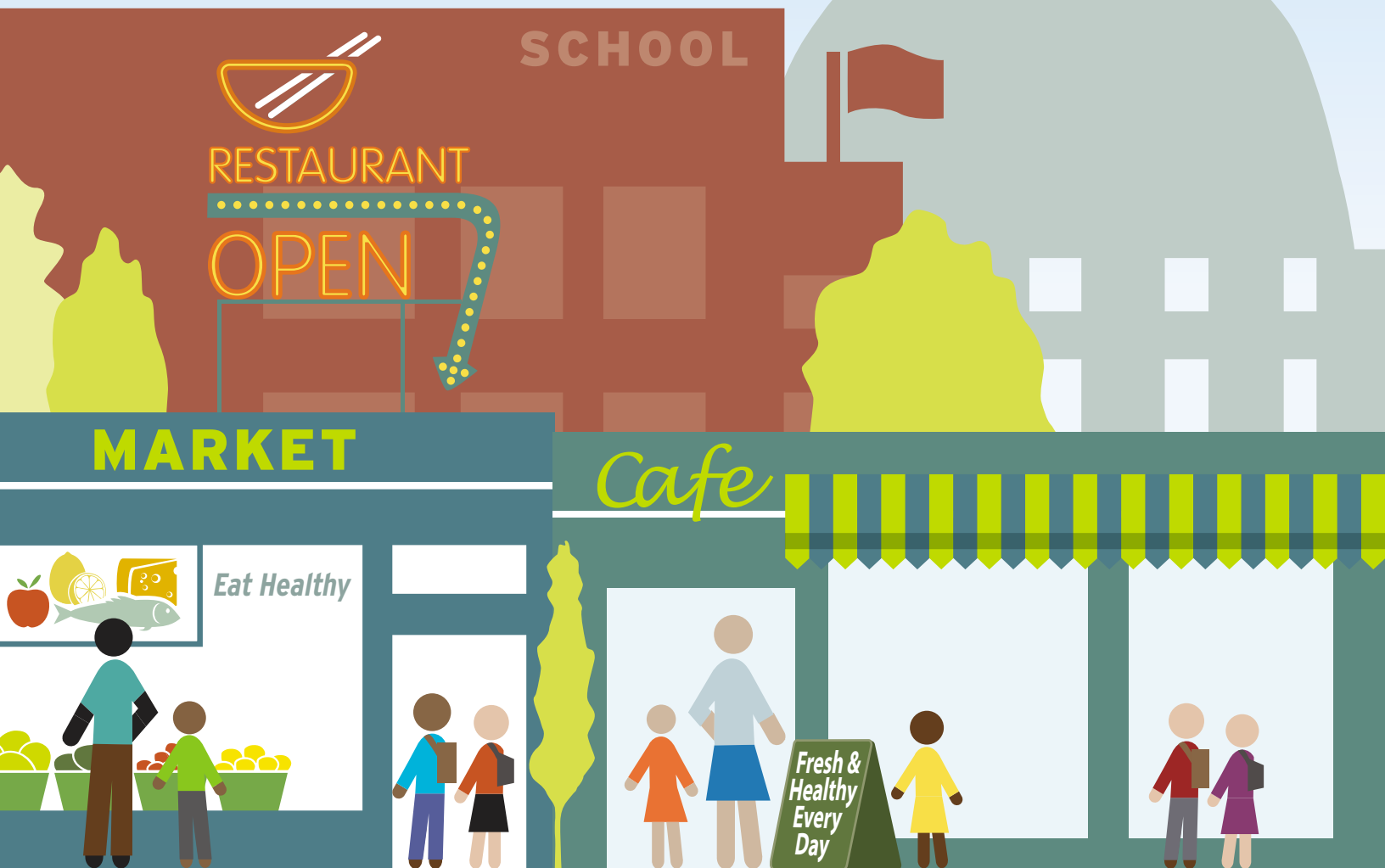


MARKETING MATTERS

A WHITE PAPER ON STRATEGIES TO REDUCE UNHEALTHY FOOD AND BEVERAGE MARKETING TO YOUNG CHILDREN



ChangeLab Solutions
Law & policy innovation for the common good.

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IMAGINE A COMMUNITY...



Retail Environment

Childcare & Schools

... with a healthy food marketing environment



Government Property

Community-Wide

EXECUTIVE SUMMARY

WHITE PAPER ON STRATEGIES TO REDUCE UNHEALTHY FOOD AND BEVERAGE MARKETING TO YOUNG CHILDREN

Background and Rationale

Policymakers, community organizations, and parents may wish to do something to address the ubiquity of food marketing to young children, but they may not know where to begin. This white paper provides an overview of the legal issues that most frequently arise when considering policies to address food marketing to young children. It also examines the specific channels through which young children are exposed to food marketing, and analyzes policy options to address marketing that occurs through each of those channels. These policy options are primarily local, though the paper also includes relevant state and federal policies. Because the paper stems from the Los Angeles County Department of Public Health's Early Childhood Obesity Prevention Initiative, its focus is on California, and on Los Angeles County in particular. However, much of the discussion is relevant for jurisdictions across the country.

The time to address food marketing is now. The obesity epidemic has dire health consequences for young children. In the United States, one out of three low-income children will be obese or overweight before his or her fifth birthday.¹ Obesity disproportionately impacts African-American and Latino children: nationally, 22 percent of Latino children and 20 percent of African-American children are obese, compared with 14 percent of white children and 9 percent of Asian children.² Obese children are at higher risk for serious health conditions such as type 2 diabetes, high blood pressure, and high cholesterol.³ And studies show that children who are obese are more likely to be obese as adults, which means they may face long-term health problems like diabetes, cancer, stroke, and heart disease.⁴

A large body of research outlines the impact of food marketing on the eating behaviors, preferences, and purchase requests of young children.⁵ Young children are especially vulnerable to marketing because children under about five years old lack the cognitive

ability to distinguish between entertainment or factual content and advertising, and children under about eight years old do not understand the persuasive intent of advertising.⁶ Food marketing in particular is especially problematic because the vast majority of food marketing to young kids promotes unhealthy foods and beverages.⁷ This combination of factors has led many groups to recommend limits on child-directed unhealthy food marketing.⁸ While other countries have taken action to limit such marketing,⁹ relatively little has been done in the United States.

Marketing Practices and Their Effects

Marketing is not just advertising in the traditional sense. Marketers use all of the “four Ps” – PRODUCT, PRICE, PLACE, and PROMOTION – to target young children with food-related marketing. From billboards to television to social media, in stores and restaurants, and on public transit, children are exposed to unhealthy food marketing almost everywhere in their communities. Food marketers seek to build brand loyalty among young children¹⁰ because doing so induces children to request, beg, and nag for specific products and brands.¹¹ At the same time, this marketing affects children’s eating behavior and weight status. For example, research shows that children request and consume more unhealthy food after seeing food advertisements.¹² Implementing policies to curb this marketing can therefore positively impact children’s health and well-being.

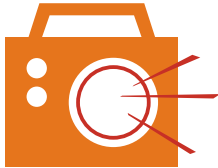
Policy Options

There are many channels through which young children are exposed to unhealthy food marketing, and there are a variety of policy options to address marketing through each channel. The viability of each option depends on legal, political, and practical considerations. For local governments, primary legal considerations include whether the federal or state government already regulates a particular marketing channel – as is the case with television, print, and digital media – and whether a policy will regulate speech. There are many non-speech marketing practices that local governments can address, as well as many areas over which local governments retain control, such as general land use and the use of government property. Local governments can also pursue any regulatory option as a voluntary policy.



Outdoor Advertising

Outdoor advertising takes many forms, and is one of the primary channels by which children are exposed to food marketing.¹³ Studies suggest an association between the number of outdoor food advertisements and obesity prevalence in the surrounding area.¹⁴ Policy options available to local jurisdictions to reduce the amount of outdoor advertising may include: **content-neutral regulation of outdoor signs**, for safety and aesthetic reasons; **voluntary restraints on billboard content by owners of billboards or by those buying billboard space**; and **local-government-funded public service announcements** related to healthy eating and physical activity.



Broadcast Media

Television advertisements remain the most common marketing channel used to reach children,¹⁵ with young children seeing an average of 10.9 food-related television advertisements each day.¹⁶ In the past few years, fast food restaurants have increasingly targeted children who are two to five years old, while decreasing advertisements aimed at older children.¹⁷ Television and other transmitted media are primarily regulated at the federal level, which means there is little room for local governments to directly regulate television advertising. They can, however, **enforce existing federal and state false advertising laws** and work with media outlets on **self-regulatory policies**.



Digital Media

Marketers increasingly use digital strategies to target young children. The majority of brands that most heavily market to children on television also have child-directed websites.¹⁸ In addition to more traditional advertising like banners on websites or advertisements during internet-streamed programs, digital marketing employs novel marketing techniques such as “advergames,” which are branded video games on the internet or on mobile devices. Federal and state laws govern many aspects of internet and mobile communications. Options for local government intervention may include **enforcement of existing federal and state false advertising laws** and **regulation of the local use of technologies that enable location-based marketing**.



Print Media

Marketing in print media, such as magazines and newspapers, is less common than in many other forms of media,¹⁹ particularly when it's directed at young children who cannot read. Nonetheless, there are still a number of child-oriented print publications, including over 160 magazines directed at children.²⁰ Though direct regulation by local governments is challenging, they can **encourage self-regulation by local print media outlets**.



Marketing in Childcare Settings and Schools

Young children spend a great deal of time either in childcare or in school, but there is a lack of data on the extent of food marketing in schools, and even less information about marketing in childcare settings. Legally, it is relatively easy for local governments to regulate marketing in public childcare settings or public schools. It is somewhat more challenging in private schools or childcare, but nonetheless there remain strategies available to local governments, including **setting nutrition standards, restricting food marketing in schools and childcare settings**, and **limiting screen time**, all to the extent allowed by state and federal law.



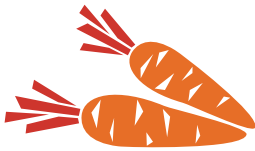
Government Procurement and Vending

Government agencies' purchasing decisions can affect marketing. Agencies purchase food products to provide meals to dependent residents, such as in public childcare settings, which impacts children's exposure to products and the attendant signage and packaging. Governments generally have the authority to choose which foods to purchase or to include contractual provisions limiting what vendors can sell on their properties. Accordingly, local governments can limit unhealthy food marketing to young children by **setting nutrition standards for food purchased by government to be distributed to dependent community members**, such as children in public childcare settings, and by **adopting healthy vending standards**, which would set nutrition standards for food sold on government property.



Government Property and Government Sponsorship

Many localities allow advertising, including advertising for unhealthy foods, on government property, such as in transit stations and on transit vehicles. Local governments and government agencies may also seek funding from private parties to support events, activities, or properties, which can provide valuable income but can raise concerns when the private party is a corporation that, for example, produces or sells unhealthy foods. Governments have varying degrees of authority to restrict advertisements on their own property, and different courts have reviewed regulation of advertisements on transit vehicles differently. Local jurisdictions' options include: **regulating the content of advertising on public property**, particularly on property that traditionally has not been open to all kinds of speech; **regulating advertising on public transit vehicles and on bus shelters/transit stations**; and **adopting a sponsorship policy** with clear criteria for selecting private sponsors.



Healthy Zoning

Land use planning can affect the extent to which young children are exposed to certain types of restaurants or retail outlets and their attendant signage. Localities have the power to regulate development in their community, and they can use zoning to determine how land may be used. Using this power, local jurisdictions can **limit unhealthy food outlets and mobile vendors near sites frequented by young children**, like childcare facilities or playgrounds.



In-Store and In-Restaurant Environments

In-store and in-restaurant environments are a hotbed for marketing to young children because marketers can utilize all four Ps of marketing – price, product, promotion, and place. For example, food items are placed at children's eye level, product packaging uses bright colors and characters that appeal to children, kids' meals include toys, and checkout aisles are stocked with candy and sodas. These environments are ripe for intervention by local governments. Opportunities include **addressing product placement on shelves and in checkout aisles, regulating signage** to promote healthier messages and create content-neutral restrictions, and **implementing nutrition standards for restaurant children's meals**.



Taxation and Tax Incentives

Tax policies affect the marketing of unhealthy foods and beverages by impacting price. Though young children do not often purchase items on their own, prices can influence the purchasing decisions made by their parents. Local governments can **impose taxes on sugar-sweetened beverages or unhealthy food**. Alternately, they can **impose a sales tax on advertising itself**.



Hospital Infant Formula Giveaways

Breastfeeding results in health benefits for infants, children, and mothers.²¹ Nonetheless, many hospitals provide mothers with free infant formula,²² which may negatively impact women's subsequent breastfeeding. There is room for local action to address this practice, including **voluntary programs to stop formula giveaways at local hospitals** and **prohibiting the giveaway of free infant formula by hospitals**.

This white paper provides detailed explanations of each of the above channels and policies. Many of the policies outlined have not yet been implemented, and therefore it is difficult to predict with certainty how they would be evaluated by a court were they to be challenged. However, local governments should not hesitate to take action to protect children's health by limiting marketing. This is particularly true with respect to settings in which marketing goes beyond speech, where laws that regulate business practices with a minimal effect on speech can be put into place. This white paper equips local jurisdictions with the preliminary tools needed to combat the pervasive marketing of unhealthy foods and beverages to young children.

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INTRODUCTION

Food marketing has a significant impact on the diet and health of children under five.

Research shows that food marketing affects children's preferences, purchase requests, and eating behavior,¹ and that children under eight years are especially vulnerable to marketing.² Moreover, the vast majority of food marketing features unhealthy foods and beverages.³ Unhealthy food is commonly defined as food that is high in calories, saturated fat, salt, and/or added sugar, and low in nutritional value. By bypassing parents and seeking to directly influence children's decision making about food, the marketing of these unhealthy foods undermines parents' efforts to ensure that children eat healthfully.⁴

In response to the myriad negative effects of unhealthy food marketing, leading groups have recommended limits on marketing to children. In 2006, the American Academy of Pediatrics produced an influential report that recommended a ban on unhealthy food advertising during children's television programs.⁵ The World Health Organization recommended in 2010 that governments set a national policy framework to decrease children's exposure to the marketing of unhealthy foods. And in 2011, an interagency working group of the Federal Trade Commission, U.S. Department of Agriculture, Food and Drug Administration, and Centers for Disease Control and Prevention released a set of principles declaring that child-directed food marketing should promote healthy products and limit the promotion of unhealthy foods.⁶

Childhood obesity and the importance of addressing food marketing

The obesity epidemic has dire health consequences for young children. In the United States, one out of three low-income children will be obese or overweight before his or her fifth birthday.⁷ Obesity disproportionately impacts African-American and Latino children: nationally, 22 percent of Latino children and 20 percent of African-American children are obese, compared with 14 percent of white children and 9 percent of Asian children.⁸ Obese children are at risk for serious health conditions such as type 2 diabetes, high blood pressure, and high cholesterol.⁹ Studies show that children who are obese are more likely to be obese as adults, which means they may face long-term health problems like diabetes, cancer, stroke, and heart disease.¹⁰ While there have been some recent reports of a reduction in obesity prevalence among two- to five-year-olds, experts caution that the data may be unreliable due to a small sample size and a lack of supporting evidence showing behavioral change that would lead to such a drop in early childhood obesity.¹¹ Studies using more robust data have found small decreases in childhood obesity, such as a drop in obesity from 20 percent to 17 percent among four-year-olds in the New York Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) between 2003 and 2011.¹² While this news is encouraging, the rates of obesity among children under five are still disconcertingly high.

Los Angeles County is among the many local jurisdictions nationwide that are struggling with childhood obesity. Local data suggest that the obesity epidemic has taken a firm hold among the very young child population. The county is home to approximately 650,000 children under five years old.¹³ Local WIC programs, which serve more than half of all children in this age group in the county, have found that approximately 20 percent of three- and four-year-olds are obese;¹⁴ this rate is nearly as high as that seen among adults (24 percent).¹⁵ For three-year-olds, rates were highest among Latino children (23 percent in 2012), followed by African-American (14 percent), white (14 percent), and Asian children (14 percent).¹⁶ In addition, obesity rates among three- and four-year-olds served by WIC in Los Angeles County steadily increased between 2003 and 2009 before stabilizing between 2009 and 2013.¹⁷

Overview of marketing practices and their impact on young children

In spite of the high rates of childhood obesity, food marketing continues to reach children through multiple channels. It builds brand loyalty, profoundly influences food preferences and eating behaviors at a very young age, and has been found deceptive by the Federal Trade Commission for children under six.¹⁸

Marketing consists of more than just traditional advertising. The four Ps – **product, price, place, and promotion** – are a common framework to describe marketing practices.



- **PRODUCT** refers to the food or beverage being sold, though research shows that child-directed advertisements rarely focus on the product itself. For example, a 2013 analysis of messages in advertising for kids' meals on children's television networks found that over 70 percent of ads have a "fun/cool" message, and 70 percent have a "humor" message.¹⁹



- Marketers can manipulate **PRICE** to make consumers feel they are getting good value for their money. For example, value meals and increased portion sizes are innovative marketing practices that expanded dramatically in the 1980s and 1990s.²⁰



- **PLACE** can refer broadly to the channel or venue where a product is sold, such as on television or in a store, as well to as the specific place within a store where a product is stocked. In a 2013 survey of stores that sell tobacco in LA County, researchers found that 53 percent also sell sugary drinks near the checkout counter and are located near schools.²¹



- **PROMOTION** refers to public communications about the product, such as through advertisements, licensing deals, endorsements, and sponsorships.²² For example, research has shown that children prefer food that comes in packages featuring licensed characters, as opposed to food with plain packaging.²³

Young children are flooded with food-related marketing through a variety of channels. Television is the most common means by which children are exposed to food advertising.²⁴ A recent study found that children aged two to five years saw an average of 10.9 food and beverage ads per day on television.²⁵ Marketers are increasingly reaching children online and through social media. For example, fast food restaurants' web-based marketing targets children as young as two years,²⁶ and almost all of the top fast food companies have Facebook,

Twitter, and YouTube accounts.²⁷ Children are also exposed to food marketing on the radio, in print, in school and childcare settings, in stores and restaurants, on outdoor billboards and signs, and in public transit vehicles and stations, among other places.

Food marketing has a significant effect on children's preferences and purchase requests. Food marketers are especially interested in building brand loyalty among young children²⁸ because research shows that children as young as two years can recognize brand names, logos, packaging, and characters; have beliefs about specific brands; and associate brands with specific products.²⁹ For example, a study of three- to five-year-olds found that children preferred food wrapped in McDonald's packaging over the exact same food wrapped in plain packaging.³⁰ This brand recognition induces children to request, beg, and nag for specific products and brands.³¹

Food marketing also impacts children's eating behavior and weight status. Research shows that children request and consume more unhealthy food after seeing food advertisements.³² One study found that children exposed to food advertisements during a television program ate 45 percent more food than children exposed to nonfood advertising.³³ Another study found that children aged four to 12 years consumed more of the brands of unhealthy foods they saw advertised, such as sugary cereals and fast foods.³⁴ Other studies have linked brand recognition to differences in eating behavior and weight status by age four.³⁵ However, children do not respond solely to unhealthy food marketing. One study found that advertising of healthy foods increased healthy eating in children aged three to six years.³⁶

The marketing of unhealthy products to young children is especially troubling because young children are more susceptible to marketing than older youth and adults.³⁷ Numerous studies show that young children do not understand the purpose of advertising.³⁸ Preschool-aged children are especially vulnerable because they lack the cognitive ability to distinguish between advertising and other forms of information.³⁹ In fact, preschool-aged children have trouble understanding the difference between reality and television programming, even when that programming is animated.⁴⁰ This problem is exacerbated when companies intentionally try to deceive young children through marketing. The evidence supporting the deceptiveness of advertising to young children is so compelling that the Federal Trade Commission held hearings and concluded in 1970 that it was deceptive to advertise to children under six years old.⁴¹ Sweden, Norway, Greece, Denmark, Belgium,⁴² Quebec, and the UK⁴³ have all either completely banned or placed legal limits on child-directed advertising.

Some argue that parents should bear the responsibility for protecting their children from unhealthy food marketing, or for ensuring that their children eat healthfully even in the face of such marketing. But food companies work hard to convince even very young children that they, rather than their parents, should be making decisions about what they are eating.⁴⁴ Marketers also have at their disposal a wealth of resources, financial and otherwise, that parents do not, and thus are incredibly savvy about how to influence children. They have developed sophisticated means of enhancing “pester power,” which is the ability of children to influence family purchases by nagging and pestering their parents.⁴⁵ And in addition to being pervasive, much unhealthy food marketing is intentionally stealthy, which makes it even more difficult for parents to intervene.⁴⁶ Moreover, many of the products specifically designed for children and marketed as “healthy” are in fact not. The Environmental Working Group recently found that a single serving of many cereals marketed to children contained as much sugar as three chocolate chip cookies, even when their packaging claimed they were a “good source of fiber.”⁴⁷ In combination, these factors make it difficult for even the best informed and most well intentioned of parents to protect their children from the effects of unhealthy food marketing.

CHANGELAB SOLUTIONS RESOURCES

- Ethical and Responsible Food and Beverage Marketing to Children and Adolescents
www.changelabsolutions.org/publications/ethical-food-marketing
- Targeted Marketing of Junk Food to Ethnic Minority Youth
www.changelabsolutions.org/publications/junk-food-minority-youth

GIVEN THE UBIQUITOUS NATURE OF UNHEALTHY FOOD MARKETING, and because poor eating habits and the marketing of unhealthy products to young children are connected, policies addressing food marketing are an important part of stemming the tide of childhood obesity. Though many forms of marketing occur in nationwide media, local communities also bear the burden. This is particularly true in a large urban county like Los Angeles, in which there are ample opportunities, ranging from billboards to public transit and beyond, for food marketers to reach young children and their families.

While the pervasiveness of unhealthy food marketing is troubling, it also presents opportunities for local action. This white paper focuses primarily on local policy options – for cities and counties – to address food marketing to young children, while touching on relevant state and federal policies. The goal of the paper is to provide an overview of the legal issues that arise with respect to food marketing policies, as well as to examine the specific channels through which young children are exposed to food marketing. For each channel, the paper will review policy options and analyze their practical and legal feasibility. At the end of each section of the paper, there is a list of potential policy strategies, accompanied by a traffic light, as outlined in the key below.

This paper was developed by ChangeLab Solutions through a contract with the Los Angeles County Department of Public Health and funding from First 5 Los Angeles.

This focus of this paper is on regulatory policies, which are binding and enforceable policies enacted by local government bodies. Voluntary approaches are noted only when regulatory policies would not be feasible. However, any regulatory approach could also be implemented as a voluntary policy if desired.

While this white paper is meant to provide an overview of available policy approaches and a framework for how to begin to pursue those approaches, any interested jurisdiction should consult with local legal counsel, such as a city attorney or county counsel's office, before taking action.

This white paper summarizes our research on the public health problem surrounding food marketing to young children, and the rationale for adopting policy strategies to address this problem. It is intended for broad distribution to the public. Our presentation of these options is based on our independent and objective analysis of the relevant law, evidence, and available data. There are arguments on all sides of the debate about policy options to address food marketing to young children. Readers should consider all of the evidence and decide for themselves which approach is appropriate for their local jurisdiction.

POTENTIAL STRATEGIES



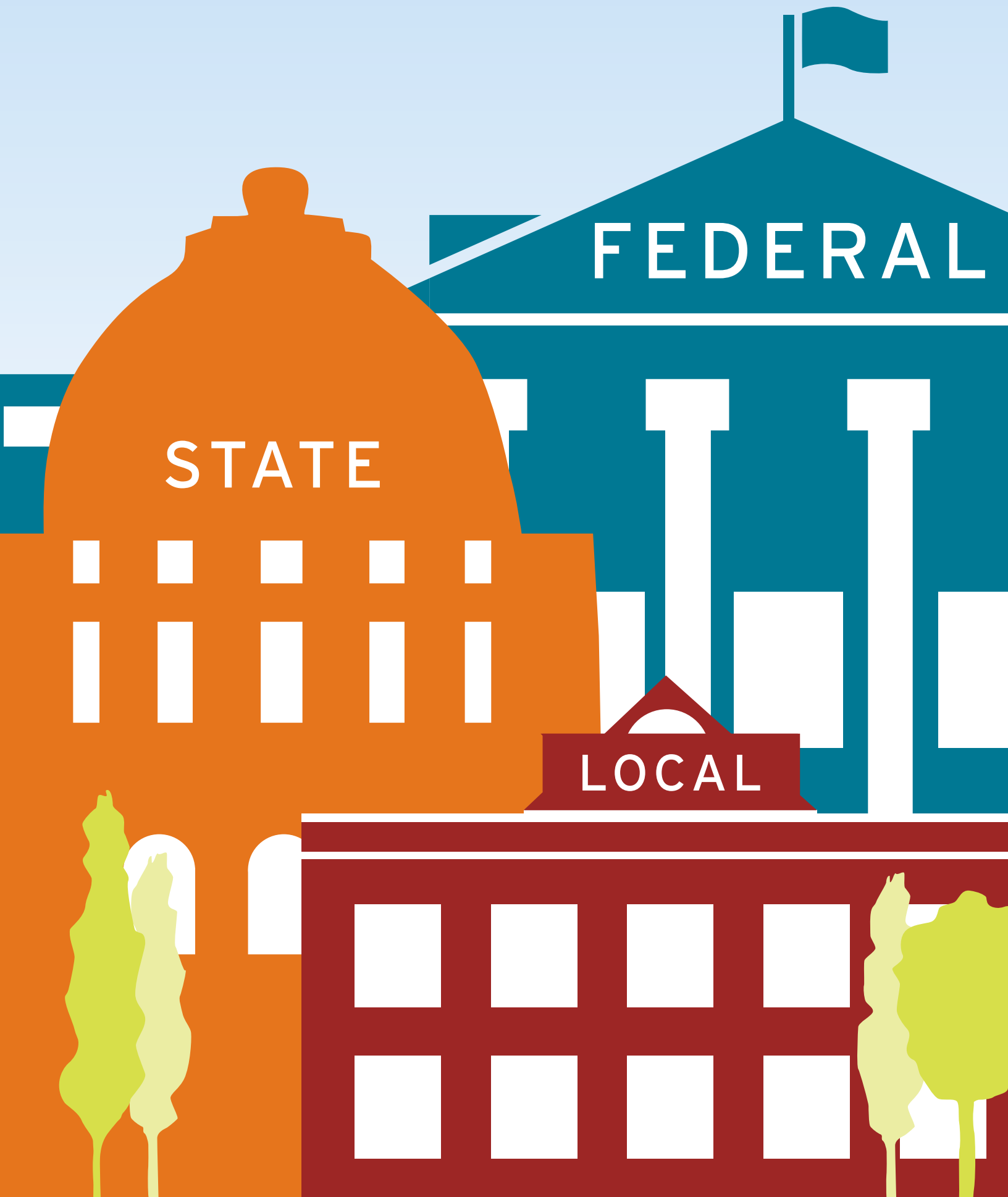
GREEN LIGHTS indicate the highest level of feasibility and the lowest level of risk.



YELLOW LIGHTS indicate moderate levels of feasibility and risk.



RED LIGHTS indicate low levels of feasibility and/or high levels of risk.



STATE

FEDERAL

LOCAL

OVERVIEW OF RELEVANT LAW

Before considering legislative or regulatory policies that address food marketing to children, it is necessary to understand what legal authority different government bodies have to enact such policies.

Thus, any discussion of policy options requires a comprehension of the legal framework within which the various levels of government in the United States act. This legal overview will set the stage for the discussion of specific policy options, and serves as a reference for the legal analyses offered throughout this white paper.

In the United States legal system, the federal Constitution governs above all else. No level of government, whether federal, state, or local, may pass laws that conflict with the Constitution. The Supremacy Clause⁴⁸ then sets the hierarchy of laws outside the Constitution. It designates federal law as the “supreme law of the land,” which means that federal law takes precedence over state and local laws.⁴⁹ Federal law often takes the form of acts of Congress, or statutes. Regulations enacted by federal agencies to give effect to those congressional acts fall below statutes in the hierarchy, but they trump laws enacted by state or local governments. State law is next in the hierarchy, with local law falling lowest on the ladder.

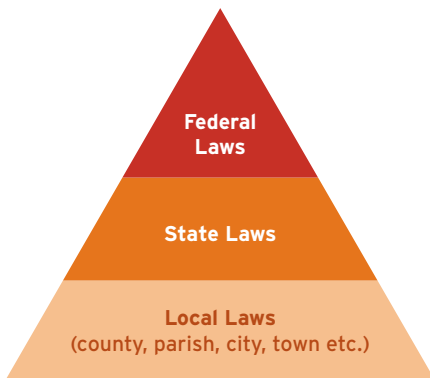
That does not, however, mean that local governments lack authority to enact binding laws to address important issues affecting their communities. Particularly with respect to public health issues, local authorities retain a great deal of power.

Police power and the authority of local government

The federal government in the United States has only those powers specifically assigned to it by the Constitution.⁵⁰ All other powers are reserved for the states or the people.⁵¹ State and local governments have what is called “police power,” which means they have authority to enact regulations that protect the public’s health, safety, and welfare. Local governments traditionally have used this police power to enact a wide variety of measures promoting public health, from indoor smoking bans to funding for bicycle and pedestrian infrastructure, to zoning that allows farmer’s markets in residential areas. Police power includes the authority to restrict the marketing of unhealthy foods and beverages to children.

Limits on local authority

In spite of the broad nature of local government’s power to regulate for the benefit of the public’s health, this power has limits.



Preemption

Derived from the Supremacy Clause, preemption is a legal principle that allows a higher level of government to limit, or even eliminate, the power of a lower level of government to regulate a certain issue. Under our federalist system of government, if a state or local law conflicts with a federal law, the federal law trumps the lower level law. Similarly, if a city council or county board of supervisors passes a law that conflicts with a state law, the state law generally trumps the local law. Whether a federal or state law preempts local authority in a given instance requires close examination of the relevant laws, and often requires a complex analysis.

There are several forms of preemption. “**Express preemption**” occurs when a law explicitly states that it is meant to preempt a lower-level lawmaking authority. For example, in 2013, the Mississippi Legislature enacted a law that, in part, prohibits cities and counties from passing any laws that:

- Prohibit a restaurant or food store from using incentives, such as giving away toys to sell unhealthy food
- Require restaurants or other food retailers to disclose nutritional information to consumers
- Restrict the portion sizes of food or nonalcoholic beverages⁵²

This law very explicitly limits local power, and is unusual in that it was enacted even in the absence of statewide regulation of the types of activities it prevents localities from regulating.*

The original California menu labeling bill also explicitly preempted local menu labeling regulations, but that law has since been repealed in anticipation of the new federal menu labeling law.⁵³

“Implied preemption” is more difficult to determine in advance, because it is not always immediately apparent when reading a statute. A court may find that the legislature intended to preempt local regulatory authority with respect to “the whole purpose and scope of the legislative scheme.”⁵⁴ Or a court might find implied preemption if the state passes a comprehensive set of laws that fully regulates a particular type of activity or commerce.

Preemption may be broad or narrow, depending on how a law is worded. For example, state or local governments may be preempted from passing or enforcing *any* laws or regulations on an issue, or they may be preempted only from passing laws on *some parts* of an issue. Sometimes the federal or state government enacts a law that sets minimum standards, but allows a lower level of government to set higher standards. This type of preemption may be referred to as “floor preemption.” For example, the U.S. Department of Agriculture (USDA), when setting nutrition standards for “competitive foods” (those foods sold outside of the school breakfast and lunch programs) sold on school campuses, expressly authorizes states or schools to set higher standards. The rule says that “[s]tate agencies and/or local educational agencies may impose additional restrictions on competitive foods, provided that they are not inconsistent with the requirements of this part.”⁵⁵ “Ceiling preemption,” in contrast, prohibits lower levels of government from requiring anything more than or different from what the higher-level law requires. Ceiling preemption can also completely prohibit lower-level governments from passing any kind of law regulating the topic or area in question.

Freedom of speech

What the First Amendment protects: speech versus business practices

With respect to the regulation of marketing practices, the most prominent legal hurdle is often the First Amendment to the

*Such explicit preemption, when enacted in the absence of state regulation on the same topic, is sometimes called “null preemption.” It can be problematic from a public health perspective because it may create a regulatory void, in which the state has not legislated on a particular subject but localities may not do so either.

CALIFORNIA RETAIL FOOD CODE

The statute most likely to raise preemption concerns with respect to local regulation of food retail environments in California is the state Retail Food Code (RFC).⁵⁶ The code states that “it is the intent of the legislature to occupy the whole field of health and sanitation standards for retail food facilities, and the standards set forth ... shall be exclusive of all local health and sanitation standards relating to retail food facilities.”⁵⁷ Given this explicit preemption language, one could argue that local jurisdictions are limited in their ability to enact obesity-prevention laws that regulate retail food facilities such as restaurants. However, under California law, that preemption argument relies on the assumption that obesity-related public health measures fall within the field of “health and sanitation standards for retail food facilities.” Because it is not clear that obesity and chronic disease prevention are “health and sanitation” issues as contemplated by the RFC, the explicit preemption language may not pose a problem for local governments.

The content and purpose of the RFC clarifies its reach. In enacting the code, the legislature declared that “the public health interest requires that there be uniform statewide health and sanitation standards for retail food facilities to assure the people of this state that the food will be pure, safe, and unadulterated.”⁵⁸ This declaration suggests that the preempted “field,” as it was understood by the legislature, relates to purity, safety, and adulteration of food. An examination of the content of the code as a whole also suggests that “health and sanitation standards” refers to standards related to food safety and foodborne illness, rather than to obesity-prevention-related standards. The Retail Food Code addresses topics such as food safety certification, employee health and hygiene, cleaning and sanitizing of equipment, and general food safety requirements.⁵⁹ The term imminent health hazard is defined as “a significant threat or danger to health” that results from a “situation that can cause food infection, food intoxication, disease transmission, vermin infestation, or hazardous condition that requires immediate correction or cessation of operation to prevent injury, illness, or death.”⁶⁰ There is no reference to chronic health issues related to poor nutrition.

The governor’s message to the senate upon his signing of the Retail Food Code provides further support for the interpretation of the code as a comprehensive food safety law, but not more. “Protecting the safety of California’s retail food is critical to ensuring the health of California’s consumers,”⁶¹ he wrote. “[T]his new law was crafted to ensure that consumers are protected when they eat at retail food facilities.”⁶² Moreover, the code’s statement of purpose is as follows: “The purpose of this part is to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented through adoption of science-based standards.”⁶³ This clear statement of intent further suggests that the code is meant to address issues of food safety and foodborne illness, which may mean that preemption is less of a concern with respect to measures enacted to prevent chronic disease and obesity.

U.S. Constitution. Even if the authority to regulate marketing for public health reasons falls within local government's police power, such regulation is not legal if it violates the First Amendment.* The First Amendment forbids government from making a law "abridging the freedom of speech."⁶⁴ In other words, the government cannot forbid a person from expressing a particular idea, such as a political or religious opinion, or from expressing herself artistically.

Traditionally, the Supreme Court interpreted the First Amendment as applying only to "core" (political, religious, artistic) types of speech. However, in the mid-1970s, the Court extended this protection to "commercial speech," or advertising. The reasoning behind the protection of commercial speech was, originally, to protect the listener – the consumer – and to ensure that information about the marketplace was free flowing. But in recent years, the Court has become increasingly protective of commercial speakers – that is, the corporations doing the advertising. As a result, it has become much more difficult for the government to regulate advertising.

In spite of this heightened protection of commercial speech, it is important to note that not everything that businesses do is considered "speech." Much of what they do, including activities in the realm of marketing, falls instead into the category of "business practices" or "business conduct." Such practices are not protected by the First Amendment, so government can more easily regulate them. For example, zoning laws that limit the number of fast food restaurants, or regulations that set minimum price requirements or limit portion sizes, do not raise free speech concerns. The line between speech and business practices is not always clear, particularly when it comes to marketing, but this white paper will elaborate on some of the types of business practices that government may be able to regulate without raising freedom of speech concerns.

Regulating commercial speech: the *Central Hudson* test

When the government does attempt to regulate commercial speech, a court will usually review such regulation using a test set out in the Supreme Court's 1980 decision in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*.⁶⁵ The test asks four questions:

1. The first prong of the *Central Hudson* test asks whether the speech is **false, misleading, or related to unlawful activity**.⁶⁶ The First

*This is true with respect to regulation at the federal or state level as well. The First Amendment limits the power of all levels of government to regulate speech.

Amendment does not protect such speech, and it may be freely regulated.⁶⁷ If the regulated speech is not false, misleading, or related to unlawful activity, a court will proceed to the remaining three parts of the test.

2. The next question asks whether the government has a **substantial interest in regulating the speech**.⁶⁸ Courts usually find that the government has a substantial interest with respect to protecting the public's health.
3. If the government's interest is substantial, the third question is whether the regulation of speech **directly and materially advances that substantial interest**.⁶⁹ While empirical studies are not necessary to meet this criterion, the government must have some evidence to show that the regulation will solve the problem.
4. If the court finds that the regulation does solve the problem, the final question is whether the regulation is **narrowly tailored to solve that problem**.⁷⁰ This prong looks at whether the regulation applies to too much other speech.

APPLYING CENTRAL HUDSON: LORILLARD

The 2001 case of *Lorillard Tobacco Co. v. Reilly* often comes up in analyses of regulations that address marketing to children. *Lorillard* applied the *Central Hudson* test in striking down a Massachusetts law that banned tobacco billboards within 1,000 feet of schools. Under the fourth prong of *Central Hudson*, the Supreme Court found that the law would have interfered too much with speech intended for adults.⁷¹ The standard articulated in *Lorillard* requires (for speech that is not false, deceptive, or related to illegal activity) that the government (1) have an important interest that is (2) directly and materially advanced in a way that (3) does not suppress much more speech than necessary.⁷²

With respect to any regulation that addresses food marketing to children, there are several possible government interests, including protecting kids from unhealthy products, reducing kids' consumption of those products, and, most broadly, reducing childhood obesity. Though the last of those interests might be the most compelling, it will also be the most difficult to justify with evidence; the government would have to show that removing unhealthy food signage would lead to a reduction in childhood obesity, and this will be difficult to do. Even if the government asserted, and the court accepted as valid, a more specific interest, such as protecting kids from the marketing of unhealthy products, the final prong of the *Central Hudson* test poses a serious challenge, because so much marketing that appeals to children can be said to be directed to adults as well.

A regulation must pass all four prongs of the test to be upheld under the First Amendment. While courts traditionally have referred to this test as “intermediate scrutiny,” in practice it has become a difficult standard to meet, especially in recent decisions. Of note, however, is a theory about how this test would apply to a regulation of advertising specifically targeted at young children. Because research has shown that advertising directly to young children is inherently misleading, such advertising may not be protected by the First Amendment at all.⁷³ In other words, advertising to young children would not receive constitutional protection at all under the first prong of the *Central Hudson* test and, at least for First Amendment purposes, the government would have a free hand in regulating it.⁷⁴ It is important to recognize, however, that this theory has not been tested, and it is impossible to predict with certainty how a court would rule.

Regulating commercial speech: the *O’Brien* test
Business activity that has an incidental effect on speech

There is a different standard of review for government regulation of “expressive conduct” – i.e., behavior that is not speech but that has a communicative component.⁷⁵ The standard of review is known as the “*O’Brien* test” because it was first articulated by the Supreme Court in *United States v. O’Brien* (a 1968 case involving an antiwar activist who burned his draft card, violating federal selective service laws).⁷⁶

Under the *O’Brien* test, a court will uphold a regulation if:

1. it is within the constitutional power of the government,
2. it furthers a substantial government interest,
3. that interest is unrelated to the suppression of free expression,
4. the effect on First Amendment freedoms is no greater than necessary to further the government interest,⁷⁷ and
5. there are ample channels available elsewhere for the regulated expression.⁷⁸

This is a relatively lenient standard of review, especially (in recent years) as compared with *Central Hudson*. In *Lorillard*, the Supreme Court used this test to uphold part of a Massachusetts law banning self-service cigarette displays because the justification for the ban was to prevent access by minors, not to suppress speech.⁷⁹ That nonspeech justification distinguished the self-service ban from the advertising restrictions, which, as noted, were assessed using the more stringent *Central Hudson* test. The *O’Brien* test is most relevant when the line between business practices and speech is blurry. Though business practices

do not implicate the First Amendment, when regulation of business practices has an incidental effect on speech a court might look to *O'Brien* to determine whether the First Amendment stands in the way.

Note that as a textual matter, the *Central Hudson* and *O'Brien* standards have a lot in common; as a practical matter, *Central Hudson* is a more significant hurdle.

Regulating commercial speech: forum analysis

Where is the speech occurring?

The validity of regulations on commercial speech also depends on where the regulated speech occurs. For the purposes of First Amendment analyses, public property may be classified as one of several types of fora. The basic distinction is between a “public forum” (where speakers have the greatest protection) and a “nonpublic forum” (where government has the greatest leeway). Many courts have recognized one or two additional categories as well. The scrutiny a court will apply to a speech restriction on public property depends on the type of forum:

1. **Traditional public forum:** These are spaces historically open for assembly and debate, like streets and parks. In these spaces, courts apply strict scrutiny to attempts to restrict political or artistic speech on the basis of its content,⁸⁰ or *Central Hudson* “heightened” scrutiny if such content-based regulations burden commercial speech.⁸¹
2. **Designated public forum:** These are spaces that are not historically open to public gathering and debate but that government has purposely opened as public fora, like school board meetings with open comment periods, or certain bulletin boards in public buildings, or certain areas in airports.⁸² A designated public forum may be limited to certain classes of speakers or areas of speech – in which case it is known as a “limited public forum” – or it may be unlimited, in which case it functions like a traditional public forum. If a court determines that a site is a limited public forum, it will apply strict scrutiny to regulations that distinguish based on the viewpoints expressed by political or artistic speakers who fall within the class of speakers to whom the forum was opened.⁸³ It is not clear how a court would act faced with a commercial speech restriction in a limited public forum, nor is it clear what it means to have a “viewpoint” in the context of commercial speech,⁸⁴ but the level of scrutiny should not exceed that of *Central Hudson*.
3. **Nonpublic forum:** These are spaces not open to the general public for speech purposes – for example, public schools or military bases.⁸⁵ A restriction on speech in these venues need only be reasonable and not an effort to suppress expression based on viewpoint.⁸⁶

With respect to regulation of commercial speech and food marketing aimed at kids in places like schools or public childcare centers, the distinctions between these types of fora become particularly relevant. They also come into play when considering speech on public transit, or private sponsorship of public spaces or events. Regulation in each of these venues is discussed in further detail below.

Regulating speech: government speech doctrine

What happens when the government itself is speaking?

The government has complete leeway to say whatever it would like when it comes to its own messages. The issue of government speech most often arises when the government compels another party to subsidize speech that is then attributed to the government. The Supreme Court has found that even compelled subsidization of government speech does not violate the First Amendment.⁸⁷ The government is therefore free to issue its own messages countering commercial speech, even when those messages are subsidized by private parties, and to inform the public about any number of issues, including the health dangers of excessive consumption of certain foods or beverages. Such speech may be used to counter the influence of food marketing. Examples of government speech include public service announcements, government health recommendations, signage or billboards attributed to the government, and government-funded reports.

Regulating speech: compelled speech

Requiring companies to say things they otherwise wouldn't say

In certain instances, the government may wish to compel certain forms of speech. Product labeling laws in the food, alcohol, and tobacco contexts are examples of speech required by government regulation. Compelled speech also has First Amendment implications, as the right to speak can include the right not to speak. Nonetheless, laws requiring the disclosure of factual, uncontroversial information need to clear only a low First Amendment hurdle, at least if the government's purpose in mandating the disclosure is preventing consumer deception.⁸⁸ If the required speech can be characterized as an opinion, rather than fact, the First Amendment may pose more of a challenge. The subject of compelled speech will be discussed in further detail in subsequent sections of this white paper.

Regulation of interstate commerce: the Dormant Commerce Clause

In addition to freedom of speech, a further limit on local government power stems from Congress's constitutional authority to regulate commerce "among the several States."⁸⁹ Over the years, courts have ruled that this means there are limits on how far an individual state or locality can go in regulating commerce. This implicit limitation on state and local power is referred to as the "Dormant Commerce Clause," and it has several practical effects.

First, the Dormant Commerce Clause means that states and localities can't pass laws that overtly discriminate against out-of-state businesses, such as (for example) by prohibiting the sale of milk processed more than five miles from the city center.⁹⁰ Second, it means that even state or local laws that are not overtly discriminatory may be challenged if they place an incidental burden on interstate commerce. In such instances, a court will weigh the benefits of the law to the state or locality against the negative effects of the law on interstate commerce.⁹¹ In most cases, the benefit of local laws to protect the public's health will outweigh the burden on interstate commerce, and the law will be upheld.⁹² Regardless, opponents of marketing-related policies that could impact interstate commerce may raise a challenge based on the Dormant Commerce Clause. The potential for such challenges will be discussed further below.

Unconstitutional conditions

Another limit on local government power, as well as on that of states and the federal government, is the doctrine of "unconstitutional conditions." This doctrine prohibits (any level of) government from conditioning the grant of a benefit on the recipient's surrender of a constitutional right.⁹³ In other words, the government cannot avoid legal limits on its power by using a contract rather than by enacting a law. In the marketing context, this doctrine most often arises with respect to the First Amendment. In most cases, if the government cannot directly regulate speech in a given area, it also cannot use a contract to limit the contracting party's speech, nor can it deny benefits on a basis that infringes on a constitutional right. For example, the Supreme Court ruled that a government entity could not condition funding to HIV and AIDS programs on the programs' adoption of an unrelated policy explicitly opposing prostitution.⁹⁴

Consumer protection statutes

In addition to direct regulation, another means by which local government can impact food marketing to young children is by enforcing existing state consumer protection statutes. Consumer protection laws are enacted to make the relationship between consumers and businesses more equitable.⁹⁵ They also provide remedies for consumers who have been subjected to deceptive trade practices.⁹⁶ Each state has its own consumer protection statute or statutes, often known as unfair and deceptive acts and practices (UDAP) laws. These laws vary from state to state, but all give state agencies enforcement authority, meaning that a government official (usually the attorney general) has the power to seek orders prohibiting a commercial actor from engaging in an unfair, deceptive, or (in some states) unlawful practice, and to seek civil penalties (monetary fines) for violations.⁹⁷

California has two consumer protection statutes relevant to food and beverage marketing: a general unfair competition law⁹⁸ and a law specific to false advertising.⁹⁹ These statutes prohibit any “unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising ...”¹⁰⁰ In addition to the attorney general, these laws grant enforcement authority to a district attorney, county counsel (authorized by agreement with the district attorney in actions involving violation of a county ordinance), and city attorney of cities with a population in excess of 750,000.¹⁰¹ This means that local jurisdictions have the ability to take action against marketing that violates state consumer protection laws. A thorough discussion of consumer protection laws is beyond the scope of this paper, but it is worth keeping in mind that such laws may be used to combat most instances of deceptive or misleading marketing, regardless of the audience and regardless of the type of marketing. Though they come into play only after the marketing already has happened, regular enforcement of these laws may have a deterrent effect. When relevant, the enforcement of consumer protection statutes by local government will be discussed in further detail below.

CHANGELAB SOLUTIONS RESOURCES:

- First Amendment FAQ
www.changelabsolutions.org/publications/first-amendment-faqs
- Understanding Preemption – Fact Sheet Series
www.changelabsolutions.org/publications/understanding-preemption
- Consumer Protection – State Attorneys General as Allies in Obesity Prevention
www.changelabsolutions.org/publications/state-attorneys-general-allies-obesity-prevention
- The New First Amendment and Its Implications for Combating Obesity through Regulation of Advertising
www.changelabsolutions.org/publications/new-first-amendment

USING THE ABOVE LEGAL CONCEPTS AS A FRAMEWORK, the remainder of this white paper will discuss potential policy strategies to address food marketing to young children. The strategies are grouped with the marketing channels to which they might pertain. Different strategies have varying degrees of feasibility, both legally and politically. Some strategies are voluntary, and some are regulatory. Some can be enacted at the local level, and some will require state-level or federal action. Of course, any specific actions taken to address food marketing to young children should be part of a broader strategy, as regulating marketing in one channel or venue may affect the type or amount of marketing in another channel.

The paper is focused on California and on Los Angeles County in particular, but much of the discussion will be relevant for jurisdictions across the country.

STUDIES SHOW THAT
SUGARY BEVERAGES
CONTRIBUTE TO
OBESITY

MARKET



Eat Healthy



Cafe



*Fresh &
Healthy
Every
Day*



OUTDOOR ADVERTISING

Outdoor advertising can take many forms, from billboards to bus benches to signage posted on brick-and-mortar stores.

A 2012 study of 2,454 parents of children aged two to 17 years found that billboards are one of the primary channels by which children are exposed to food marketing.¹⁰² Approximately 80 percent of all fast food restaurants nationwide use exterior signage to promote their products.¹⁰³ A 2013 study of over 7,000 California stores that sell tobacco – including convenience, supermarket, liquor, tobacco, small market, discount, drug, and big-box stores – found that 70 percent of stores in Los Angeles County have exterior advertising that promotes

POTENTIAL STRATEGIES

- **Content-neutral regulation of billboard locations** (for safety and aesthetic reasons)
- **Content-neutral regulation of electronic billboards** (for safety and aesthetic reasons)
- **Content-neutral regulation of sandwich boards and other non-billboard outdoor signs** (for safety and aesthetic reasons)
- **Voluntary restraints on billboard content by owners of billboards or by those buying billboard space** (encouraged by local government)
- **Local-government-funded public service announcements** (related to healthy eating and physical activity)

unhealthy products, while only 12 percent have exterior advertising for healthy products.¹⁰⁴ Many of these stores are fewer than 1,000 feet away from schools.¹⁰⁵ Research shows that there is a higher rate of unhealthy food advertisements in low-income neighborhoods than in higher income neighborhoods.¹⁰⁶ These trends are disturbing because recent studies suggest an association between the number of outdoor food advertisements and obesity prevalence in the surrounding area.¹⁰⁷ For example, studies show that outdoor food advertising is associated with greater rates of soda consumption and obesity.¹⁰⁸ This section outlines policy options to address food marketing in outdoor advertising.

Overview of legal issues

Local restrictions on outdoor advertising, including billboards, signs, and sandwich boards, would most likely be reviewed using the *Central Hudson* test, as articulated in *Lorillard*.¹⁰⁹ Again, that standard requires (for speech that is not false, deceptive, or related to illegal activity) that the government (1) have an important interest that is (2) directly and materially advanced in a way that (3) does not suppress much more speech than necessary.

However, restrictions on outdoor signage are somewhat more likely to survive review than other kinds of government restrictions on speech.¹¹⁰ In a 1981 case, the Supreme Court upheld a San Diego ordinance that prohibited many billboards but exempted others, including onsite advertising.¹¹¹ The Court ruled that the city had reasonably determined that billboards posed a threat to traffic safety and were aesthetically harmful, and that those safety and aesthetic concerns were valid reasons to allow billboards in some places but not in others.¹¹² The Court further ruled that the city could not favor commercial signs over noncommercial signs in enacting signage regulations.¹¹³ As a result, localities have had a relatively free hand in enacting regulations of outdoor signage for reasons unrelated to speech.

Regulating sign and billboard location

Like many cities around the country, Los Angeles and other cities in Los Angeles County already regulate outdoor commercial signs extensively.¹¹⁴ These regulations do not distinguish between signs based on their content.¹¹⁵ For example, Los Angeles does not allow off-site billboards, digital signs, and “supergraphics”^{116*} in most areas of the city.¹¹⁷

* “Supergraphics” are signs that exceed the size, location, and other restrictions for wall signs, temporary signs, off-site signs, and murals, such as large ads that appear on walls.

Generally, regulation of outdoor signage is legally viable if such regulation is based solely on safety or aesthetic concerns. It is also permissible to ban all outdoor signage outright.^{118*} However, if a government wishes to base outdoor signage restrictions on content, it will have limited options. It may be legal to single out commercial speech (advertising) as a broad category – for example, by barring *all* off-site commercial signs. Based on precedent, such a regulation would probably pass the *Central Hudson* test.^{119*}

It is more difficult, legally, to prohibit only signs advertising unhealthy food, or even only signs advertising unhealthy food within a certain area (e.g., near childcare facilities or preschools). The *Central Hudson/Lorillard* framework would apply to any regulation limiting the location of, specifically, unhealthy food advertisements. It is difficult to envision an effective content-based regulation of the location of outdoor unhealthy food signage that would pass the test, especially after the Court struck down such a regulation in *Lorillard*.

Regulating electronic billboards

Any attempt to regulate electronic billboards based on content would (just as with other billboards and signs) need to pass the *Central Hudson* test. Because of the unique nature of electronic billboards and the effect they may have on traffic safety, it may be possible to regulate their location more strictly than that of non-electronic signs, but such regulation would have to apply to all electronic signs regardless of content. The city of Los Angeles already regulates electronic billboards based on content-neutral criteria.¹²⁰

Regulating sandwich boards and other non-billboard outdoor signs

Sandwich boards are outdoor signs comprised of two boards set up in a triangle shape, with a hinge along the top. They are often used to advertise on the street outside of stores. As with other signage, a government may regulate sandwich boards or other non-billboard outdoor signs if such a regulation is content neutral and based solely on safety or aesthetic concerns. The city of Los Angeles already prohibits sandwich boards in many areas.¹²¹ In regard to sandwich boards, safety concerns include pedestrians’ – and particularly wheelchair users’ – ability to pass freely, as the signs are often placed on the sidewalk. However, there are limits on how far a city can go if it is regulating signs on noncommercial property (e.g., at people’s homes).¹²²

* Alaska, Hawaii, Maine, and Vermont ban billboards entirely.

CASE STUDY

GETTING RID OF SIGNS ALONG THE VENTURA-CAHUENGA BOULEVARD CORRIDOR

In the city of Los Angeles, the Ventura-Cahuenga Boulevard Corridor Specific Plan prohibits certain types of signs, regardless of content, along a section of Ventura and Cahuenga Boulevards.¹²³ For example, window signs are restricted to store names, hours, security signs, logos, and holiday paintings (as long as they are not placed in the window more than 30 days before a holiday, and are removed within ten days after the holiday).¹²⁴ Even signs that fall into these excepted categories may occupy no more than 10 percent of any window's area.¹²⁵ The plan also prohibits pennants, flags, and banners; signs with blinking lights or moving parts; supergraphics; and most billboards, among other things.¹²⁶ For legal reasons, these restrictions in no way reference food or beverage (or any other type) of marketing, but they effectively eliminate such signage in this particular area by prohibiting all signage. Other jurisdictions could adopt similar restrictions.

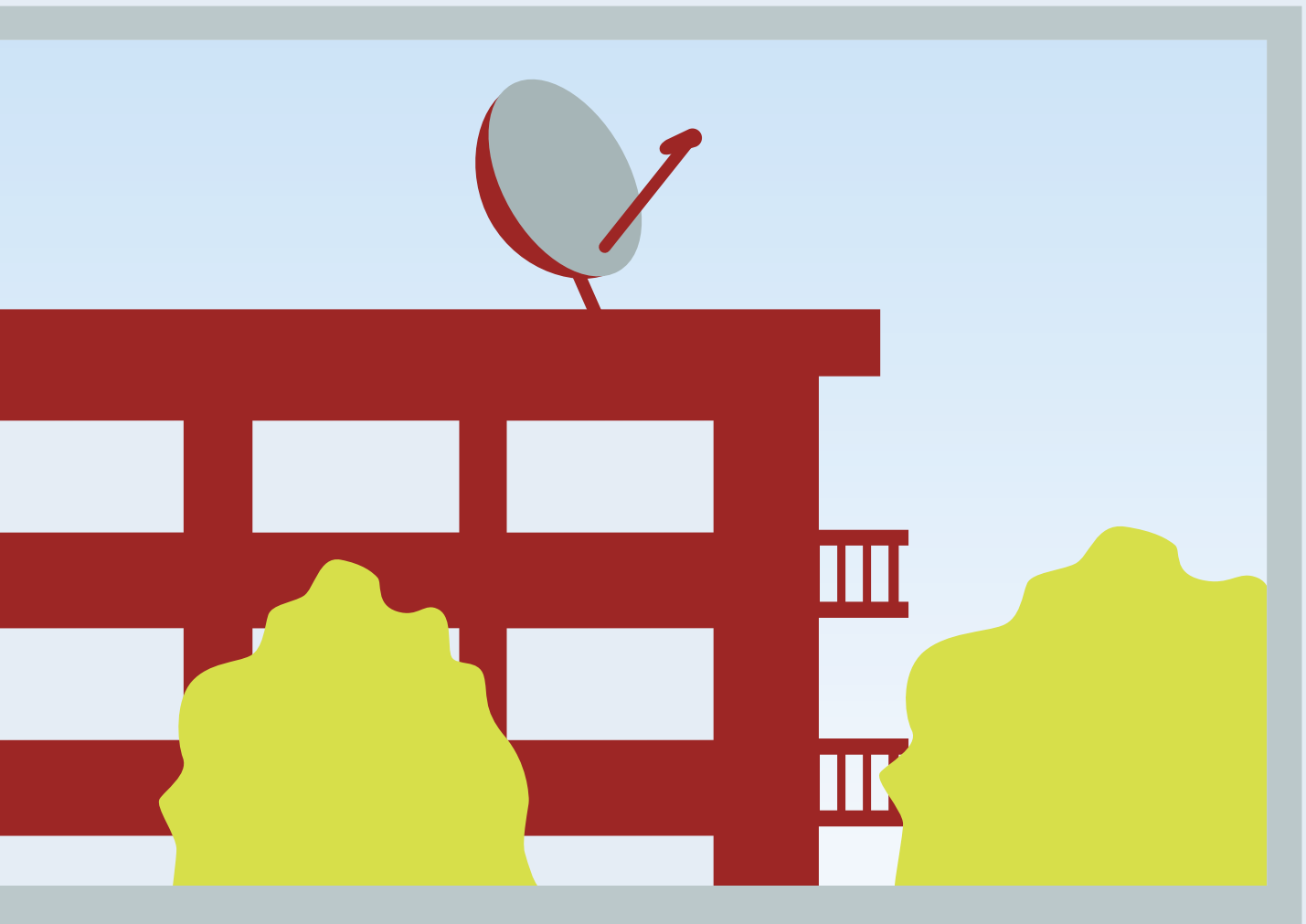
Voluntary restraints by owners of billboards or through media buying strategies

There are few legal constraints on voluntary or contractual approaches to limiting what appears on outdoor signs or billboards, and a voluntary approach could include content-based guidelines. However, the government is constrained from using contracts to get around the Constitution. According to the doctrine of unconstitutional conditions, the government cannot simply draw up a contract as a means of avoiding limits on its lawmaking authority. With respect to billboards and signage, this doctrine would arise only in instances when the government itself was a party to the contract pertaining to a sign or billboard.

If the government is not a party to the contract, there is no limitation on its ability to encourage private parties to include contractual provisions regarding what may appear on billboards and signs. This presents an opportunity for government to work with owners of billboards located near child-frequented locations – such as childcare facilities, parks, or playgrounds – to encourage them to voluntarily limit advertisements for unhealthy foods or beverages in those locations.

Public service announcements

The First Amendment does not limit what government itself can say. Local jurisdictions can use outdoor signage or billboards to convey their own messages to counter the marketing of unhealthy foods to children. Messages must clearly and explicitly come from the government to be considered government speech, however. For more on government speech and mandated signage in retail locations like stores and restaurants, see the In-Store section below.



BROADCAST MEDIA

Children are most commonly exposed to food marketing through television advertisements.

Research shows that 67 percent of children ages two to four watch television at least once each day.¹²⁷ Children aged two to five years see an average of 10.9 food-related television advertisements each day¹²⁸ and an average of 2.8 advertisements for fast food each day.¹²⁹ In the past few years, fast food restaurants have continued to target preschool-aged children, while decreasing advertisements aimed at older children.¹³⁰

Food marketers target Latino and African-American children disproportionately. A 2013 study found that the number of fast food ads that Latino preschoolers saw on Spanish-language television increased by 16 percent between 2009 and 2012.¹³¹ Another study found

POTENTIAL STRATEGIES

- **Enforcement of existing federal and state false advertising laws** (by a district attorney or city or county counsel's office)
- **Industry self-regulation** (encouraged by local jurisdictions and targeted at local television or radio outlets)
- **Direct regulation of television and radio advertising** (though this will likely be difficult given the legal climate)
- **Requiring coding of food advertisements using V-chip technology** (though this will likely face legal and practical hurdles)

that 84 percent of child-directed advertisements on Spanish-language television promoted products such as candy, sugary cereals, fries, and sodas, compared with 73 percent of child-directed ads during English-language programs.¹³² The same study found that only 1 percent of all television advertisements in both Spanish and English were for healthy foods, such as fruits and vegetables.¹³³

Though some progress has been made in the form of voluntary action by companies like Disney, which implemented nutrition standards for all foods marketed on its television and radio channels,¹³⁴ broadcast media remains one of the primary channels through which children are exposed to unhealthy food marketing.¹³⁵

Overview of legal issues

Broadcast television, cable, satellite, and radio traditionally have been subject to federal rather than state or local regulation. There are various federal laws governing broadcast media, including the Telecommunications Act of 1996,¹³⁶ which updated the original Communications Act of 1934.¹³⁷ The Federal Communications Commission (FCC) is the federal agency with direct jurisdiction over the television and radio airwaves.¹³⁸ Much (though certainly not all) broadcast media travel across state lines and therefore are considered interstate commerce, which makes it difficult for localities to regulate them directly. Local government prosecutors can sometimes use consumer protection laws to challenge deceptive advertisements transmitted through broadcast media. Enforcement of consumer protection laws may be given freer rein in court than direct regulation.¹³⁹

What counts as a deceptive advertisement is in some respects the most critical question affecting the legal analysis of what regulation is permissible in the area of broadcast media. Recent scholarship suggests that advertising directed to children under 12 – because of their inability to understand and act on the distinction between editorial content and advertising – is inherently misleading for First Amendment purposes.¹⁴⁰ From this perspective, advertising directed to children under five – who cannot even distinguish between advertising and content – is certainly inherently misleading and, it follows, susceptible to regulation.

Does this logic, when extended, mean that all advertising directed at children zero to five is actionably deceptive? That is an open question, but since such advertising is and has been tolerated for decades, declaring it unlawful might seem extreme. On the other hand, very

little analysis has been done – and very little attention paid – to the psychological and moral ramifications of advertising to children too young to understand what an advertisement is, much less able to act on that understanding. Similarly, the legal principles involved have not, as yet, been extensively examined. This is an area of law, and of policy, that is in acute need of development.

Enforcement of existing false advertising laws

One means by which local governments may impact food marketing to young children via broadcast media is by enforcing existing federal and state consumer protection laws. If a deceptive advertisement for a local business appears on a local television or radio station, there should be no question of the local district attorney's (or city attorney's or county counsel's) jurisdiction (and responsibility) to do something about it.¹⁴¹

It is also likely that a local or state public prosecutor could bring suit against a national company for deceptive television and radio advertisements, at least if she could show that the company knew that the deceptive ads were aired in the relevant jurisdiction.¹⁴² The fact that the audience for such ads is geographically dispersed and larger in number than the population of that jurisdiction does not constitute grounds for immunity from liability. That said, local authority to enforce a false advertising law is less likely to be challenged when the advertiser's business operates locally, and when those affected by a given advertisement reside primarily in that local government's jurisdiction. For example, if a county has a restaurant-health-rating ordinance, it can very likely enforce that law by prohibiting restaurants from falsely claiming that they received an "A" – even if they are national chain restaurants, and even if they are making the claim in a television ad that reaches beyond the local jurisdiction. The county could also take action against false claims of participation in a voluntary healthy restaurant certification program, or false claims of certification/approval by the county department of public health.

Direct regulation of television and radio marketing

It likely would be difficult for localities to directly regulate advertising in transmitted media. It is one thing to enforce state consumer protection laws; it is another to enact an ordinance targeting advertising in particular, especially advertising specifically for unhealthy food. False and deceptive advertising receive, in theory at least, no First

Amendment protection.¹⁴³ And it is only false and deceptive advertising that would be affected by a targeted action under the state's false advertising law.

An ordinance restricting specific types of advertising in specific media would be scrutinized closely. For example, a stand-alone county ordinance restricting the airing in Los Angeles County of television and radio commercials targeted to children that advertise unhealthy food would have to survive First Amendment, jurisdictional, preemption, and Dormant Commerce Clause challenges that, taken together, would likely lead to its being struck down.¹⁴⁴ It is worth noting, however, that the First Amendment – at least if recent theoretical developments are borne out in the courts – may not be an obstacle to laws targeting advertisements aimed at very young children. The practical question would be how to define advertising to young children for the purposes of such an ordinance, in such a way that it would be applicable only to those ads targeted at children under the age of 12. Regardless, the other legal hurdles make this a less feasible strategy than enforcement of false advertising laws.

V-chip in cable franchise agreement

Another potential strategy involves the use of V-chip technology. Since January 2000, a V-chip has been installed in all televisions sold in the United States. It allows parents to block the transmission of certain programming, based on ratings.¹⁴⁵

A local jurisdiction could consider requiring, as a condition of its cable franchise agreement, that all cable companies operating in the jurisdiction ensure that every food advertisement targeting children under a certain age be labeled as such, and that V-chips in the jurisdiction be programmed with the capacity to block those ads.¹⁴⁶ This approach has not been tested, however, and it could face a number of practical and constitutional impediments.

First and foremost, the V-chip, at least as currently implemented, doesn't seem to work very well. The FCC, for example, has suggested that the V-chip has not succeeded in blocking the types of programming it was designed to block.¹⁴⁷ Many parents do not know about the presence of the V-chip in their televisions, and many of those who do know either don't use it or find it difficult to use.¹⁴⁸ Therefore, practically speaking, an attempt to add an "unhealthy food commercial" tag to the V-chip regime, even if legally and technologically feasible, may have little effect.

From a legal perspective, though there has been some academic support for the proposal,¹⁴⁹ a V-chip law requiring coding for food marketing could be subject to a challenge under the First Amendment, the Dormant Commerce Clause, and the Supremacy Clause of the U.S. Constitution. The requirement that a national company tag all food ads on kids' shows just in one local jurisdiction might lead to a challenge on the ground that the measure would, as a practical matter, require the cable company to tag food ads across the country (it would have to provide the same service to customers in other states), which companies could claim to be a violation of the Dormant Commerce Clause. The validity of such a challenge depends in part on technical questions beyond the scope of the paper, such as how easy it would be for companies to code advertisements shown only during programs received by customers in one jurisdiction.

The Federal Cable Act¹⁵⁰ of 1984 and 1992 may pose a still more formidable challenge; federal law governing cable television regulates broadly enough that there is a real possibility of preemption of local law. As the FCC has noted, there remain areas in which local regulatory efforts are not preempted,¹⁵¹ but those areas do not seem to extend to anything that affects the content provided by the cable company. Similarly, a ratings (or definitional) system could be encouraged or voluntarily provided,¹⁵² but the cable industry seems unlikely to concede that advertising to young children is a problem (as it might with respect to, for example, pornography that could be seen by young children). Finally, although the ratings system would be aimed at advertisements targeting children, and such ads are at least arguably unprotected by the First Amendment,¹⁵³ the standards for determining what content leads to what rating are likely subjective enough that the First Amendment would constitute an obstacle.¹⁵⁴

Self-regulation

One way to avoid constitutional obstacles is to look to industry to impose (or at least propose) its own set of self-regulatory standards. The trouble with such an approach – illustrated by the decades-long activities of the Better Business Bureau (BBB) and its Children's Advertising Review Unit, for example – is that such standards tend to be weak and enforcement lax.¹⁵⁵ In the context of food marketing to children, the BBB and the food industry have created an industry-wide effort, the Children's Food and Beverage Advertising Initiative,¹⁵⁶ which is designed to improve the nutritional quality of foods marketed to children. Though the effort, which includes most of the largest players

in the children's food industry (though not the media companies), has made some progress, most independent evaluations of its effectiveness have been mixed.¹⁵⁷

Of course, it may be difficult for any one locality to move the national food industry. Most of the work on self-regulation of food marketing to children has been done at the national, or at least state, level.¹⁵⁸ On the other hand, a jurisdiction like the County of Los Angeles has a population greater than that of many states, and is home to the headquarters of many leading media and entertainment companies.

A city or county like Los Angeles could certainly work with media companies, for example, on a "Healthy LA" campaign that could involve nutrition and even tobacco/drug avoidance. Such a campaign could include improving the nutritional quality of products in kid-targeted ads carried by those companies, but that would be a bigger challenge. If the media companies got involved in other aspects of the campaign first, however, the project might be feasible. The change in advertising carried by those companies would be less significant in a voluntary program than it would be if enforced by government mandate, but the First Amendment and political realities make a government mandate improbable.¹⁵⁹ Therefore, even local voluntary guidelines might have more of an impact.

On the other hand, there are legitimate concerns about a public-private partnership with media or food companies, including the possibility that government will be seen to have approved as healthy whatever food its partners choose to market.¹⁶⁰ To ensure the success of such a partnership would require, at the least, a clearly articulated vision, developed by the local jurisdiction and with continued local leadership, with an invitation extended to companies to participate. And the jurisdiction involved will have to decide whether the benefits of any such partnership in terms of the improved nutritional profile of the products marketed outweigh the potential detriment of putting the government's imprimatur on what may after all be of only marginal benefit.



DIGITAL MEDIA

Children today are surrounded by digital marketing, including ads on websites, social media, and mobile phones.

Food and beverage companies are increasingly using digital marketing to target young children. For example, McDonald's web-based marketing targets children as young as two years.¹⁶¹ A 2006 study by the Kaiser Family Foundation found that 85 percent of the brands that most heavily market to children on television also have child-directed websites.¹⁶² According to a Federal Trade Commission (FTC) survey of Apple and Android apps for children, 11.5 percent of Apple and 4 percent of Android apps were designed for infants or toddlers; 7.5 percent of Apple and 10.5 percent of Android apps were designed for preschoolers.¹⁶³ Over 50 percent of the apps that listed an age or grade range listed a range beginning at two years or younger, and over 80 percent listed a range beginning at age four or younger.¹⁶⁴ A separate study by the FTC found that 58 percent of apps contain advertising.¹⁶⁵ In addition, ubiquitous "advergames," which are marketing in the form of branded video games on the internet or

POTENTIAL STRATEGIES



Enforcement of existing federal and state false advertising laws (though this will likely face legal and practical hurdles)



Direct regulation of digital media (including by regulating the local use of technologies that enable location-based digital marketing)

on mobile devices, blur the line between entertainment and marketing and are often targeted at children. For example, McDonald's "McPlay" app allows children to unlock games by scanning the toys provided in Happy Meals.¹⁶⁶ A review of advergames in 2009 and 2010 found that 95 percent of meals and 78 percent of snacks marketed through that channel did not meet U.S. Department of Agriculture and Food and Drug Administration recommendations for total fat.¹⁶⁷

Additional data about how children, particularly very young children, are reached in the digital sphere – and quantifications of the amount of food advertising – would assist with policy development. What is already clear is that an enormous amount of digital media is targeted at children of all ages, and that children are exposed to food marketing through this channel.

Overview of legal issues

The general regulatory obstacles involved in attempting to restrict marketing in transmitted media also apply to internet, mobile, and other digital media. Like broadcast and cable media, internet and mobile communications, particularly those that travel across state lines, are primarily governed by federal, and sometimes state, law. Additionally, jurisdictional issues arise from the international character of the internet and other digital communications, including marketing communications.

On the other hand, advances in technologies with geographical targeting capability ease some of the jurisdictional concerns about local governments regulating beyond their borders. In other words, online marketers can no longer claim that they do not know where the marketing is going.¹⁶⁸ Far from being less knowledgeable about their customers' locations than marketers in other media, some digital marketers now have very detailed information about who views their ads and where those viewers are located. Increased localization may provide new windows of opportunity for local policies to address digital food marketing, especially in the mobile sphere. And as with traditional broadcast media, there exist opportunities for local government authorities – particularly for district and city attorneys – to bring cases against deceptive advertisers, even online, though the opportunities are somewhat narrowly circumscribed and must be pursued selectively.

The principal regulatory effort in the digital space on behalf of kids under five remains the federal Children's Online Privacy Protection Act (COPPA).¹⁶⁹ Among other things, COPPA requires that all websites collecting "personal information" (which is broadly defined) from

children under the age of 13 obtain verifiable parental consent before collecting that information.¹⁷⁰ In 2012, the Federal Trade Commission issued updated rules to strengthen COPPA, clarifying what constitutes personal information and extending the law's reach.¹⁷¹ The updated rules, which took effect in 2013, clarify that personal information includes children's likenesses and location – both of which mobile applications collect from users as a matter of course. Since COPPA covers mobile applications that are directed to children, violations of the law could occur simply when a child opens an app on a parent's device and unwittingly divulges her location (along with other identifiers tied to the device that implicate COPPA).

Though states are authorized to enforce COPPA,¹⁷² there is no provision in the law for localities to do so. A local jurisdiction might therefore need to work in tandem with state agencies like the attorney general's office when it sees violations. Alternatively, local jurisdictions can report violations directly to the FTC, which has the power to bring enforcement actions.

Enforcement of existing false advertising laws

One way in which local government can influence digital marketing is by enforcing existing false advertising and consumer protection laws. The means by which a local government would do so, and the accompanying legal analysis, is the same as outlined above in the section on broadcast media. For example, a California district attorney, or certain city attorneys,¹⁷³ could bring an action under the state Unfair Competition Law against a company that markets through advergames, claiming this marketing constitutes a deceptive trade practice insofar as children do not recognize such games as marketing.¹⁷⁴ Similar actions could be taken against other types of digital marketing aimed at young children.

Direct regulation of digital media

It would be difficult for a local government to directly ban digital and internet-based marketing of unhealthy food, even when that marketing is targeted at children under five. If the practical hurdle of identifying and defining digital outlets targeted only at very young children could be overcome, the First Amendment would be less of a concern. But this is not a small hurdle. Most very young children do not have their own computers, mobile phones, or social media accounts, and therefore companies can argue that even a digital outlet or marketing that appears to be targeted at young children is not for their eyes alone. This could lead to a *Lorillard*-like outcome, in which restrictions

directed at marketing to kids are struck down because they regulate too much speech intended for adults.¹⁷⁵ Even if direct local regulation could survive a First Amendment challenge, it would certainly face other constitutional challenges, such as the Dormant Commerce Clause and preemption.

However, because it is likely that companies increasingly have access to the physical address at which the viewers of digital marketing reside, or to their current physical location (in the case of mobile marketing), local regulation of certain practices may be increasingly feasible. For example, a local jurisdiction might be able to enact a policy prohibiting location-based marketing within a certain jurisdiction for privacy reasons. Such a policy might target mobile ads that appear on a smartphone when a consumer enters a certain radius of a particular retailer. If enacted for reasons unrelated to communication and if applicable to all forms of marketing, the First Amendment would be less of a concern. Regardless, such a regulation would still be risky, and would require consultation with experts in communications law, who could assist in navigating the complex web of federal and state regulations governing this area and analyze the risk of preemption and other barriers.

A different approach, again motivated by interests unrelated to speech and therefore raising fewer First Amendment concerns, might be to regulate the emerging technologies used to track consumers' movements. Some location-based digital marketing relies on GPS (which uses satellite technology and likely cannot be controlled by local regulation). But the technology is evolving so rapidly that it's not yet clear what the "next big thing" to track consumers will be, as companies compete to have their technology recognized as an industry standard.

Currently, two leading tracking technologies are iBeacons,¹⁷⁶ which use phones' bluetooth signals, and Wi-Fi tracking.¹⁷⁷ Retail outlets are already utilizing these technologies to gather information on things like customers' locations, web browsing history, and type of mobile devices.¹⁷⁸ These data are then used for marketing purposes, including mobile coupons, and may also be shared with other companies.¹⁷⁹

Although the FCC controls the spectrum on which these devices run, it's not clear that it exclusively controls where technologies such as iBeacon and Wi-Fi are installed. It's therefore possible that a locality could enact a law that prohibited, for example, Wi-Fi tracking within 1,000 feet of a school, or iBeacon installation within 1,000 feet of a public sidewalk. This sort of regulation governs the placement of certain devices rather than the transmission of data or the technology itself,

and therefore may be feasible on the local level. If these devices cannot be located in certain places, transmission will be impacted even if not regulated directly. Because the technology and its attendant marketing techniques are evolving so rapidly, any local government wishing to pursue this sort of regulation should consult with experts both in the technology field involved and in telecommunications law.

CHANGELAB SOLUTIONS RESOURCES

- Digital Food Marketing to Children and Adolescents
www.changelabsolutions.org/publications/digital-food-marketing-children-adolescents
- Food and Beverage Marketing to Children in the Digital Age
www.changelabsolutions.org/publications/children-digital-age

Cafe



PRINT MEDIA

Food marketers spend much less money in print media than they do on other forms of marketing.

In 2009, food and beverage companies spent \$7.2 million on child-directed print and radio advertisements combined.¹⁸⁰ These expenditures amounted to less than 10 percent of what they spent for television commercials.¹⁸¹ Nonetheless, there are still a number of child-oriented print publications: over 160 magazines are directed at children.¹⁸²

Overview of legal issues

The legal issues involved with government regulation of print media are very similar to those outlined in the Broadcast Media section above.

Advertising in magazines and newspapers, though more often subject to federal or state oversight, can at least be addressed through enforcement of false advertising laws. A deceptive advertisement for

POTENTIAL STRATEGIES

- **Enforcement of existing federal and state false advertising laws** (by a district attorney or city or county counsel's office)
- **Industry self-regulation** (encouraged by local jurisdictions and targeted at local print media outlets)
- **Direct regulation of local print media targeting young children** (though this may be difficult given the legal climate)

a local business in a local newspaper will fall comfortably within the purview of the district attorney's office.¹⁸³ Could a local law enforcement agency, though, legitimately bring suit against national companies advertising in all print media? That would likely depend on the ability of the district attorney to tie the challenged conduct to local business and/or local consumers. So a local government with a restaurant-health-rating ordinance probably can enforce that law by prohibiting restaurants from falsely claiming – in any print ads – that they received an "A." False print media claims of participation in a local department of health certification or approval program would likely also be actionable.

Direct regulation of print media will be more challenging. The First Amendment remains perhaps the primary constitutional concern when considering direct regulation, though the possibility of Dormant Commerce Clause scrutiny also exists if a local government addresses national advertisements in national publications.

Regulation of local print media targeting young children

Even when First Amendment concerns might seem to be at their lowest ebb, it can still be difficult for government to regulate print media. For example, as noted, the First Amendment should in theory pose no obstacle to regulation of advertisements targeting children under five – even the staunchest defenders of commercial speech recognize that there is an age below which any targeted advertising is inherently misleading and so can be freely regulated.¹⁸⁴

The difficulty is in isolating print media that are intended exclusively for the under-five age group. In the broadcast media context, government might be able to regulate advertisements on Nick Jr., but it would have a harder time with most shows and stations, the majority of which are watched by older members of the family too. Similarly, in the print media context, there are relatively few outlets that are actually targeted to young children to the exclusion of their parents and guardians and/or older children. And if there is a significant audience of older viewers to whom the advertising is not inherently misleading, then the First Amendment will apply.¹⁸⁵ Therefore, unless very narrowly tailored (in a way that would likely leave out the great majority of ads seen by young children), a law barring unhealthy food print advertisements to young children would probably implicate the First Amendment.

Industry self-regulation

There is already some degree of self-regulation of print advertising to children in the form of the Children's Food and Beverage Advertising Initiative, but, as outlined in the section above on broadcast media, independent evaluations of its effectiveness have been mixed.¹⁸⁶ A local jurisdiction could, here as in other marketing contexts, adopt a series of nutrition guidelines and a model voluntary code of conduct for marketers. Then if companies do a good job of following the self-regulatory guidelines, local government can work with local media outlets to recognize them.

The scope of the self-regulation should include print advertising to *parents* of kids under five as well. And it should remain entirely voluntary so as not to offend the "unconstitutional conditions doctrine," which (as discussed above) posits generally that government can't accomplish indirectly that which it is barred from doing directly.

CHILDCARE SETTINGS AND SCHOOLS



CHILDCARE SETTINGS AND SCHOOLS

The childcare landscape in most parts of the United States, including Los Angeles County, is diverse and complex.

There are many types of childcare settings and providers, including licensed settings such as childcare centers, license-exempt providers such as nannies and relatives, and state-subsidized care such as the California State Preschool Program.¹⁸⁷ Children may be formally enrolled in programs like Head Start or informally cared for by friends and neighbors.¹⁸⁸ It is common for children to spend time with multiple providers.¹⁸⁹ The 2005 California Health Interview Survey found that 40 percent of children under five in Los Angeles County, or about 350,000 children, spend most of their day in a childcare setting.¹⁹⁰ And a 2005 study of WIC participants in LA County found that children in childcare were 26 percent more likely to be overweight than children not in childcare.¹⁹¹ Though there is a lack of data on the types and prevalence of marketing in the childcare setting, this section describes policy options to address any food marketing that might exist.

POTENTIAL STRATEGIES

- **Setting nutrition standards for the childcare setting** (which could be mandatory, to the extent allowed by state law, or voluntary)
- **Limiting screen time and media use** (which could be mandatory, to the extent allowed by state law, or voluntary)
- **Direct restrictions on food marketing in schools and childcare settings** (which could be mandatory, to the extent allowed by state law, or voluntary)

Overview of legal issues

Childcare is primarily regulated at the state level. State legislatures enact laws setting forth general requirements for childcare providers and facilities to obtain a license or permission to operate. Usually, the administering agency, such as the department of social services or similar office, then enacts more detailed regulations. In states with comprehensive licensing schemes, cities and counties are often preempted from regulating childcare operations in their local jurisdiction, unless specifically authorized.^{192*}

The California Child Day Care Facilities Act and the regulations promulgated by the California Department of Social Services under the act are the primary laws regulating childcare in California.¹⁹³ The act and its regulations provide a comprehensive system for licensing child day care facilities.¹⁹⁴ While there is no law directly on point, a strong case may be made that local governments in California are preempted from enacting laws in areas addressed by the state childcare licensing scheme, which includes health and safety regulations.

As a First Amendment matter, the government will have a relatively free hand in regulating speech within public schools and government-owned childcare settings, because they are government property classified as non-public fora, which means they are not traditionally open for the free interchange of ideas.¹⁹⁵ Thus, in these settings, reasonable regulations of speech that are viewpoint neutral will be upheld.¹⁹⁶ On the other hand, a government regulation imposing restrictions on speech in private childcare settings would likely have to comport with the *Central Hudson* test. That is a much more difficult standard to meet.

Of particular note, however, is the limited audience in the childcare setting. By its nature, it is one of very few settings in which policies targeted at marketing to children under five will affect only those in or near that age group, with the exception of teachers and parents dropping off or picking up their children. Contrast this to settings such as the street, for example, or the retail environment, or even areas in close proximity to schools or playgrounds, where young kids are but one (often small) part of the viewing audience. This may mean that it would be easier, from a First Amendment perspective, to regulate marketing in private childcare settings than it would be in almost any other setting, even when the *Central Hudson* test is used to review such a regulation.

*Some states specifically authorize local regulation of childcare.

The first prong of *Central Hudson* asks whether the speech being regulated is false, misleading, or related to illegal activity.¹⁹⁷ And because research shows that marketing to children under 12 is inherently misleading, insofar as they lack the ability to process advertising messages and distinguish between those messages and factual information, such marketing may not be protected at all by the First Amendment.¹⁹⁸ This theory has not, however, been tested in court, so it isn't possible to predict with certainty how a court would rule.

Further complicating the analysis is the fact that it may be more difficult to regulate speech in family day care homes, which are located in providers' private residences. In California at least, there are regulations that restrict licensing reviews of family day care homes to only health and safety matters.¹⁹⁹ A court may be particularly sensitive to a private childcare provider's First Amendment rights. That said, it could be argued that a food marketing restriction is a health matter, and that a limited restriction focusing only on unhealthy food marketing in the areas of the home open to the children, and during the time the children are present, is reasonable. Nonetheless, given the uncharted nature of this area of law, it may be best to focus first on childcare centers, if a jurisdiction is interested in pursuing this strategy.

Regulating nutrition in the childcare setting

Though childcare nutrition standards do not directly affect advertising, they impact other elements of marketing, including the locations where products are available and exposure to product packaging. Because they do not implicate speech or directly concern interstate commerce, the primary concern with respect to nutrition regulations is preemption.

Federal and state laws setting nutrition standards in childcare

The Child and Adult Care Food Program (CACFP) is a federal program administered by the U.S. Department of Agriculture (USDA) that subsidizes meals and snacks for low-income children and adults receiving care outside their homes.²⁰⁰ The USDA's Food and Nutrition Service administers CACFP through grants to states. In California, the state Department of Education (DOE), Nutrition Services Division, administers the program. Independent childcare centers and "sponsoring organizations" enter into agreements with the DOE to assume administrative and financial responsibility for CACFP operations. A family childcare home must sign an agreement with a sponsoring organization to participate in CACFP and must be licensed or approved to provide day-care services.²⁰¹ The regulations governing CACFP set meal patterns based on the age of the children and types of meal served.²⁰² Under the Healthy Hunger-Free Kids Act (HHFKA), the USDA

must review and update the requirements for CACFP meals at least every ten years to ensure they are consistent with the goals of the most recent Dietary Guidelines for Americans.²⁰³ In early 2015, the USDA issued a proposed rule updating the meal patterns.²⁰⁴ Once finalized, the new requirements will ensure that more nutritious meals are served in childcare settings that participate in CACFP by, for example, requiring the service of whole grains and limiting milk for children over two years to 1 percent or skim.²⁰⁵

Many states also have laws or regulations governing nutrition in childcare settings. In California, the legislature has explicitly restricted the beverages that children may be served in any day care facility, including childcare centers and family childcare homes.²⁰⁶ The Healthy Beverages in Child Care Act, which took effect on January 1, 2012, allows only water, unsweetened lowfat or skim milk, and one serving per day of 100 percent juice.²⁰⁷ All beverages with added sweeteners, either natural or artificial, are prohibited.²⁰⁸ The law is part of the state's childcare licensing regulations, and is enforced through licensing inspections. State law also requires childcare centers to provide meals that, at a minimum, comply with the CACFP meal patterns.²⁰⁹ The same is not true for family day care homes; meals in those settings are not regulated by the state.

Summary of Health and Nutrition Standards in Childcare

Federal Law

Child and Adult Care Food Program (CACFP): federal regulations set out minimum nutrition standards and meal patterns for meals funded by CACFP. The program is administered by the states. The standards apply only to meals served as part of CACFP.

State Law

State childcare licensing regulations: state laws and regulations may include nutrition requirements for meals and/or beverages served in childcare. Depending on the state, local jurisdictions may be allowed to set standards as well. The standards may differ depending on the type of childcare setting (childcare center versus in-home childcare). Enforcement of any standards is usually through licensing inspections, the frequency of which varies from state to state.

In California: state law (Health & Safety Code § 1596.808) regulates the beverages permitted in all childcare settings, allowing only water, skim milk, and one serving per day of 100 percent juice. State law also requires childcare center meals (but not meals in family day care homes) to comply with the federal CACFP meal patterns.

While local governmental entities may lack the authority to regulate the health and nutrition environment in childcare settings because of preemptive state laws, they can take measures to encourage childcare providers to improve nutrition. A local government could pass a resolution urging providers to adopt enhanced nutrition standards.

Local governmental entities or private funders could also require implementation of nutrition standards as a condition for funding. For more on government procurement of foods served in childcare settings, see the Procurement section of this white paper. In addition, childcare rating systems, developed either by local agencies or private entities, could also incorporate enhanced nutrition standards, thus providing an incentive for providers to improve the nutritional quality of foods in childcare settings. Finally, childcare providers could be encouraged to adopt enhanced nutrition standards voluntarily.

Direct restrictions on food marketing in childcare settings

A local restriction on marketing in public schools or in childcare settings that are part of a school district could be enacted through district policy. Such a policy could impact not just the childcare settings, but also the other schools in the district. Recently, as part of the HHFKA, the USDA proposed a new federal regulation that would require all school districts to have a wellness policy that limits marketing during the school day to only those products that can be sold under the federal nutrition standards for foods sold in schools.²¹⁰ This could affect childcare settings that are part of a school district. As of the publication of this white paper, that regulation had not been finalized. Regardless of the final outcome of the regulation, it would serve as a floor, meaning that states and local districts could go further to address school-based marketing.

Any district policy restricting marketing should be very specific about exactly what is prohibited and how the restriction will be enforced. For example, a school district could choose to restrict (1) marketing just of those foods and beverages that aren't permitted to be served; (2) marketing of all foods and beverages, regardless of nutritional quality; or (3) all marketing. ChangeLab Solutions has a model statute restricting marketing in schools,²¹¹ as well as model district-level policies.²¹²

Because of preemption and the First Amendment, it will be more difficult for localities to regulate marketing in childcare settings that are not part of a school district, at least in California. In states where there isn't preemption, local regulation could be feasible. As with nutrition standards, however, a local government or private entity that rates childcare settings could require marketing restrictions as a condition for receiving the highest ratings. While such a requirement wouldn't be mandatory, it could incentivize childcare providers to get rid of any marketing they might have. Likewise, providers could voluntarily remove all marketing from childcare settings.

Limiting screen time and media use

Another way to address marketing in the childcare context is to limit children's access to outside media, like television or the internet. California law does not currently regulate media or computer use in childcare settings, though many other states address this issue.²¹³ While California law likely preempts a local government from enacting a law limiting media or computer use in childcare settings,²¹⁴ a local government can encourage childcare providers to limit use. A local governmental entity could develop media standards and pass a resolution urging providers to follow them. Government or private funders could require adoption of media use standards as a condition for funding. Childcare rating systems could also incorporate such standards. Finally, childcare providers could adopt media use standards voluntarily.

The National Resource Center for Health and Safety in Child Care and Early Education, the American Academy of Pediatrics, and the American Public Health Association have drafted evidence-based best practices regarding screen time in childcare settings.²¹⁵ These standards prohibit any screen time for children under the age of two, and limit media time for children over two to no more than 30 minutes once per week, for educational or physical activity purposes only.²¹⁶ Computer time for non-school-age children should be limited to 15-minute increments, except for children with health-related technology needs.²¹⁷ Moreover, the best practices state that all media should be "free of advertising and brand placement," and that "TV programs, DVD, and computer games should be reviewed and evaluated before participation of the children to ensure that advertising and brand placement are not present."²¹⁸ These best practices serve as an excellent model for screen time regulations or incentives, insofar as they are evidence based and developed by experts in the field. Additionally, screen time limits have the dual benefit of potentially reducing sedentary time and decreasing exposure to food marketing.

CHANGELAB SOLUTIONS RESOURCES

- Fact Sheet – Restricting Food and Beverage Advertising in Schools
www.changelabsolutions.org/publications/fact-sheet-school-food-ads
- Model Policies Restricting Food and Beverage Advertising in Schools
www.changelabsolutions.org/publications/restricting-advertising-food-and-beverages-not-sold-school-grounds
www.changelabsolutions.org/publications/district-policy-school-food-ads
- Model Statute Limiting Food Marketing at Schools
www.changelabsolutions.org/publications/food-marketing-schools
- First Amendment Implications of Restricting Food and Beverage Marketing in Schools
www.changelabsolutions.org/publications/first-amendment-marketing-in-schools
- Developing a Healthy Beverage Vending Agreement
www.changelabsolutions.org/publications/healthy-bev-vending-agreement



GOVERNMENT PROCUREMENT AND VENDING

Government agencies purchase (or “procure”) goods, including food, for employees, students, and community members.

Generally, agencies procure food for two purposes. First, agencies buy food to provide meals and snacks for dependent residents in government-operated or funded sites, such as jails, juvenile facilities, hospitals, public childcare settings, and senior centers. Second, agencies purchase food directly, or through contractors, to sell on their properties, both to employees and to visitors. Agencies sell food in retail outlets on government property, such as cafeterias or cafes, vending machines, and concession stands.

POTENTIAL STRATEGIES

- **Setting nutrition standards for food purchased by government to be distributed to dependent community members** (such as children in public childcare settings, subject to limits imposed by federal or state law)
- **Adopting healthy vending standards** (which would set nutrition standards for food to be sold directly to citizens on government property)

While policies related to procurement do not directly affect advertising, they impact other elements of marketing, including the places where products are available and exposure to product packaging. With respect to young children, government procurement policies can influence the availability of foods (and the exposure to marketing of those foods) in public parks or recreation facilities, including zoos, beaches, or playgrounds; libraries; and government-owned or funded childcare centers.

For more information on regulation of advertising on government property, including transit, see the Government Property section below. For more information specific to childcare centers, see the Childcare section above.

Overview of legal issues

Generally, governments have broad authority to determine what foods they choose to procure. When a government entity buys food, it is exercising its “market participant” power rather than its regulatory power (the power to enact laws and regulations that have binding effect on citizens and private entities). When it acts as a market participant, a government agency is entering the marketplace, just as a private entity might. Therefore, agencies generally have broad discretion over the types of foods they may purchase and provide or sell, although, as described more fully below, that discretion can be limited by overriding federal or state law or by conditions placed on the funding being used to make the purchases. By adopting healthy procurement policies, governments can provide healthier food to community members and make a positive impact on community health. In addition, if their purchasing volume is large enough, they may be able to affect the types of foods available more broadly to the community by creating demand for healthier products.

Procurement of food for distribution to dependent community members

Subject to the restrictions described below, state or local government entities can adopt policies setting nutrition standards for the procurement and distribution of meals and snacks distributed by their agencies. At the state level, the legislature could pass a law requiring state agencies to purchase healthier foods. Or, if state law gives the governor authority over executive branch agencies that purchase

CASE STUDY

HEALTHY PROCUREMENT IN LA

Los Angeles County is a leader in implementing healthy procurement policies affecting the purchase, distribution, and sale of food and beverages in food service and vending contracts. The county has adopted several policies on healthy procurement and healthy nutrition at child-centered sites. In 2011, the board of supervisors adopted Healthy Food Promotion in Los Angeles County Food Service Contracts, a motion to require all county food procurement contracts to contain nutrition standards.²¹⁹ To comply with this requirement, the county's Department of Public Health must develop nutrition standards in new and renewing requests for proposals for food service and vending contracts across county departments.²²⁰

In accordance with this motion, the department is working with 12 county departments to implement nutrition standards as part of their contract solicitation process, and to put a monitoring and compliance system in place.²²¹ Provisions regarding pricing, promotion, and placement strategies are also being integrated into contracts to promote the healthier food offerings. For example, only products that meet the county's vending machine nutrition standards, such as water or other lower-calorie beverages, can be advertised on the front of vending machines. To date, six of the 12 county departments have adopted healthy procurement policies and/or practices through specific contractual requirements, including the Department of Public Works, Department of Health Services, the Probation Department, the Department of Parks and Recreation, the Department of Beaches and Harbors, and the Chief Executive Office. Several of the departments' food venues include cafeterias and vending machines. The Probation Department includes food services at juvenile halls and camps, the Department of Parks and Recreation administers meal programs in the summer and after school, and the Department of Beaches and Harbors runs concessions operations at county beaches.²²²

More than ten cities in Los Angeles County have also adopted healthy vending policies. For example:

- The City of Baldwin Park requires that all foods provided and/or sold in city facilities, vending machines, and institutions, including but not limited to afterschool programs, recreation centers, pools, libraries, parks, community centers, and childcare centers, meet nutrition standards. The fronts of vending machines read "Healthy Baldwin Park."²²³
- The City of Bell Gardens requires all foods and beverages sold in vending machines on city property to meet nutrition standards.²²⁴

food, the governor can issue an executive order requiring those agencies to follow healthier nutrition standards, as has been done in Massachusetts.²²⁵

The decision makers with authority to set healthier food standards at the local level will vary. At the school district level, school boards generally set the policy. At the city or county level, the governing body (such as a city council or county board of supervisors) could enact a binding policy (usually by resolution or motion) requiring city or county departments to purchase and provide healthy foods, or directing their employees or the health department to develop healthy procurement standards that city departments must follow. In a city where the mayor has authority over the executive branch departments that buy food, the mayor can issue an executive order requiring those departments to make healthier purchases. Mayor Michael Bloomberg issued such an order in New York City; the nutrition standards were developed by the city's Food Policy Task Force with active participation from city agency staff.²²⁶ In some cities, an executive order may not be binding or may be subject to override by the city council. Generally, unless a particular department or sub-agency has explicitly been given such authority, government departments cannot create binding procurement policies that extend to other departments.

When an agency purchases food to provide to dependent members of the community, its authority to implement nutrition standards or select certain foods may be preempted or limited, either by requirements imposed as a condition of receiving the funding used to purchase the food or by other laws imposed by a higher level of government. Government agencies, either directly or through contracting agencies, provide free or low-cost meals with funding from the federal nutrition programs, including the National School Lunch Program, School Breakfast Program, Child and Adult Care Food Program, and Summer Food Service Program, among others. To qualify for this type of federal funding, state and local governments must comply with federal rules and regulations, including purchasing rules and nutrition standards. Generally, those regulations act as baseline standards, meaning local governments must comply with those regulations, but they may choose to set higher standards.

State laws can also limit local governments' procurement authority. State laws may govern the procurement and provision of institutional meals, such as those served to youth in juvenile halls or facilities.²²⁷ Sometimes federal and state law may restrict the procurement and distribution of meals and snacks. For example, in the childcare setting, there are federal regulations governing the Child and Adult Care

Food Program, including nutrition standards.²²⁸ There are also state laws governing certain aspects of nutrition in childcare, such as the California law that regulates the beverages providers may serve.²²⁹

So, a county, city, or school district can set nutrition standards for the distribution of meals or snacks, provided that those standards do not conflict with any requirements from a funding source or any federal or state law. And where the local entity provides the funding, it can choose to impose its own reasonable conditions on the distribution of funding. In San Francisco, for example, the Department of Children, Youth and Their Families distributes funding (from local property taxes) to nonprofit organizations and the school district to provide programs and services to children and their families. As a condition for receiving the funding, the recipient must agree to comply with the department's nutrition standards for grantees.²³⁰ A First 5 Commission or other funding entity could similarly establish a healthy procurement policy and incorporate it as a condition for contractors or grantees receiving its funding.

Provided that a local government's health agency food standards do not conflict with any requirements from a funding source or from overriding federal or state law, no legal issues arise. Any legal disputes over government procurement generally arise in the implementation of procurement; that is, disputes may arise over whether the agency has followed public contracting laws and procedures. The public contracting process is beyond the scope of this paper, but government agencies and their legal counsel should be familiar with them.

Procurement of food for sale ("healthy vending" policies)

Government agencies at the state or local level can also adopt policies, sometimes referred to as "healthy vending policies," that set nutrition standards for foods sold on government property to employees or to the public. For example, parks and recreation departments might adopt a policy setting out standards for foods and beverages sold in vending machines in their facilities. Those policies can be implemented at the state or local level by the same means as the agency food standards addressed above.

When selling food on government property, a government agency generally has the same authority to determine what to sell as a private party would. As a result, there are no legal issues that prevent a city or county from enacting a healthy vending policy. Because food sales on government property are often conducted by third parties, either by government contract or permit, the agency must ensure that the policy is incorporated into the contracting or permitting process. Again, legal disputes may arise over the government contracting or permitting process, but there are no issues with the government's authority to establish a healthy procurement policy.

CHANGELAB SOLUTIONS RESOURCES:

- Understanding Healthy Procurement
www.changelabsolutions.org/publications/healthy-procurement
- Making Change: Healthier Vending for Municipalities
www.changelabsolutions.org/publications/healthier-vending-municipalities
- Local Food for Local Government
www.changelabsolutions.org/publications/local-food-local-government

METRO ↓



PUBLIC TRANSIT AND GOVERNMENT PROPERTY

Municipalities can exercise control over some forms of advertising on their own property.

Some states and municipalities allow advertising on buses and trains, in transit stations, in prison holding areas, in welfare office waiting rooms, and at the Department of Motor Vehicles.²³¹ Los Angeles allows advertising on several different types of public property, including Metro buses and trains.²³² Such advertising can often be lucrative. The Metro contract with CBS Outdoor guarantees \$110 million over five years for the transit agency.²³³ And a 2014 Southeastern Pennsylvania Transportation Authority (covering the greater Philadelphia area) contract is expected to generate at least \$150 million over nine years.²³⁴ Advertised products can include unhealthy food like pizza²³⁵ and fast food, along with local and national businesses.²³⁶ In spite of the lucrative nature of these contracts, municipalities may wish to exercise some control over the advertisements appearing on their property.

POTENTIAL STRATEGIES

- **Regulating advertising on school buses**
- **Regulating the content of advertising on public property** (particularly on property that has not traditionally been open to all kinds of speech)
- **Regulating advertising on public transit vehicles and in bus shelters/transit stations**

Legal analysis

When looking at the extent to which government can restrict speech on its own property, courts generally employ a “forum analysis” in which public property is classified as one of several types of fora. Local government can freely restrict advertising on its own property if the property is a nonpublic forum, meaning that it’s not traditionally open to any and all public speakers. Examples of places readily susceptible to such regulation include schools, military bases, and post offices. Regulation is much more conscribed in public fora, where all comers have traditionally been able to speak – for example, on street corners or in town squares or parks. The law governing restrictions on advertising on public transit is somewhat different, and is described in further detail below. For a more extensive discussion of forum analysis, see the Overview of Relevant Law section of this white paper.

Regulating advertising on public property

As noted above in the section on outdoor advertising, the fairly lenient version of the *Central Hudson* analysis that governs restrictions on billboards also applies to restrictions on outdoor signs on public property.²³⁷ If the outdoor advertising is on government property (e.g., on bus shelters), then a forum analysis would apply – and if the government has maintained a nonpublic forum or, more likely, a limited public forum, then it may set nutritional guidelines for food and beverage advertisements as long as those guidelines are reasonable and not aimed at suppressing speech based on the speaker’s viewpoint.²³⁸

It is an open question whether permitting ads from private parties denigrating unhealthy food while banning ads promoting unhealthy food would constitute impermissible viewpoint discrimination. One way to avoid the issue would be to have any anti-unhealthy food advertisements be the speech of (paid for by) the government itself, which would not be subject to First Amendment restraint.²³⁹ There would therefore be no constitutional obstacle to public service advertisements about health or nutrition.

If the space the government is regulating is a public forum, then it is likely a court will apply a *Central Hudson* analysis to any restriction on speech in that forum. A local government seeking to remove unhealthy food ads from a public forum would have to carefully select the government interest it was seeking to advance. That interest could not, for example, simply be to reduce the number of advertisements seen by kids under five, because the great majority of those viewing such

ads in a public place are over five years old, and restricting speech in order to prevent young children's exposure would likely violate the First Amendment.²⁴⁰ If the government stated its interest as preventing *all* residents from seeing the ads, it would have to show that its interest was still "important" under *Central Hudson*. This would not be an easy thing to do when dealing with a product – unhealthy food – that is legal for the target audience to purchase.²⁴¹

Certainly, the government's task will be easier if it seeks to regulate advertising in a nonpublic or limited public forum.

Regulating advertising on transit

Precedent is mixed with respect to restrictions on speech in the transit context, and much will depend on the particulars of a specific policy and the way it is implemented over time. In some cases, courts have found the insides of transit vehicles to be nonpublic fora where even content-based restrictions on political advertising directed to adults were deemed permissible, in part because the audience in transit vehicles is "captive."²⁴² Other courts have found that public transit advertising programs created designated public fora, in which case strict scrutiny applied to restrictions on political speech.²⁴³

In any case, the constitutionally least problematic rule would be one barring *all* advertising in a given context – this would avoid clashes over whether a particular type of content- or viewpoint-neutral policy is most likely to pass muster. Thus, a bar on transit ads of all kinds would be least risky. It may be more difficult, though not impossible, to single out food advertisements, and particularly unhealthy food advertisements. If the ad spaces were found to be public, then the same *Central Hudson* problems discussed above would come into play. If the ad spaces were determined to be nonpublic – and if the standards set for permissible foods were clearly stated – then there would be a plausible argument in favor of the restriction. On the other hand, it is not easy to state clear and defensible restrictions that readily distinguish permissible from impermissible food advertisements, especially outside of the school context, in which there are already nutrition standards in place for the sale of foods. Unhealthy food does not bear the stain of tobacco or even alcohol, and thus barring ads from public transit would face practical as well as potential constitutional difficulties.

On the other hand, as noted, if the speech is that of the government itself in a public service advertisement on public transit (or, for that matter, a school bus), there should be no constitutional obstacle.

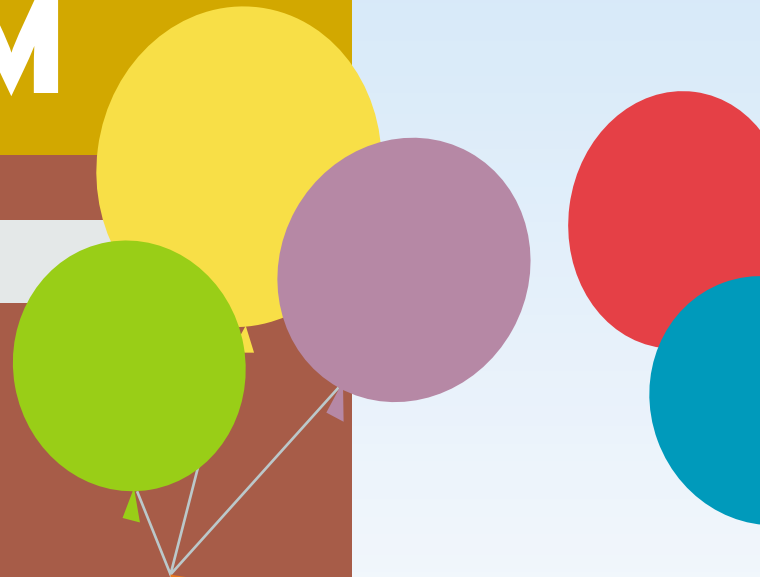
SCHOOL BUSES

It is unlikely that school bus ad space would be found to be a public forum – there is no history of this space being used by all comers to have their say. Thus, even if a school district were to permit some ads on buses, it could still convincingly assert that the forum is a nonpublic one – so the government should be able to set nutrition standards and permit only certain types of products to be advertised. The government would do well to develop and promulgate a clear set of standards to apply when determining which products are permissible to advertise on school vehicles – for example, a bar on advertising products that are not permitted to be served or sold in the school or childcare center served by the bus would be more easily defensible than one that barred advertisements for foods available in schools.²⁴⁴ And, again, if a restriction prohibited all food marketing, it would also likely sidestep the “viewpoint” issue and survive any constitutional challenge.

CHANGELAB SOLUTIONS MATERIALS

- Restricting Junk Food Advertising on School Buses
www.changelabsolutions.org/publications/school-buses-ads

BASEBALL STADIUM



Healthy
STREET FEST



GOVERNMENT SPONSORSHIP

Municipal governments and agencies often enter into agreements with private parties for sponsorship of certain properties, events, or other activities.

For those concerned about the detrimental effects of food marketing to young children, private sponsorship is fertile ground for reform. At the same time, regulating in this area requires some sophistication because the law is unsettled. One thing that is clear is that a municipality that plans proactively to address legal and policy concerns involving corporate sponsorship is better protected from potential liability.

Some examples help to put the issue of sponsorship in perspective. In one typical situation, a city might invite private sponsorship of a city-owned sports arena, with the city receiving financial support and offering some form of recognition or other benefit in exchange. The nature of the benefit offered may depend on the sponsor, and might include public appreciation, naming rights, exclusive rights to in-arena advertising, or exclusive rights to provide food and beverage service. Similarly, a city or city agency might seek out corporate sponsorship of city programs or of civic events, like celebrations.

POTENTIAL STRATEGY

● **Adopt a sponsorship policy** (with clear criteria for selecting private sponsors)

One recent example is the City and County of San Francisco's agreement with Google to underwrite the cost of free public transportation for low-income children, providing a benefit to the public of \$6.8 million over two years.²⁴⁵ In exchange, Google receives recognition for its contributions to the community. This generation of goodwill is of substantial value to Google right now. As San Francisco rents skyrocket, angry residents are wary of the effect of "Google buses" and tech workers with high salaries on the city's housing prices. In another example, many states turned to corporate sponsorship for the first time when state park systems were hit hard by the recent recession.²⁴⁶ In New York and California, for example, food companies contributed to playground-building efforts and donated money to state parks.²⁴⁷

While these sponsorships can provide a valuable source of funds for important programs or facilities, they also serve as unique and high-value marketing opportunities for sponsors. If a particular sponsor will add to the serious problem of food marketing to young children, municipal leaders may want to think twice about accepting their support. For example, recently several cities have entered into agreements with a large beverage company to become the "official soft drink" of the municipality, in exchange for money.²⁴⁸ Sponsorship agreements entered into by one agency can undermine the efforts of other municipal agencies to educate citizens about the health implications of consuming certain products. They can also have a detrimental effect on local government's efforts to create a social climate that encourages healthy eating and physical activity. When, for example, a mayor's office enters into an agreement with a beverage company to sponsor a city event, and allows that beverage company to place signage and provide sample beverages, the health department is likely to be concerned about the message such sponsorship sends to citizens. To resolve this tension, a municipality may wish to develop a systemwide policy that governs sponsorship agreements with private parties.

Overview of legal issues

A government body's determination of who may or may not sponsor certain government properties, events, or other activities may raise First Amendment questions.

There are three ways to look at sponsorship from a legal perspective: (1) as a government program in which private parties can participate, (2) as a government benefit, or (3) as a special form of advertising.

Government program

First, a system that creates sponsorship opportunities can be treated like any other government program in which private entities apply to participate and agree to abide by the conditions of the program. For example, sponsors may be invited to pay to submit entries to an art program that will place animal sculptures around the downtown area. So long as the government sets the parameters for acceptance, exercises full editorial control, and conveys clearly that the art exhibit is an expression of the government (and not of the sponsoring organizations or companies), it is likely to be treated as a government program like any other.²⁴⁹ In that context, the selection of sponsors for participation, delivery of appreciation messages, and so forth typically will be treated as government speech. In general, government speech is not subject to First Amendment strictures, and the inquiry ends there.

One of the First Amendment's fundamental principles is that the government cannot discriminate against a speaker based on his or her viewpoint. But that does not mean that sponsors have the right to dictate the government's messages in the government's own programs. In the case of the animal art program, the government can accept or reject submissions on whatever basis it likes. The bottom line is that structuring sponsorship programs to ensure the government retains control of the messaging (and satisfies other elements of the test for government speech) is the best way for a municipality to operate a selective sponsorship program while protecting itself from exposure to liability.

Government benefit

At the same time, the government must be careful not to overreach. A municipality can dictate the messages delivered in its own programs but it cannot require participants to espouse government-mandated policies beyond the scope of those programs. This is where the second approach to sponsorship comes into play. Because sponsorship typically provides value to the sponsor, it can be treated as a government benefit (in the form of visibility, improved image in the community, or endorsement by the government). Attempting to control sponsors' messages beyond the scope of the particular program risks violating the bounds of government speech, within which the First Amendment is unlikely to pose an obstacle. It may encroach into terrain governed by the doctrine of unconstitutional conditions. As described earlier, that doctrine stipulates that the government cannot condition a benefit (e.g., sponsorship) on the sponsor's willingness to agree to terms that would be unconstitutional for the government to impose directly.

For example, the Supreme Court ruled in a recent case that it was unconstitutional for the government to require an organization participating in a government-funded HIV-prevention program to adopt an organization-wide policy against prostitution. Requiring a participant to send the government's message not only within the government-funded program but also in all of the organization's work was ruled to be illegal compelled speech. In the sponsorship context, municipal agencies should be careful not to condition sponsorship on the sponsor's agreement to convey certain messages, or to refrain from conveying certain messages, beyond the scope of the program.

Special form of advertising

Third, sponsorship can be treated as a special form of advertising, with the government creating a "forum" in which sponsors advertise their message. When sponsorship looks like advertising, First Amendment restrictions are a significant obstacle. At a minimum, great care must be taken to avoid any discrimination in sponsor selection based on the speaker's viewpoint or the content of the sponsor's message. A full discussion of the legal complexities of this issue is beyond the scope of this white paper. But the key questions will involve whether the selection criteria are permissible because (1) the government has greater latitude when restricting commercial speech, and the *Central Hudson* test is satisfied; or (2) the restriction is consistent with the standards for limiting speech in the particular type of forum at issue (designated, limited, or nonpublic).

Unfortunately, these different ways of characterizing sponsorship are not easily distinguishable. Courts look at various indicia, all of which are ultimately intended to protect private speech from government control while permitting government to speak for itself. For example, if a government is selecting a single company to name a stadium or a park, this creates a very different circumstance from, for example, when a government is permitting nearly every sponsor who asks – but not all sponsors who ask – to participate in an Adopt-A-Highway program.²⁵⁰ In naming a stadium, selectivity is essential. Requiring inclusivity would mean shutting down the sponsorship program entirely. More fundamentally, when only a few sponsors can participate, the likelihood that selections are being made specifically to disadvantage a particular viewpoint – rather than to advance the government's program or purpose – is slim. In contrast, when only one or two applicants from a large pool are denied, and sponsors get public recognition that looks a lot like advertising, the risk of liability is higher.

Sponsorship policy

A comprehensive policy to guide government agencies in making sponsorship decisions is essential. Without a policy, sponsorship decisions could leave a municipality vulnerable to a challenge that too much discretion is vested in officials to pick and choose the sponsors they like, based on the content or viewpoint of the sponsors' messages.²⁵¹ With a policy in place, agencies can structure each sponsorship opportunity or program in such a way as to minimize potential First Amendment issues that otherwise might arise. A policy can be adopted by a city or county to govern all sponsorship decisions across the municipality. Or it can be adopted by an individual official's office or by an individual department. The mechanism for adopting a sponsorship policy will mirror the standard practice in the jurisdiction for the adoption of any other sort of policy.

The value of adopting a sponsorship policy before accepting any form of sponsorship cannot be overstated. Without a policy, any selectivity in acceptance of sponsorships is vulnerable to a constitutional challenge. In contrast, a good policy can provide substantial protection by clarifying the parameters that will govern sponsorship acceptance and thereby maximizing the likelihood that messages in the sponsored program are respected as government speech.

A municipal policy by its very nature will be relatively general, setting forth requirements for all sponsorship processes within a jurisdiction. However, despite its generality, a countywide or citywide policy may include overarching restrictions on sponsorship, to ensure consistency with key governmental priorities and initiatives. By contrast, a policy at the agency level typically will be more focused on the agency's specific policy goals. For example, when Idaho considered accepting sponsorship for state parks, it wanted any sponsors' products and placement to be "conductive to the natural setting, heritage, recreation or natural use" of Idaho's parks.²⁵²

A clearly written policy at the municipal level:

- Creates a factual record of the government's intent in creating the specific program, event, or site;
- Outlines how the selective sponsorship process will operate;
- Ensures that decisions about the purpose of an event, program, or site are made before decisions about sponsorship;
- Provides a framework that, if used properly, will create a factual record for each sponsorship decision; and

- Provides substantial protection against claims that officials have been granted unbridled discretion or that a defense is being constructed after the fact to cover up illegal suppression of disfavored speech.²⁵³

To lessen the legal risk involved in sponsorship decisions, a government sponsorship policy should include several key requirements:

- First and foremost, it should require that all announcements of sponsorship opportunities describe the scope and purpose of the program, event, or site, and it should specify the central messages the government intends the program, event, or site to convey. Such announcements also should make clear to reasonable observers that the program, event, or site is being run only to advance the government's own message and programmatic goals, and not to convey the ideas of any sponsoring parties.
- A policy should require – for every program, event, or site for which sponsorship will be accepted – that the partnering government agency, department, or official maintain complete editorial control. The policy should also detail how that control will be exercised. It should require sponsorship opportunity materials and announcements to specify with whom political accountability lies for decisions associated with government speech relating to the particular event, program, or site; describe the identity of the responsible person; and provide information about how to contact that person.
- The policy should also require that each sponsorship program establish clear selection criteria for sponsors, and that these criteria be tethered either to overarching governmental priorities or to the purpose of the specific program, event, or site. Selection criteria should, when possible, be inclusive rather than exclusive, and should specify what a sponsor must provide or offer, such as expertise in the subject matter or a reputation that will increase the perceived power or veracity of the government's message.
- A sponsorship policy should always require that decision-making bodies refrain from conditioning sponsorship on the sponsor's adoption of a public statement of opinion or policy. It also should state affirmatively that sponsors need not espouse a particular set of beliefs to qualify as a sponsor.
- If the sponsorship opportunity is similar to advertising, the policy should require the decision-making body to document how the selection process will directly advance a substantial governmental interest and explain any alternative means of advancing that interest

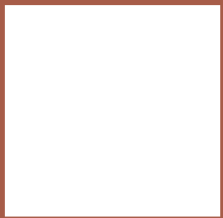
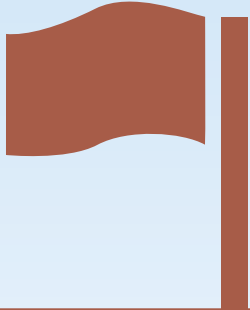
that have been considered and found insufficient. In addition, it should describe alternative means for sponsors to express their own messages, to the extent such means are readily identifiable.

While this long list of requirements may seem daunting, it is actually not terribly difficult in practice to adopt and implement a sponsorship policy, and it is well worth the effort to minimize potential liability and to prevent the potential harmful effects of certain sponsorship agreements.

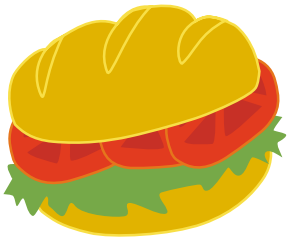
CHANGELAB SOLUTIONS RESOURCES

- Model Sponsorship Policy
www.changelabsolutions.org/publications/model-sponsorship-policy

SCHOOL



Burgers



Ice Cream



HEALTHY ZONING

In certain neighborhoods, locations frequented by young children, such as parks or childcare facilities, may be surrounded by fast food restaurants or other unhealthy food outlets.

These outlets not only offer unhealthy food options, but also often include signage that advertises unhealthy foods and reinforces young children's recognition of certain brands. In 2011, the city of Los Angeles had over 2,000 fast food restaurants and a prevalence of 5.6 fast food restaurants per 10,000 people.²⁵⁴ A 2008 study of public schools in LA County found that 23 percent had one or more fast food restaurants within 400 meters of the school, and 65 percent had one or more fast food restaurants within 800 meters, or about half a mile, of the school.²⁵⁵ The proximity of fast food outlets to schools in LA County is troubling because research has suggested that students, particularly low-income minority students, who attend schools close to fast food outlets are more likely to be overweight or obese.²⁵⁶ In 2011, approximately 51 percent of children in LA County ate fast food at least once a week.²⁵⁷ African-American children and Latino children were more likely than white children to report eating fast food at least once a week.²⁵⁸

POTENTIAL STRATEGY

Limiting unhealthy food outlets and mobile vendors near sites frequented by young children (like childcare facilities or playgrounds)

Policies that restrict the number of fast food or other unhealthy food outlets in child-frequented areas can reduce exposure to both unhealthy food and the marketing that accompanies it.

Overview of legal issues

Cities and counties use zoning and other land use measures to regulate the growth and development of the community in an orderly manner. Zoning divides a community into districts and determines how the land in each district may be used. For example, a community may limit the use of land in a residential district to housing. In that district, housing is the only “permitted” use. Some communities may zone to allow a particular use in a district, but require a permit or approval (by the planning commission or similar agency) for each specific instance of that type of use. Such a use is referred to as a “conditional use.”

CASE STUDY

NO NEW FAST FOOD IN SOUTH LA

In 2008, the City of Los Angeles enacted what was to be a one-year moratorium on new fast food restaurants in South Los Angeles.²⁵⁹

The moratorium was extended and is still in effect. Since the moratorium was imposed, obesity rates in that area have dropped about 3 percent, which is the largest decrease anywhere in LA County.²⁶⁰

The City of Los Angeles also recently released the first draft health and wellness element of its general plan, which demonstrates a commitment to making sure that places where children congregate are healthy. For example, the draft health element seeks to “support strategies that make schools centers of health and well-being by creating environments in and around local schools that are safe, abundant in healthy goods and services, and offer opportunities for physical activity and recreation.”²⁶¹

Local governments have considerable discretion when enacting zoning measures, including those regulating where food outlets may be located. The protection of a community's health, if articulated as a basis for a zoning regulation, is likely to be a reasonable basis upon which to uphold the regulation.²⁶² For example, courts have upheld many zoning ordinances, for health and safety reasons, that prohibit adult businesses and liquor stores from locating near schools.²⁶³

Limiting the availability of unhealthy food near areas frequented by young children

One way to use zoning to limit marketing to children under five is to create “healthy food zones” around locations that young children frequent, such as parks and childcare settings. This can be done through zoning ordinances that prohibit fast food restaurants or other unhealthy food outlets, such as mobile vendors, from locating within a certain distance of child-frequented locations. Because of the great difficulty and cost involved in relocating existing businesses, in practice these policies apply only to new developments, and therefore have greater impact in communities that are in the process of developing or redeveloping. If a community is planning to construct new child-oriented facilities or schools, or has areas in which there are currently no unhealthy food outlets near child-oriented facilities, this policy may be of particular interest.

Communities considering this policy will have to make several policy decisions. One decision is how to define the zone that will be free of new unhealthy food outlets. That will involve determining the minimum distance from designated locations that unhealthy food outlets must be located, as well as the types of locations around which there will be a healthy zone. Restricting outlets near schools is one option, as schools are a place where children and families congregate. With respect to younger children, a community may want to consider other locations such as childcare centers or parks. However, because there may be more of these locations than schools, expanding the list of locations may have a more widespread effect than intended. For example, prohibiting fast food locations near family childcare homes may effectively eliminate all new fast food restaurants in a locality, given the number of family childcare homes, particularly in urban areas. Mapping studies identifying where food outlets are located can be helpful in making this decision.²⁶⁴

Another decision required when enacting this type of policy is what types of food outlets to prohibit in the healthy food zone. Fast food restaurants are one option, but a community may also wish to prohibit

mobile vendors or corner stores. A community will need to weigh the desire to limit unhealthy food options against the reality of the overall number of food options available. In some communities, corner or convenience stores may be the only place where groceries are sold, and limiting them may have more negative than positive effects, on balance. Likewise, mobile vendors can be a source of healthy foods in some communities. One option is to allow only those mobile vendors who sell healthy foods to locate in the healthy food zone. If a local jurisdiction does not wish to limit the location of mobile vendors, it can also use incentives to encourage vendors to sell healthy food, as has been done with the Green Carts program in New York City.²⁶⁵

ChangeLab Solutions has a model ordinance that creates a healthy food zone around schools or other designated locations that children are likely to frequent.²⁶⁶ This ordinance includes an option to prohibit mobile vendors from the healthy food zone, and an additional option to allow only mobile vendors who sell healthy foods. This ordinance does not prohibit convenience stores in the healthy food zone. It does include a number of options that allow a community to tailor the ordinance to its particular needs, as well as a section on implementation. Accompanying the ordinance is a list of findings that outlines the need for such a law.²⁶⁷ ChangeLab Solutions also has information on healthy mobile vending policies.²⁶⁸

CHANGELAB SOLUTIONS RESOURCES

- [Creating a Healthy Food Zone Around Schools: A Fact Sheet for Advocates](http://www.changelabsolutions.org/publications/healthy-food-zone)
www.changelabsolutions.org/publications/healthy-food-zone
- [Model Healthy Food Zone Ordinance & Findings](http://www.changelabsolutions.org/publications/model-ord-healthy-food-zone)
www.changelabsolutions.org/publications/model-ord-healthy-food-zone
- [Healthy Mobile Vending Policies](http://www.changelabsolutions.org/publications/mobile-vending-policies)
www.changelabsolutions.org/publications/mobile-vending-policies
- [Creating a Permit Program for Produce Cart Vendors](http://www.changelabsolutions.org/publications/permit-produce-cart-vendors)
www.changelabsolutions.org/publications/permit-produce-cart-vendors
- [Model Produce Cart Ordinance](http://www.changelabsolutions.org/publications/model-ordinance-produce-carts)
www.changelabsolutions.org/publications/model-ordinance-produce-carts



CIGARETTES



IN-STORE ENVIRONMENTS

In stores, marketers are able to use all “four Ps” of marketing – **price, product, promotion, and place** – to ensure that certain foods appeal to young children and their families.

POTENTIAL STRATEGIES

- **Healthy checkout aisle policies** (which require items placed in one or more checkout aisles to meet certain nutrition standards)
- **Regulating product placement** (such as limiting what is placed in “end caps” or requiring certain products to be placed behind the counter to prevent shoplifting or grabbing by young children)
- **Regulating product pricing** (such as through minimum price laws, by limiting discounts, or by requiring proportional pricing, in which there is no per unit discount for larger volume sales)
- **Prohibiting unhealthy food and sugar-sweetened beverage sales in stores whose primary business is not selling food** (such as toy or electronics stores)
- **Regulating in-store signage** (either through content-neutral limits on signage – such as restrictions on window coverings for safety or aesthetic reasons – or by requiring certain signs promoting healthy foods or safety warning labels)
- **Regulating sampling and food giveaways** (for food safety or other non-communicative reasons)

Some strategies employed to appeal to children include using licensed characters or unusual colors or shapes²⁶⁹ and placing products or advertisements approximately three feet from the ground, which is a young child's eye height. One recent study found that cartoon characters on children's cereal boxes consistently look down at a 9.6 degree angle and therefore make eye contact with children standing in the aisle.²⁷⁰

In Los Angeles County, a 2013 survey of convenience, supermarket, liquor, tobacco, small market, discount, drug, and big-box stores found that 31 percent of stores have alcohol ads near candy or toys, or placed below children's eye level.²⁷¹ Data collected from two areas in Los Angeles County show that less than 5 percent of stores have healthy marketing practices.²⁷² Most of the products promoted to children in stores are unhealthy,²⁷³ and research shows that children can influence their parents' purchases, even of products that are not necessarily intended for children.²⁷⁴

Though these in-store marketing strategies are troubling, they also present opportunities for intervention. Because business practices such as product placement do not involve speech per se, they may be easier to regulate than traditional advertising. This section will explore possible means of addressing various forms of marketing in the retail environment.

Overview of legal issues

First Amendment

For First Amendment purposes, the government's ability to regulate marketing in the in-store environment varies depending on the type of expression being regulated. A law directly regulating expression (for example, a ban on all in-store advertisements for unhealthy food) would be subject to relatively searching review under the *Central Hudson* test. It might be a challenge for the government to establish that an in-store advertising ban materially advances the purpose of, for example, reducing obesity among children. It would also be challenging to establish that such a law did not prohibit a great deal of speech – advertising to adults in the store – that is irrelevant to the government's stated purpose of reducing childhood obesity. Alternately, if the government's interest were more modest – say, reducing kids' exposure to stimuli for unhealthy eating – the challenge might be to prove that the interest is important enough, or (again) that it justifies barring a good deal of speech to adults. The upshot is that a broad ban on in-store unhealthy food advertising would likely be struck down.

On the other hand, a carefully drawn restriction on certain kinds of business conduct, only incidentally affecting expression, would probably be upheld under the First Amendment. For example, a law prohibiting open-refrigerator or open-freezer displays to prevent energy waste – even though it might have some effect on the expressive aspect of product display – would likely survive scrutiny under the *O'Brien*²⁷⁵ standard. As long as using closed-door freezers actually saves a substantial amount of energy, the open-freezer ban, for example, would seem to pass the elements of that test easily: it (1) falls within a local government's power, (2) advances a significant interest that is (3) unrelated to suppressing expression, (4) blocks no more product display than necessary (e.g., it doesn't require an opaque door), and (5) leaves many other forms of product marketing available. Whether those other forms of marketing would need to be available *inside* the same store is an interesting (and thus far unresolved) question.

Finally, a measure that restricts only business conduct that has nothing to do with expression would receive no First Amendment protection at all. For example, a law banning the sale of sugar-sweetened beverages in stores near schools likely would not raise free speech concerns. The key principle to keep in mind is that the less a restriction has to do with limiting expression, the easier it will be to defend under the First Amendment. Because it's not always possible to distinguish clearly between business regulations and regulations of speech, the stated rationale behind a regulation should have nothing to do with restricting speech.

Preemption

Federal and state preemption may also play a substantial role in determining which methods of regulating in-store marketing are available to local government. The federal Food, Drug and Cosmetic Act²⁷⁶ (FDCA) places some limitations on what state and local governments can do to regulate in-store marketing. For example, the law – especially the amendments contained in the Nutrition Labeling and Education Act of 1990²⁷⁷ – restricts what states and local governments may require with respect to the “labeling” of food and beverage products.²⁷⁸ Likewise, in California, the state Retail Food Code²⁷⁹ may preempt some forms of local retail regulation. See the Overview of Relevant Law section of this white paper for a full discussion of the Retail Food Code.

In general, various in-store measures may be conceived as being at different points along a spectrum reflecting the likelihood of preemption. At one end of the spectrum, facing almost certain preemption under the FDCA, are (for example) local-government-

mandated disclosures about the amounts of certain ingredients in specific foods, such as how many calories or grams of sugar they contain. Toward the other end, subject to far less risk of preemption, are mandated disclosures of generalized health information that are related to obesity, attributed to the government, and not located on or near a particular food product. And, of course, voluntary or incentive programs – programs that are not “requirements” – stand at the far end of the spectrum, and generally are not subject to any risk of preemption. The extent to which preemption is a concern with respect to specific policies will be addressed in further detail below.

Healthy checkout aisles

The legal principles outlined above come into play in an area of increasing interest to advocates and researchers: the creation of healthy checkout aisles in grocery stores and other food retail locations. The part of a retail store most accessible to very young children – the checkout aisle – is the one most likely to be stocked with sugary drinks, cookies, chips, and candy. The availability of individually packaged items, in combination with the fact that checkout areas can’t be avoided (as candy or cookie aisles can be), means that the trip through the checkout line, especially when it involves a wait, can undermine parents’ efforts to provide their children with a healthy diet. Moreover, checkout aisle sales account for 46 percent of sales of impulse-buy products, such as candy and gum.²⁸⁰ A healthy checkout aisle policy could take many forms, but would essentially mandate that one or more checkout aisles contain only items that meet certain nutritional requirements.

Though the First Amendment may present a challenge, the obstacles can be navigated. Any ordinance requiring one or more healthy checkout aisles would need to focus on the *access* that shoppers have to the items in the checkout aisle, as opposed to any *communicative* function that the placement of unhealthy items at checkout might have.²⁸¹ That is, a law should emphasize the ability of small children waiting in line to physically reach the items on offer, rather than the lure of packaging familiar from television commercials. If a court were to proceed with a First Amendment review of a law focusing on location of and access to certain products, it would likely conduct that review using the *O’Brien* standard.

The *O’Brien* standard is relatively lenient, and a healthy checkout aisle law would therefore be likely to stand in the face of a First Amendment challenge if examined under that standard. Localities usually have the authority to enact product display measures to benefit the public welfare, and they have an important interest in combatting obesity.

CASE STUDY

IMPROVING THE CHECKOUT EXPERIENCE IN WEST VIRGINIA AND IOWA

Though there are no existing laws requiring healthy checkout aisles, there are several examples of successful voluntary programs. In West Virginia, Change the Future WV worked with three Walmart stores, five Foodland stores, and a few local grocery outlets. They used the state nutrition standards for competitive foods in schools to set guidelines for healthy checkout aisles, and dieticians worked with store owners to determine which products met those guidelines. They also encouraged stores to stock the healthy checkout aisles with physical activity toys and water. The use of consistent signage in all stores helped community members recognize which aisles were “healthy,” and the program was very well received. Store owners were also receptive to the program, and found that certain items sold better in the healthy checkout aisles than they did on the shelves. For more on the West Virginia program, visit www.changethefuture.wv.gov.

Likewise, in Cedar Falls, Iowa, a healthy communities project called Blue Zones worked with Hy Vee grocery stores to increase sales of healthy products and reduce sales of candy and sugar-sweetened beverages in checkout aisles. The stores replaced candy with fresh fruit and healthy snack bars, and replaced sugar-sweetened beverages with healthier beverages such as water and unsweetened tea. In just three months, the stores saw a 99 percent increase in sales of healthy snack bars and a 151 percent increase in sales of healthy beverages. Overall revenues also increased, as sales of healthy products made up for the decrease in sales of unhealthy products. To read more about the Cedar Falls program, visit: www.bluezones.com/2014/04/hy-vee-boosts-sales-with-healthier-options.

There is also research indicating that product location in a store greatly influences sales,²⁸² suggesting that healthy checkout aisles may lead to reduced sales of certain potentially harmful items, though it's possible that a court could require more evidence that healthy checkout aisles would advance the government's interest in combatting obesity. A healthy checkout aisle requirement is also narrowly tailored, in that it does not limit the availability of unhealthy foods elsewhere in the store, nor does it denigrate unhealthy items; it simply makes them a bit more difficult to purchase.

FDCA preemption concerns are minimal, and can be addressed through attention to how store aisles are designated on signs – “family friendly,”

for example, is a term less likely than “healthy” to run into preemption challenges. An entirely voluntary program – while likely effecting change in fewer locations – would not face any obstacles from the First Amendment or preemption, though stores may have contractual agreements with distributors that could interfere.

Because there are pragmatic hurdles to a checkout aisles mandate, voluntary programs might be a good way to introduce this strategy. Those hurdles include: how to define “healthy” (which nutritional standards to use); how to delineate the “checkout aisle” in stores, such as corner stores, where there may be no “aisles” at the checkout; how to set “aisle” boundaries in stores where there are complicated checkout aisle arrangements; and how to take into account self-checkout areas.

Product placement

In addition to checkout aisles, there are other places in the store where products are more easily accessible and appealing to young children and their parents. For example, items placed in “end caps,” which are the outward-facing displays at the ends of aisles, can sell between two and five times more than items located elsewhere, and can account for 30 to 40 percent of supermarket sales.²⁸³ Similarly, “freestanding product display racks rank second in their ability to attract attention [from consumers].”²⁸⁴

Efforts to prohibit the placement of unhealthy food and sugary drinks in end caps, or to restrict their placement only to certain aisles in the store, will raise concerns about the First Amendment and preemption similar to those raised by a healthy checkout aisle policy. Key here, as with healthy checkout aisles, is the emphasis on the policy’s goal of furthering a government interest unrelated to communication – for example, limiting toddlers’ access to (or ability to grab) unhealthy food off the shelves. Justifications that rely on “keeping unhealthy food messages from reaching young minds” or even “stopping impulse buys” implicate communication in a way that could make the First Amendment a more prominent obstacle. If the focus in such policies remains on access and location, the analysis should be much the same as outlined above for healthy checkout aisles.

Another policy to consider is requiring the placement of certain items in areas accessible only to staff – similar to the way that cigarettes and other tobacco products are located only behind counters in some stores. In *Lorillard*, the Supreme Court reviewed Massachusetts’ regulation requiring cigarettes to be displayed behind counters to restrict access

by minors. Because the purpose of the regulation was unrelated to the communication of ideas, the court relied on *O'Brien* in upholding it (while noting that the First Amendment might not be implicated at all). There is some evidence that certain unhealthy food items are especially attractive to shoplifters.²⁸⁵ The government therefore could require that high-theft items be kept behind counters to reduce criminal activity.²⁸⁶ And obviously, at the same time, placing such products behind counters will make them less accessible to young eyes and hands.

Product pricing

The U.S. food industry frequently uses “value” marketing – a technique to increase profits by encouraging consumers to spend a little extra money to purchase larger portion sizes, thus leaving consumers with the feeling that they have benefited from a “deal.”²⁸⁷ However, the more problematic effect of value marketing on consumers is a substantial increase in caloric and saturated fat intake.²⁸⁸ Large-sized packages, containers, and restaurant portions imply that it is appropriate, typical, reasonable, and normal to consume a larger quantity of food and beverages.²⁸⁹ Regardless of portion size, increasing food prices for unhealthy products creates a financial incentive for consumers to avoid unhealthy foods. It has been shown that both individual consumers and population groups decrease purchases of discretionary foods as prices are increased.²⁹⁰ Moreover, strategies that make the relative price of healthy foods lower than that of unhealthy foods have proven effective at altering the types of food that consumers purchase.²⁹¹ (Similarly, price regulation has been used successfully to reduce sales of tobacco products.²⁹²)

Strategic product pricing policies may include (1) minimum price laws, (2) proportional pricing, (3) discounting tactics, and (4) taxation. The last of these is addressed in the Taxation section of this white paper. Minimum price laws guarantee that the price of certain foods or beverages remains at or above a designated amount. Proportional pricing requires that larger serving sizes be priced at the same per-volume or per-weight rate as smaller serving sizes, thus eliminating the discount when consumers purchase larger sizes. While there is no legal reason why either of these strategies cannot be used to regulate food prices, they are most often discussed in the context of sugar-sweetened beverages (SSBs), as there is a large body of scientific research demonstrating their negative health effects.²⁹³ All of these strategies can be pursued via a local ordinance regulating product sales.

There are few legal concerns with respect to pricing strategies. Setting consumer prices for public health reasons falls within the police power

of local governments.²⁹⁴ Some food products are subject to state or federal minimum price laws, which could raise preemption concerns. But those products (e.g., milk²⁹⁵) tend not to be processed or unhealthy. The Dormant Commerce Clause may be implicated when states or localities regulate pricing, but requiring that in-state prices be higher than out-of-state prices – unless the requirement has the purpose or effect of benefiting in-state businesses – has not traditionally been a problem.²⁹⁶ Pricing policies also sometimes raise antitrust questions, but antitrust laws have to do with prohibiting collusion between parties, which should not be an issue when the government is regulating a market for public health reasons.²⁹⁷

In addition to setting minimum prices, local government may wish to regulate the discounts provided by coupons. This approach has been successful in the tobacco context. In 2012, Providence, Rhode Island, adopted an ordinance that prohibited the redemption (though not the distribution) of coupons for discounted tobacco products.²⁹⁸ Tobacco retailers challenged the ordinance as a violation of the First Amendment, claiming that it banned protected commercial speech, or at least expressive conduct, and that it should be struck down under either *Central Hudson* or *O'Brien*.²⁹⁹ The court disagreed, and upheld the law, finding that such pricing regulations did not implicate the First Amendment.³⁰⁰ This may leave open a window for a similar law applying to unhealthy food coupons, but any such law would have to be drawn carefully to avoid overreaching and regulating communication about prices, rather than just the prices themselves.

When a store's primary business is not selling food, prohibit unhealthy food and beverage sales

Often stores whose primary business is selling another type of product – like toys, electronics, home wares, or sporting goods – sell candy, sodas, and other unhealthy foods. One survey of over 1,000 retail stores in the United States whose primary merchandise was not food found that 20 percent sold SSBs, often within arm's reach of the cash register.³⁰¹ SSBs are ubiquitous even in retail establishments whose purpose is to promote health and well-being. A survey of pharmacies in Minneapolis found that 60 percent sold food or beverages, including SSBs, within ten feet of the register, and carried, on average, nearly four different kinds of SSBs.³⁰² Especially in non-food stores frequented by young children with their parents, placement of these products increases exposure and provides additional opportunities to purchase unhealthy products. To address this tactic, localities can legislate to prohibit

nonfood stores, or some types of nonfood stores, from selling certain food products. This policy is analogous to the approach taken by some cities to limit where tobacco products may be sold.*

Limiting sales of food products at nonfood stores could be accomplished through direct legislation or through a permitting process. ChangeLab Solutions has a model ordinance regulating where sugar-sweetened beverages may be sold.³⁰³ That model includes several options to limit sales of SSBs, from limiting the number, location, or density of retailers to prohibiting the sale of SSBs by retailers that cater primarily to children and their caretakers. These regulations can be effected by direct legislation or by amendments to zoning codes. Or they can be accomplished through licensing schemes that regulate SSB sales. The model provides regulatory language as well as findings to support the rationale for enacting such legislation.

There are few legal barriers to regulating retail sales of specified food and beverage products. In most states, including California, regulation of retail sales for public health reasons falls within the police power of local governments. Likewise, local governments generally have wide leeway to enact zoning regulations that govern the use of land within their jurisdiction, and these can also affect where certain products are sold. For example, some cities have used zoning codes to prohibit liquor stores or adult businesses from locating near schools.³⁰⁴ Some communities have used zoning laws to limit the proximity of fast food restaurants to schools³⁰⁵ and other places children frequent.³⁰⁶ Using zoning to limit unhealthy food sales in certain locations is an extension of this tactic.

Two additional legal issues that may arise when limiting unhealthy food sales are regulatory takings** and vested rights. A regulatory taking is a situation in which regulations severely impact business operations. Courts use a balancing test to determine whether a business is owed compensation for such a taking, and will weigh the government's interest against the extent of the intrusion.³⁰⁷ With respect to limiting SSB sales, the government has a very compelling interest, but opponents to this policy strategy may raise the regulatory taking issue nonetheless. Vested rights are those rights accorded to people or businesses that the government has only limited ability to change via regulation.³⁰⁸ The issue of vested rights is most likely to arise with

* For example, San Francisco has prohibited pharmacies from selling tobacco products. San Francisco Health Code §§ 1009.91 *et seq.*

** The Fifth Amendment to the United States Constitution (and similar provisions in the California Constitution) prohibits the government from taking private property without just compensation.

respect to zoning code changes. The law of vested rights is similar to that of regulatory takings, as is the analysis in the context of limiting unhealthy food sales.

Regulating signage

There are at least two possible ways to regulate in-store signage. The first is to limit or ban in-store ads for unhealthy products. The second is to mandate signs either encouraging the consumption of healthier products or discouraging the consumption of unhealthy products. Such mandated signs could be attributed to the government, or they could be generic. The legal implications of these respective approaches are outlined below. Another means by which to improve in-store signage is through voluntary programs, which do not have to meet the same legal requirements as a regulatory approach. For example, New York City's Shop Healthy program, which works with corner stores to improve healthy food offerings, was able to shift the ratio of unhealthy to healthy ads in participating corner stores from 11:1 to 1:1 over the course of a single year.³⁰⁹

Sign restrictions

The first sign regulation option would be to restrict unhealthy food ads in stores. Such restrictions would likely be reviewed under the fairly stringent *Central Hudson* test. If the restrictions were based on content (e.g., restrictions applicable only to unhealthy food or soda signs), it is likely they would be struck down.* However, if restrictions were based on reasons unrelated to content or to communication, such as safety or aesthetics, they would be reviewed under a less stringent standard.³¹⁰ Some states and localities have enacted laws requiring a certain percentage of the windows of certain types of retail establishments to be free from all signage so that the police can easily see in and customers can easily see out.³¹¹ These laws have not run afoul of the First Amendment. Content neutral restrictions on the time, place, or manner of speech are permissible if they are narrowly tailored to serve a legitimate government interest.³¹²

Mandated signs/product labeling

Mandated signs could take several forms. They could encourage the purchase and/or consumption of, for example, fruits and vegetables. Or they could discourage the purchase and/or consumption of, for example, sugar-sweetened beverages. They could also provide factual information about products, such as "contains 300 calories," or "sugar-

* For a full discussion of content-based signage restrictions, see the Outdoor Advertising section of this white paper.

sweetened beverages contribute to heart disease or diabetes.” They could be attributed to the government or lack attribution. Each of these approaches has legal implications, the most important of which have to do with the First Amendment and federal preemption.

First Amendment

Laws requiring the disclosure of factual, uncontroversial information – like nutritional facts panels on packaged foods – need to clear only a low First Amendment hurdle.³¹³ If the requirements are reasonably related to a valid government interest, particularly an interest in making sure consumers are not deceived or confused,³¹⁴ then the First Amendment will not stand in the way. For example, a requirement that stores post a chart explaining how to read a nutrition facts panel should not face a constitutional obstacle.

Requirements for signs carrying a message that can be characterized as opinion rather than fact may face more significant First Amendment hurdles. Either the *Central Hudson* test or an even more stringent “strict scrutiny” regime would likely apply to, for example, a law requiring stores to post a sign stating, “Kids Should Drink More Water and Less Soda.” It’s unlikely that such a sign requirement would survive a First Amendment challenge.

There may be more room for required signs that display an opinion if it is clear that the government itself – rather than the retailer – is speaking. For example, a county health department may be able to post its own signs in grocery stores encouraging the consumption of fruits and vegetables. Though the First Amendment does not limit what the government itself can say, it is possible that the Constitution limits where the government may say it. So, a county may buy space on a billboard to say, “A Message from Los Angeles County: Kids Should Drink More Water and Less Soda.” But it’s not clear whether a county can require a retailer to post a sign inside a store that says the same thing.³¹⁵ The limits of the government’s ability to post signs in stores have not yet been developed by the courts, as the “government speech doctrine” is relatively new; the Supreme Court first directly addressed it only in 2005.³¹⁶ The possibility of more lenient scrutiny for the government’s own speech (as opposed to private speech that the government requires) suggests that a government agency may want to ensure that required messages are considered “government speech” – for example, by paying for and distributing any signs that it requires be posted.

Preemption

Mandated signs may also give rise to preemption concerns, particularly under the federal Food, Drug & Cosmetics Act and the Nutrition Labeling and Education Act (NLEA).³¹⁷ “Labeling” is defined expansively under federal law – it may, for example, include any message that accompanies a product, even if the message does not appear on the product packaging.³¹⁸ The NLEA expressly preempts any state or local “requirement for nutrition labeling of food” that is not identical to federal requirements.³¹⁹ It likely means that localities cannot require their own front-of-package labeling schemes listing nutrition information. The act explicitly *permits*, however, the enforcement of state and local laws that are identical to the federal standard. That means, for example, that a state may pass a law requiring that federal requirements be followed, and then it may enforce that law with health department inspections or administrative procedures or private actions that may not be available under the federal law.

In spite of the broad definition of labeling, not every message in a grocery store, or even on a product package, is “labeling,” as defined by federal law, and not every message on a label is preempted. A flyer or poster or book counts as labeling only if it “accompanies” the product and provides information to consumers in the context of a sales transaction. And even then, such a flyer would be preempted only if it contained the type of nutrition information regulated by federal law. The preemption determination is case specific, but will involve an assessment of at least the content, function, and location of the required message.

Despite its broad preemption regime, the NLEA explicitly carves out a sphere for state and local safety warnings on food labeling. The act’s safety warning exception states that preemption “shall not be construed to apply to any requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food.”³²⁰ Therefore, there is a fair chance that state or local ordinances can be saved from preemption if they are properly framed as requiring safety warnings.

State and local safety warning requirements are an untested area of law, and would almost certainly be challenged in court. The more a state or local warning label resembles existing warnings required by federal law or state law, such as California’s Proposition 65, and the less it resembles nutrition information governed by the NLEA or FDA regulations, the less legal risk it will face. At a minimum, a warning should be expressly attributed to the government and explicitly warn consumers of a particular safety effect of consuming the food or

beverage. Ideally, it should also include the words “safe” or “safety.” Although it is possible that courts may interpret the NLEA’s warning exception to apply only to allergies and foodborne illness rather than nutrition, there is a strong argument that the exception extends to warnings about obesity, heart disease, and diabetes. It is also possible that such a warning would fall completely outside the parameters of the NLEA, which governs a very specific set of labeling information, and therefore would not be preempted.

Risk Assessment Chart for Mandated In-Store Signage

	Highest Risk of Preemption	Moderate Risk of Preemption	Less risk of preemption
Nutrition disclosures about specific products “Pepsi is high in sugar”	Displayed anywhere in the store and not attributed to local government		Displayed away from the specific product and attributed to local government (e.g., posters, leaflets, booklets)
Nutrition disclosures about generic products “Soda is high in sugar”		Displayed on or near specific examples of the generic product (e.g., stickers, shelf tags, aisle signs)	Displayed away from specific products and attributed to local government (e.g., posters, leaflets, booklets)
Government endorsement of particular products “Portland Healthy Choice”		Displayed on or near the product (e.g., stickers, shelf tags, or aisle signs)	Displayed away from specific products and attributed to local government (e.g., posters, leaflets, booklets)
Dietary guidance “Eat Right” with a picture of fruits and vegetables “Eat healthy – avoid foods high in fat” with pictures of fatty foods		Displayed on or near a particular example of one of the products depicted (e.g., stickers, shelf tags, aisle signs)	Displayed away from specific products and attributed to local government (e.g., posters, leaflets, booklets)
Public health messages about food “Studies show that sugary beverages cause obesity”		Displayed on or near a particular product (e.g., stickers, shelf tags, aisle signs)	Displayed away from specific products and attributed to local government (e.g., posters, leaflets, booklets)
Messages unrelated to food nutrition “Studies show exercise reduces the likelihood of obesity”			Displayed anywhere in the store

Regulating sampling and food giveaways

Another form of in-store marketing that is especially appealing to young children is sampling. From a legal perspective, free sampling and giveaways traditionally have been considered a form of promotion but not a form of speech.³²¹ For a long time, cases involving sampling restrictions, which usually arose in the tobacco context, did not raise First Amendment challenges at all. However, this has changed in the

recent past, and the Sixth Circuit Court of Appeals recently applied the *Central Hudson* test to a federal ban on tobacco sampling.³²² The court upheld the ban on free samples, however, finding that it was no more extensive than necessary to advance the government's substantial interest in curbing juvenile tobacco use.³²³ In so finding, the court looked to tobacco's physiologically addictive nature, and noted that free samples constitute an "easily accessible source of these products to young people."³²⁴

It is not clear, however, how this analysis would play out in the food and beverage context, as there isn't any precedent. Though there is some evidence about the addictive nature of sugar, tobacco and food are very different in nature. In addition to many other differences, the basic fact that tobacco is illegal for minors to purchase played a role in the court's analysis. If a court were to follow the Sixth Circuit's lead, it is possible that a ban on sampling of certain foods would not pass muster under the *Central Hudson* test. However, it's also possible a different court would find that sampling does not implicate speech at all, and there would be no First Amendment concern. Another possibility is that a court would review a ban on sampling using the more lenient *O'Brien* test, particularly if the ban is justified by reasons unrelated to expression.

Lorillard is the most relevant Supreme Court case applying the *O'Brien* test in a similar context. In that case, the Court declined to rule directly on whether Massachusetts' self-service tobacco-display ban implicated a protected speech interest.³²⁵ Instead, the court assumed for the sake of argument that the regulation had a communicative component, and then subjected the regulation to the four-part *O'Brien* test.³²⁶ The court upheld the regulation, finding that (1) Massachusetts had the constitutional power to implement the regulation, (2) the regulation furthered the substantial government interest in preventing access to tobacco products by minors, (3) that interest was unrelated to the suppression of free expression, and (4) the regulation was appropriately narrow. The court emphasized that the regulation left open ample alternatives for tobacco companies to engage in "expression" about their products, including by placing empty tobacco packages in the self-service displays or placing actual tobacco products where they could be seen but not accessed directly by customers.³²⁷

Lorillard provides some precedent in support of a law, regulation, or government policy restricting food sampling, at least for reasons unrelated to expression. But, given the possibility of review under the *Central Hudson* test, especially in light of the Sixth Circuit sampling case,³²⁸ a policy regulating food sampling will need to be drafted

carefully, with particular emphasis on rationales that pertain to issues such as safety and aesthetics, but have nothing to do with the communicative aspect of food sampling.

Some sampling of food products also occurs outside of retail establishments, such as on the street or in parks. Food companies sometimes give away free beverages or foods to passersby, or at events like fairs or parades. The analysis above also applies to sampling bans on the street. A local jurisdiction may be able to ban the actual giveaway of food if there's a reason to do so that's unrelated to communication. These concerns may vary, and could include food safety, litter, crowds, safe passage on sidewalks, or other effects of food giveaways on the street.

Though the California Retail Food Code addresses sampling only at farmers' markets and fruit stands, the California Conference of Directors of Environmental Health has issued guidelines for retail food sampling.³²⁹ They are not binding, but they suggest for food safety reasons that all food sampling be done only in permitted retail food facilities. The guidelines state that, for example, "a food establishment, which is permitted to sell prepackaged food only, may not offer samples that require food preparation."³³⁰ Even these guidelines would not prevent, however, a supermarket or other facility from offering samples that do not require preparation.

Los Angeles County currently regulates the sampling of food products. Chapter 11.10 of the County Code defines a "food demonstrator" as any person who offers or serves to the public, with or without charge, unpackaged bulk food or packaged food, for the purpose of publicizing, advertising, or promoting the sale of food, food products, or food equipment.³³¹ It then goes on to impose various public health-related requirements for such demonstrations, including sanitation requirements and a provision allowing the director of public health to impose additional requirements.³³² Food demonstrations are permitted only in a building or approved tent at a community event.³³³ This means that the practice of handing out samples of food on the street is not permitted, though enforcement may be challenging unless violations of the code are discovered and reported.

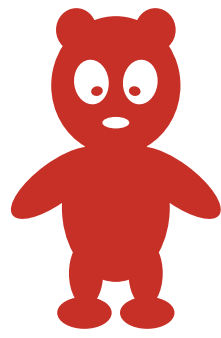
CHANGELAB SOLUTIONS RESOURCES

- Model Ordinance Regulating Sales of Sugar-Sweetened Beverages
www.changelabsolutions.org/publications/SSB-strategies
- Model Ordinance Regulating Where Sugar-Sweetened Beverages May Be Sold
www.changelabsolutions.org/publications/SSBs-Locations

Kid's Meal



Free toy
with every kid's meal



IN-RESTAURANT ENVIRONMENTS

Restaurants market to young children through a variety of tactics, for example, on television, on billboards, through digital media, and on site.

In 2009, fast food restaurants spent \$583 million on marketing to children ages two to 11.³³⁴ Of that amount, \$341 million was spent on child-directed “premiums.”³³⁵ In this context, “premiums” usually take the form of toys that are given away with children’s meals, which are most attractive to young children. There are also other ways in which

POTENTIAL STRATEGIES

- **Regulating the nutritional quality of children’s meals or beverages in children’s meals** (with or without an accompanying toy)
- **Regulating product pricing** (such as through minimum price laws, by limiting discounts, or by requiring proportional pricing in which there is no per unit discount for larger volume sales)
- **Requiring menu labeling** (above and beyond that required by federal law)
- **Regulating restaurant signage** (either through content-neutral limits on signage or by requiring certain signs promoting healthy foods or safety warning labels)
- **Requiring the provision of free tap water**

restaurants market to young children on site, such as through specially priced children's meals that do not contain toys, on-site signage, and the promotion of SSBs (either as part of meals or separately). This section provides an overview of policy options to address some of these forms of in-restaurant marketing.

Overview of legal issues

The First Amendment analysis with respect to in-restaurant marketing is essentially the same as that for the in-store setting, as outlined above. Where possible, the focus should be on regulation of business activity rather than on regulation of speech, so the First Amendment hurdles will not be as great. However, it's not always possible to clearly distinguish between business practices and speech. In order to make regulation less susceptible to First Amendment challenges, the rationale for regulation of business activity should have nothing to do with the activity's communicative elements.

In addition, preemption may arise when regulating in the restaurant context, at least with respect to certain policies. When relevant, preemption will also be discussed below as a potential barrier.

Regulating children's meals

One way to improve the in-restaurant marketing environment is to require that children's meals meet minimum nutrition standards. Children's meals are a powerful marketing tactic directed to young children. In 2009, fast food restaurants sold slightly more than 1 billion meals accompanied by toys to children ages 12 and under.³³⁶ A 2013 study examined the nutritional content of 3,494 children's meal combinations from the top 50 chain restaurants and found that 97 percent did not meet the standards developed by nutrition and health experts, and 91 percent did not meet the National Restaurant Association's own Kids Live Well standards.³³⁷ Another 2013 study showed that while fast food restaurants have introduced healthier kids' meal options since 2010, less than 1 percent of all kids' meal combinations have met recommended nutrition standards.³³⁸ These findings are especially troubling, considering that, on average, children get 25 percent of their daily calories at fast food outlets and other restaurants.³³⁹

There are several approaches to regulating kids' meals. First, a state or local government could require that children's meals accompanied by toys meet certain nutrition requirements. They could also require that

CASE STUDY

HEALTHY TOY GIVEAWAY IN THE SAN FRANCISCO BAY AREA, CALIFORNIA

In 2010, both San Francisco³⁴⁰ and Santa Clara County³⁴¹ enacted legislation governing the nutritional content of children's meals accompanied by toys. Four months after its enactment, a study of the effect of the Santa Clara ordinance revealed marked improvements in the restaurant environment, including improvements in on-site nutritional guidance such as signage containing nutrition information, and promotion of healthy meals, beverages, and side items.³⁴²

In San Francisco, where the ordinance was worded slightly differently and thus, strictly speaking, applied only to toys provided at no charge with children's meals, McDonald's and Burger King announced that they would start charging ten cents per toy.³⁴³ This allowed the restaurants to avoid changing the nutritional profile of their children's meals while still offering a very inexpensive toy. Careful drafting of an ordinance that closely follows ChangeLab Solutions' model can prevent this type of loophole.

all children's meals, whether or not accompanied by toys, meet nutrition requirements, or that the beverages accompanying such meals meet certain requirements. Because these strategies regulate a business practice – bundling of meals or the provision of toys – rather than speech, the First Amendment should not pose a problem.

With respect to nutrition requirements for children's meals, the primary practical challenge is how to define what constitutes a “healthy” meal. In 2012, the RAND Corporation convened a conference of experts to develop nutrition standards for restaurant meals. These standards are based on the most up-to-date science, but also take feasibility and acceptability into consideration.³⁴⁴ ChangeLab Solutions' models use these standards, but a state or local government could choose different standards.

In addition to the strategies outlined above, healthier children's meals can also be promoted through voluntary programs. These types of programs typically provide recognition and other incentives to restaurants that choose to participate by meeting requirements for healthier children's meals. San Antonio's Por Vida and Los Angeles County's Choose Health LA Restaurants are two examples of such programs.

Pricing regulation

As in the retail store context, pricing affects restaurant purchases. The policy options and accompanying legal analyses are the same for restaurants as they are for stores, as outlined above.

Signage

Signage is also pervasive in the restaurant setting. The policy options and accompanying legal analyses are largely the same for restaurants as they are for stores, as outlined above. The one exception is restaurant menu labeling, which is addressed in the next section.

Menu labeling

The First Amendment doesn't present a serious problem with respect to menu labeling, since the required disclosure of factual information in a commercial setting is subject to the most lenient type of First Amendment review.³⁴⁵ The long-recognized doctrine of “compelled commercial speech” has allowed the government to require companies

to disclose facts about their products including, among other things, nutrition facts panels³⁴⁶ and warnings on cigarette³⁴⁷ and alcohol packaging.³⁴⁸

With menu labeling, federal preemption is a concern. The Affordable Care Act established a federal menu labeling law that applies to restaurants and similar retail establishments that have 20 or more outlets nationally.³⁴⁹ The FDA issued final regulations in late 2014, which clarified that the menu labeling requirements apply to a wide variety of food outlets, including movie theaters, grocery stores that serve prepared foods, sports arenas, and other similar food retailers.³⁵⁰ Though this law preempts local menu labeling requirements that apply to food retail establishments covered by the federal law, local jurisdictions are free to enact identical requirements; doing so would allow localities to enforce the federal requirements. Local governments can also enact laws that require menu labeling at restaurants or other food retailers that are not covered by the federal law (i.e., those with fewer than 20 outlets nationwide).³⁵¹

Requiring the provision of free tap water

While many restaurants provide free tap water voluntarily, most states and localities, including California and Los Angeles County and the cities therein, do not require them to do so. At the same time, beverage companies encourage restaurants with whom they contract to market sugary drinks much more heavily than water. On a website aimed at restaurant partners, Coca-Cola's Cap the Tap campaign posted the following: "Every time your business fills a cup or glass with tap water, it pours potential profits down the drain. The good news: Cap the Tap™ – a program available through your Coca-Cola representative – changes these dynamics by teaching crew members or wait staff suggestive selling techniques to convert requests for tap water into orders for revenue-generating beverages."³⁵² ChangeLab Solutions has also received anecdotal reports of a customer requesting tap water and being told the restaurant's contract with a beverage company would not allow them to provide it.

In order to counter this in-restaurant marketing technique, local jurisdictions may be interested in requiring restaurants to provide tap water to patrons free of charge. There are different ways to think about implementing such a policy, each entailing different legal considerations. The first is through the plumbing code, and the second is through direct regulation of water provision.

Plumbing codes govern the construction of plumbing systems in new buildings, and often include requirements related to water fountains and water availability in commercial buildings. In California, the plumbing code is incorporated as part 5 of the Building Standards Code.³⁵³ Local jurisdictions may amend the state Building Standards Code provided that two conditions are met: (1) the local amendments are more protective than the state standards, which serve as a floor, and (2) the local amendments are “necessary to address a local, topographic or climactic condition.”³⁵⁴ Currently, the California Plumbing Code requires newly constructed restaurants with an occupant load of more than 30 to have drinking fountains or water stations,³⁵⁵ but it does not specify whether those fixtures must provide ready access to free water for patrons. A locality could either work with the State of California to amend the Plumbing Code to make it clear that water supplied in restaurants must be readily available free of charge, or it could enact a local amendment, though the local amendment would have to meet the requirements outlined above and, as with the state code, would apply only to new restaurants.

Perhaps an easier and more effective approach for localities would be to directly regulate water access in restaurants through a city or county ordinance. The primary legal concern with respect to direct regulation would be preemption by the California Retail Food Code.³⁵⁶ The retail food code states that it is the intent of the state legislature to occupy the whole field of health and sanitation standards for retail food facilities.³⁵⁷ If a local restaurant water access policy is presented as a “health and sanitation” standard, the Retail Food Code would appear to preempt it. But the purpose of the Retail Food Code is to “safeguard public health and to provide to consumers food that is safe, unadulterated, and honestly presented through adoption of science-based standards.”³⁵⁸ This language and the enumerated policies underlying it would suggest that the code’s aim is to design policies based on hygiene and sanitation, rather than on the public health goals that a restaurant water access policy would seek to achieve. So a policy requiring free tap water access at restaurants should not be preempted by the Retail Food Code because it would be outside its scope.*

Though preemption should not be a concern, there are several practical concerns that do arise with respect to a water access policy. The first is the availability of potable water. Potable water may not be available for environmental reasons, such as the contamination of the municipal water supply, though this should not be an issue in Los Angeles. It also may not be available, or at least not readily available, due to drought conditions. Los Angeles has already enacted the water conservation restrictions in phase II of the city’s mandatory Emergency Water

Conservation Plan Ordinance. Phase II incorporates all policies of phase I, and under a phase I water shortage alert, “[n]o restaurant, hotel, café, cafeteria, or other public place where food is sold, served or offered for sale, shall serve drinking water to any person unless expressly requested.”³⁵⁹ However, it is possible to craft a free tap water requirement to comply with this drought-time restriction by allowing restaurants to serve water upon request only. Lastly, the drafters of a policy will have to consider details such as whether the policy should require that the available water be made equally attractive to other beverage options (e.g., by requiring service in the same size cup), whether restaurants should be permitted to charge a nominal fee for the cup or for the cost of the tap water, and whether signage should be required notifying customers of water availability.

* For more on the Retail Food Code, see the discussion in the Overview of Relevant Law section.

CHANGELAB SOLUTIONS RESOURCES

- Model Ordinance for Toy Giveaways at Restaurants
www.changelabsolutions.org/publications/healthier-toy-giveaway-meals
- Model Kids’ Meal Ordinance
www.changelabsolutions.org/publications/kids-meal-ord
- Creating Successful Healthy Restaurant Policies
www.changelabsolutions.org/publications/creating-successful-healthy-restaurant-policies

Community Meeting

Today



Soda Tax

**Benefits
for our
community**

TAXATION AND TAX INCENTIVES

Local taxes on unhealthy food, and particularly on sugary drinks, are an option for addressing childhood obesity that policymakers are discussing with increasing frequency.

A 2013 Field Poll of California voters found that 67 percent supported a sugar-sweetened beverage tax with revenues funding school nutrition and physical activity programs for kids.³⁶⁰ At the same time, researchers have found that a penny-per-ounce tax would reduce consumption, at least by adults, by 15 percent. This would reduce rates of obesity, type 2 diabetes, and coronary heart disease, thereby providing substantial savings in health care costs.³⁶¹

In 2011, 23.9 percent of children under five in Los Angeles County consumed at least one sugar-sweetened beverage per day.³⁶² Low-income children are more likely to consume more than one SSB daily than higher income children, and African-American and Latino children are more likely to consume that amount than white or Asian and Pacific Islander children.³⁶³ The health consequences are dire: one-third of

POTENTIAL STRATEGIES



A local tax on sugar-sweetened beverages and/or unhealthy foods

A content-neutral tax on local advertising sales

all children born in 2000 are expected to develop type 2 diabetes.³⁶⁴ By indirectly raising prices, taxes mitigate the impact of unhealthy food and beverage marketing on young children.

Overview of legal issues: sugary drink or unhealthy food tax

There are two types of taxes that could be applicable to sugar-sweetened beverages, or to food products more generally: sales taxes and excise taxes. Sales taxes are collected from consumers by retailers, and are usually measured as a percentage of the sales price. Excise taxes are imposed on the performance of an act or the exercise of privilege, such as the sale of a product by a business. The business is usually responsible for paying the tax. In contrast with sales taxes, excise taxes are generally aimed at a particular type of product – gasoline or alcohol, for example.

In California, local governments can generally impose sales taxes only on the products that are also subject to the state sales tax. Additional sales taxes on food products, above and beyond those already provided for by state law, are prohibited by the state constitution.³⁶⁵ Therefore, an excise tax (specifically a business license tax) is the only option for California local governments looking to tax sugar-sweetened beverages or unhealthy foods. Such taxes would be imposed on businesses for the privilege of selling the taxed items. In some cases, businesses might pass all or part of that expense along to consumers.

California's Proposition 26 prevented the levying of assessments on particular industries for the purpose of mitigating the harm caused by those industries, unless the fees are approved by a two-thirds vote of the electorate.³⁶⁶ (Prior to Proposition 26, under a decision of the California Supreme Court, fees imposed on industry in order to protect public health – presuming that the industry's products or activities were conclusively associated with harmful health effects – required only a majority vote.³⁶⁷)

But the California Constitution and state tax law give cities and (in unincorporated areas) counties the power to impose business license taxes on business activities that occur within city or county limits.³⁶⁸ Taxes will usually be levied on retailers selling specified products to consumers, though they may also be levied on distributors selling to retailers within the city or county.

While legislators can vote to place a tax measure on the ballot, the final decision is always left to the electorate.³⁶⁹ A local jurisdiction

must decide whether a proposed tax will be a general tax or a special tax. General taxes generate revenue that is available for any purpose and is deposited in the taxing jurisdiction's general fund.³⁷⁰ A special tax generates revenue that is restricted by law for specific uses.³⁷¹ The primary practical difference between the two is that general taxes require only a simple majority of voters to pass, whereas special taxes require a two-thirds majority. That said, while special taxes may be more difficult to pass, they have two benefits. The first is that they can generate a source of funding for a particular purpose. So, for example, a tax on unhealthy food or sugar-sweetened beverages could raise revenue for nutrition education or physical activity promotion. The second is that polling data shows that special taxes, at least on sugary drinks, are more popular with voters than general taxes – that is, voters are more likely to approve a tax on sugary drinks if the revenue stream is dedicated for a specific activity like supporting school gardens and nutrition programs.³⁷²

Regardless of the type of tax, any locality considering a business excise tax faces a number of practical considerations. The first issue is how to decide what is taxed. Mexico recently imposed a tax on both sugary drinks and unhealthy food.³⁷³ The Navajo Nation's governing body approved a similar measure taxing unhealthy food, which also would have eliminated the nation's tax on healthy foods, but it was subsequently vetoed by the nation's president.³⁷⁴ Thus far, other jurisdictions around the United States have sought to tax sugar-sweetened beverages only,³⁷⁵ but there is no legal reason why local jurisdictions in California could not seek to impose an excise tax on unhealthy foods more generally. The difficulty will be in defining "unhealthy foods" for the purposes of the tax. Defining a sugar-sweetened beverage is a simpler task, though it still involves some careful wording. Communities also have to determine the amount of a tax, as well as how it will be collected and how the tax requirement will be enforced.

Local advertising tax

Of course, a local jurisdiction may choose – subject, in California, to the limits of the state constitution – to impose taxes on items other than foods and beverages. Various municipalities in Arizona, for example, levy – and courts have upheld – an assessment on local advertising.³⁷⁶

As long as such an assessment is imposed on all advertising without regard to content, it will likely be upheld.³⁷⁷ A measure applying only to advertising in certain media is also likely to survive constitutional challenge.³⁷⁸ It is even possible that a measure targeting only

commercial (rather than, say, political) advertising could survive review,³⁷⁹ though that distinction could be more problematic in the current environment of heightened protection for commercial speech. Finally, crafting the measure so that it applies only to local advertising – in order to avoid problems with the Dormant Commerce Clause – could improve the measure’s chances of being upheld.³⁸⁰

On the other hand, a measure singling out advertising only for certain products, like unhealthy foods and beverages, would have to pass the increasingly stringent *Central Hudson* test. Courts are likely to be hostile to a tax aimed at reducing speech – even commercial speech – about a lawful product.³⁸¹ A tax on local advertising is much more apt to survive judicial scrutiny if it does not draw distinctions based on the content of the advertisements. A locality could impose such a tax with the idea of using the revenue to fund health- and nutrition-related public service announcements – though in California that would likely constitute a “special tax” requiring a two-thirds majority vote of the electorate.

CHANGELAB SOLUTIONS RESOURCES:

- Model Sugar-Sweetened Beverage Tax Legislation
www.changelabsolutions.org/publications/ssb-model-tax-legislation
- Model Local Resolution Supporting a Statewide Excise Tax or Regulatory Fee on SSBs
www.changelabsolutions.org/publications/SSBs-resolution-tax-reg-fee

MATERNITY



HOSPITAL INFANT FORMULA GIVEAWAYS

The eating habits of young children are influenced by marketing.

Research shows that breastfeeding has health benefits for infants, children, and mothers.³⁸² Babies who stop breastfeeding early and are fed formula instead of breast milk are at higher risk for obesity, diabetes, respiratory and ear infections, and sudden infant death syndrome, and are likely to require more doctor visits, hospitalizations, and prescriptions.³⁸³ The American Academy of Pediatrics recommends that mothers breastfeed exclusively for six months and then continue breastfeeding for one year.³⁸⁴ While 75 percent of mothers start out breastfeeding their infants, only 13 percent continue breastfeeding exclusively through six months. Nonetheless, 66 percent of hospitals in the United States give free infant formula to new mothers, oftentimes along with diapers and other items in a corporate-branded tote bag.³⁸⁵ Studies show that women who receive discharge bags with infant formula samples breastfeed less and wean their babies sooner than women who do not receive such promotional materials.³⁸⁶

Overview of legal issues

A regulation limiting the free distribution of infant formula samples could well be subject to a First Amendment challenge. Though no

POTENTIAL STRATEGIES



Voluntary programs to stop formula giveaways at local hospitals



Prohibiting the giveaway of free infant formula by hospitals

court has directly addressed the sampling issue in the context of infant formula, one federal court of appeals – as noted in the In-Store section above – has found that the sampling of tobacco products constitutes “commercial speech” and subjected a sampling restriction to the *Central Hudson* test.³⁸⁷ The court upheld the law under that standard. As has been discussed, the *Central Hudson* test requires the government to assert a substantial interest, the restriction must directly advance that asserted interest, and the government must not restrict much more speech than necessary to advance that interest. The Supreme Court has provided two somewhat contradictory standards for this last element of the *Central Hudson* test: either the law must restrict no more speech than necessary, or there must be merely a reasonable fit between the purpose of the law and the means chosen to accomplish that purpose.³⁸⁸ The court of appeals upheld the tobacco sampling restriction under the second of those two standards, though the burden on the government was not insubstantial.

Senate Bill 402, the California breastfeeding promotion law passed in 2013, does not change the constitutional analysis. That there is a state (or for that matter federal) law on a subject does not reduce the impact of the First Amendment – no level of government in the United States may act in violation of the U.S. Constitution. Further, the California law does not forbid the distribution of infant formula in hospitals. Rather, it provides that hospitals “shall ... adopt the ‘Ten Steps to Successful Breastfeeding,’ as adopted by Baby-Friendly USA, per the Baby-Friendly Hospital Initiative.”³⁸⁹ One of those ten steps states, “Give infants no food or drink other than breast-milk, unless medically indicated.”³⁹⁰ However, this would not seem to prohibit infant formula samples in going-home “gift” bags, for example. The California law provides that hospitals *may* adopt alternate plans³⁹¹ – including one that explicitly stipulates, “[c]ommercial advertising of artificial infant milk or promotional packs should not be given to breastfeeding mothers.”³⁹² But there is no requirement that California hospitals adopt these alternate plans. Also, S.B. 402 does not go into effect until 2025. Therefore, this leaves room for further policy initiatives by local governments.

Voluntary programs to stop formula giveaways

Several jurisdictions have developed voluntary programs which hospitals undertake to eliminate the provision of non-medically indicated infant formula from their maternity and infant care protocols. This includes leaving infant formula out of the going-home packages given to breastfeeding mothers. Massachusetts,³⁹³ Rhode Island,³⁹⁴ Portland, Oregon,³⁹⁵ and New York City³⁹⁶ have all adopted voluntary

programs that effectively eliminate infant formula marketing in birthing hospitals. Half of the hospitals in Oklahoma have done the same.³⁹⁷ These sorts of voluntary programs have proven quite effective and may serve as models for measures that local government may wish to take.

Mandatory policies

Aside from the likely surmountable obstacle of the *Central Hudson* test, there are no obvious constitutional impediments to a local jurisdiction's adopting a mandatory rather than voluntary regime of eliminating free formula bags. New York City policy has excluded infant formula from gift bags and promotional materials in the city's public hospitals since 2007.³⁹⁸ Massachusetts passed a policy forbidding infant formula marketing, but (after a change in governors) rescinded it before it went into effect. Massachusetts then achieved the same result through a voluntary program.³⁹⁹

The International Code of Marketing of Breast-Milk Substitutes, a nonbinding United Nations agreement among 160 nations (including the United States), calls for the implementation of the following policy:

- NO advertising of breast-milk substitutes to the public
- NO free samples to mothers
- NO promotion of products in health care facilities
- NO company "mothercraft" nurses to advise mothers
- NO gifts or personal samples to health workers
- NO words or pictures idealizing artificial feeding, including pictures of infants on the products
- Information to health workers should be scientific and factual
- All information on artificial feeding, including the labels, should explain the benefits of breastfeeding, and the costs and hazards associated with artificial feeding
- Unsuitable products, such as condensed milk, should not be promoted for babies⁴⁰⁰

The World Health Organization list serves as a useful guide to a locality contemplating either voluntary or mandatory measures.

In short, the opportunities are great. Acting swiftly to put measures in place carries significant upside in one of the most – if not the most – crucial areas of early childhood nutrition: breastfeeding.



CONCLUSION

Though there are legal barriers to direct regulation of food marketing, the First Amendment being the most prominent, this should not deter local governments from taking action to protect children's health.

This marketing is disturbingly pervasive, yet the variety of channels and marketing techniques employed leaves open many avenues to curb such marketing. Perhaps the most promising strategy for local governments is to think broadly about what constitutes marketing, and to address business practices that effectively function as marketing but that don't implicate, or only minimally implicate, the First Amendment. Also, with respect to practices that target only very young children, there exists a strong argument that the First Amendment should not be a barrier at all.

It is important to keep in mind that much of this is uncharted territory, as many potentially effective policies have never been attempted, much less tested in court. But the evidence is clear that the health and well-being of children are at stake. It is therefore worth the effort for local governments to take assertive (as well as creative and innovative) steps to limit the marketing of unhealthy foods and beverages to young children. This white paper can, we hope, catalyze local jurisdictions, including Los Angeles County and the cities therein, to think about which actions may be most effective to address this issue in their communities.

APPENDIX

This appendix includes short guides for community groups, parents, and policymakers. They are intended to be used in conjunction with the full white paper, but can also stand alone as resources on policies to address food and beverage marketing to young children.

Glossary

**Unhealthy Food and Beverage Marketing to Young Children:
A Guide for Community Groups**

**Unhealthy Food and Beverage Marketing to Young Children:
A Guide for Parents**

**Regulating Unhealthy Food and Beverage Marketing
to Young Children:
A Guide for Policymakers**

**Policy Options to Address Unhealthy Food and Beverage
Marketing to Children**

GLOSSARY

ADVERTISING: Paid public messages promoting a product to existing or potential customers, such as on television, in print, or on a billboard. Advertising is a subset of marketing.

CALIFORNIA RETAIL FOOD CODE: The California law governing certain aspects of operations, such as food safety and sanitation, in retail food establishments.

CENTRAL HUDSON: A 1980 case, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, in which the U.S. Supreme Court laid out a four-part test for reviewing regulations of “commercial speech” (advertising) under the First Amendment. The test asks (1) whether the speech is false, misleading, or related to unlawful activity (if so, it’s not protected by the First Amendment); (2) whether the government has a substantial interest in regulating the speech; (3) whether the regulation of speech directly and materially advances that substantial interest; and (4) whether the restriction on speech is narrowly tailored to solve that problem. If the regulated speech is not false, misleading, or related to unlawful activity (the first element of “the *Central Hudson* test”), then the regulation must pass the remaining three parts of the test to be upheld by a court.

CHILD AND ADULT CARE FOOD PROGRAM (CACFP): The federal program, administered by the U.S. Department of Agriculture (USDA), that provides financial assistance to child and adult care institutions for the provision of snacks and meals. Institutions that accept CACFP funding must abide by the USDA’s regulations for the program, which include nutrition regulations.

CHILDREN'S FOOD AND BEVERAGE ADVERTISING INITIATIVE (CFBAI): A self-regulatory program launched in 2006 and administered by the Council of Better Business Bureaus. The program focuses specifically on food and beverage marketing directed at children under 12 years old. Participating companies must adhere to nutrition standards developed by the CFBAI and must pledge to limit marketing to children in specific ways.

CHILDREN'S ONLINE PRIVACY PROTECTION ACT (COPPA):

A federal law governing the online privacy of children under 13 years old. COPPA requires operators of websites or other online services to take certain precautions if their websites or services are directed to children under 13, or if they have actual knowledge they are collecting personal information from children under 13. In 2013, the Federal Trade Commission updated the specific requirements to be more protective of children's privacy.

COMPELLED SPEECH: Speech that is required by law, such as product warning labels or nutrition fact panels. The First Amendment is implicated when laws compel an actor to speak, but such laws are generally upheld if they require the disclosure of factual, uncontroversial information in a commercial context.

CONTENT-NEUTRAL SPEECH REGULATION: A regulation that does not refer to the subject matter or substance of the speech, but rather regulates all types of speech and speakers equally. For example, a content-neutral law could limit the size of all billboards for aesthetic reasons, or regulate the time (e.g., not after midnight), place (e.g., not in a store window), or manner (e.g., not broadcast over loudspeakers) in which speech may occur.

DESIGNATED PUBLIC FORUM: A space that is not historically open to public gathering and debate, but that the government has purposely opened for that purpose, such as a school board meeting with an open comment period or certain areas in airports.

DORMANT COMMERCE CLAUSE: An implied limitation on state and local governments' ability to regulate interstate commerce. The limitation derives from the Constitution's explicit grant to Congress of the authority to regulate commerce "among the several states."

FEDERAL FOOD, DRUG AND COSMETIC ACT (FDCA): The federal law that governs the safety and labeling of foods, drugs, medical devices, and cosmetics.

FIRST AMENDMENT: The amendment to the United States Constitution that, among other things, forbids government from making a law "abridging the freedom of speech." Though this protection of

speech initially applied only to “core” political, religious, or artistic speech, in recent decades the Supreme Court has extended protection to “commercial speech” (advertising).

GOVERNMENT SPEECH DOCTRINE: A relatively new legal doctrine that holds that the First Amendment does not apply to speech by the government itself. According to this doctrine, therefore, the government may say whatever it would like when it issues its own messages, at least insofar as the First Amendment is concerned. The issue of government speech most often arises when the government compels another party to subsidize speech that is then attributed to the government. The Supreme Court has found that even compelled subsidization of government speech does not violate the First Amendment.

HEALTHY BEVERAGES IN CHILD CARE ACT: A California law that took effect in 2012 and that requires childcare providers to serve only healthy beverages, including water, skim or 1 percent milk, or one serving per day of 100 percent juice.

HEALTHY, HUNGER-FREE KIDS ACT (HHFKA): A federal law, passed in 2010, that sets policy for the U.S. Department of Agriculture’s child nutrition programs, including the School Breakfast Program, the National School Lunch Program, WIC, and the Child and Adult Care Food Program. In accordance with the HHFKA, the USDA has issued or will be issuing updated nutrition standards and other regulations for many of these programs.

LOCAL GOVERNMENT: The government of a city, county, or other entity (like a transit or water district) that is smaller than a state.

LORILLARD: A 2001 case, *Lorillard Tobacco Co. v. Reilly*, in which the Supreme Court struck down a Massachusetts law prohibiting tobacco advertising within 1,000 feet of schools, finding that the law would interfere with too much speech intended for adults. The Court stated that restrictions on speech that is not false, deceptive, or related to illegal activity must (1) be related to an important government interest that is (2) directly and materially advanced in a way that (3) does not suppress much more speech than necessary. The Court in *Lorillard*, upheld, however, a restriction on self-service tobacco displays, using the *O’Brien* test.

MARKETING: The action or business of promoting and selling products or services. Marketing includes but is broader than advertising. The “4 Ps” – product, promotion, placement, and price – are elements of marketing.

MINIMUM PRICE LAW: A law that sets a minimum price for a particular type of product, such that no product of that type may be sold for less than the prescribed amount.

NONPUBLIC FORUM: A government-owned space not traditionally open to the public for speech purposes, such as a public school or a military base.

NUTRITION LABELING AND EDUCATION ACT (NLEA): The federal law that governs the nutrition labeling of foods and beverages.

O'BRIEN: A 1968 Supreme Court case, *United States v. O'Brien*, that sets forth a test for regulations of behavior that is not speech but that has a communicative component. Under the *O'Brien* test, a court will uphold a regulation if: (1) it is within the constitutional power of the government; (2) it furthers a substantial government interest; (3) that interest is unrelated to the suppression of free expression; and (4) the effect on First Amendment freedoms is no greater than necessary to further the government interest. A court will also likely require that there are ample channels available elsewhere for the regulated expression. This is an easier standard to meet than the *Central Hudson* test.

POLICE POWER: The power of state and local governments to enact laws to protect the public's health, safety, and welfare.

PREEMPTION: A legal principle that allows a higher level of government to limit, or even eliminate, the power of a lower level of government to regulate a certain issue. Preemption can be express (a law explicitly states that lower levels of government may not pass additional or different laws on the same matter) or implied (a court finds from the nature of the law passed by the higher level of government that it intended to preempt action by lower levels of government).

PROPORTIONAL PRICING: A requirement that larger serving sizes be priced at the same per-volume or per-weight rate as smaller serving sizes, thus eliminating the discount that results when consumers purchase larger sizes.

STRICT SCRUTINY: The most searching standard of review a court can adopt; it generally leads to laws being struck down.

SUPREMACY CLAUSE: The section of the United States Constitution that states that federal law is the “supreme law of the land,” which means it takes precedence over (preempts) state and local law.

TRADITIONAL PUBLIC FORUM: A government-owned space that historically has been open for assembly and debate, such as a park or street corner.

Unhealthy Food and Beverage Marketing to Young Children

A Guide for Community Groups

The marketing of unhealthy foods and beverages to young children is pervasive in our communities. Unfortunately, it is mostly unhealthy foods that are being marketed, which negatively impacts children's health and well-being. Studies have shown that marketing influences children's tastes, purchase requests, and brand recognition.

Today's marketing goes far beyond traditional television, radio, and billboard advertising. Marketers also entice young children using practices like product packaging and location (characters on cereal boxes stare downward to meet children's eyes and certain items are often placed at children's eye height) and "advergames" (advertising disguised as mobile or internet games).

What can community groups do to address the problem of food marketing to young children? Here are a few ideas:



Learn to recognize food marketing in your community.

Start to be aware of food marketing in all forms, from billboards to signage in restaurant windows to the location of products in stores.



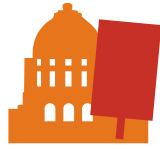
Start a conversation about food marketing.

Inform parents and community members. Involve the media.



Engage with people who can change how much marketing is in your community.

Store and restaurant owners and childcare providers are examples of people who can alter their practices to lessen children's exposure to food marketing.



Reach out to local government officials.

Educate officials about the issue and share your concern with them. Use photos to illustrate the problem. Local government officials can adopt policies to promote healthier food marketing. For example:

- In the **City of Baldwin Park**, city staff worked with community stakeholders to develop a citywide **Healthy Corner Store Policy**. The policy aims to promote healthier eating and increase access to fresh produce and healthier foods by establishing best practices for healthy marketing, signage, and floor plans. It also includes an incentive program for corner stores that create healthy store environments. The city council formally adopted the policy in August 2014.
- The **City of Long Beach** established a youth-targeted healthy vending policy. Specific nutritional requirements were developed for beverage vending machines located at “youth sites.” The policy applies on city property that is open to the public and where there is programming specifically for children, such as health centers, libraries, parks, community centers, and youth athletic facilities, among others.

For **additional strategies** to consider in your community, see the list found in *Policy Options to Address Unhealthy Food Marketing*.

For a **fact sheet** to give to local policymakers, see *Regulating Marketing to Young Children: A Guide for Policymakers*.

For a **detailed legal analysis** of policies to address food marketing to young children, see the full report, *Marketing Matters: A White Paper on Strategies to Reduce Unhealthy Food and Beverage Marketing to Young Children*.

Unhealthy Food and Beverage Marketing to Young Children

A Guide for Parents

Do your children watch TV or use the internet? Are they with you when you walk down the street or ride the bus? Do you take them to the grocery store or out to eat?

If you answered yes to any of these questions, then your children have seen food marketing. Unfortunately, it's mostly unhealthy foods that are being marketed to young children. And studies have shown that marketing affects what children want to eat and which brands they want you to buy. In one study, children reported that food in a package with a well-known brand logo tasted better than the exact same food without the logo.

Food marketing is everywhere. Today's marketing goes beyond TV, radio, and billboard ads. It also includes things like "advergames," product location, and product packaging, all of which can attract young children. *Advergames* are internet or mobile ads disguised as games. *Product location* includes things like placing foods at children's eye levels, such as in the checkout aisle, so they can easily see it and grab it. An example of *product packaging* is using well-known cartoon characters on cereal boxes. These characters look down at just the right angle to meet your children's eyes!

As a parent, there are things you can do to fight back against food marketing. Here are a few ideas:



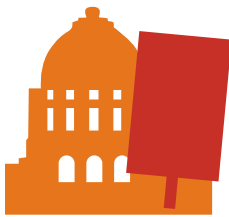
Notice it!

- Food marketing is in your community – find out where it is: On billboards? On fast food restaurants signs? In grocery store checkout aisles filled with candy? On TV ads while your child is at home or in childcare?



Talk about it!

- Talk with other parents and help them see that marketing is everywhere in your community.
- Talk to your children about marketing. You can let them know that advertisements are designed to make them want something.
- Tell companies that you want them to stop marketing to your children. Use social media.
- Report false or misleading advertisements to government officials. False and misleading advertising is against the law. It might include marketing that pretends to be something else, or that takes advantage of the fact that it's hard for children to understand marketing. For information on how to report it, visit: www.changelabsolutions.org/publications/identifying-misleading-ads.



Do something about it!

- Talk to people who can change how much marketing is in your community. Your local government officials can pass laws – go to city council meetings and talk with your mayor. Ask them what they can do about this problem. Can they pass a law that will limit the number of signs on the streets? Can they enact nutrition standards for foods sold in government-owned spaces? Make sure they know how much you care about the issue of unhealthy food marketing.
- Talk with your local grocery store owners. Ask them to place only healthy items in checkout aisles.
- Talk with your childcare providers. Ask them to limit children's screen time and serve them only healthy foods.

For **additional strategies** to consider in your community, see the list found in *Policy Options to Address Unhealthy Food Marketing*.

For a **fact sheet** to give to local policymakers, see *Regulating Marketing to Young Children: A Guide for Policymakers*.

For a **detailed legal analysis** of policies to address food marketing to young children, see the full report, *Marketing Matters: A White Paper on Strategies to Reduce Unhealthy Food and Beverage Marketing to Young Children*.

Regulating Unhealthy Food and Beverage Marketing to Young Children

A Guide for Policymakers

The marketing of unhealthy foods and beverages to young children is pervasive. And almost all of that marketing is for foods and beverages that have a negative effect on children's health and well-being. A large body of research demonstrates the impact of food marketing on the eating behaviors, preferences, and purchase requests of young children. **Policymakers can take action to address food marketing to children, and in doing so can help improve community health.** Here are a few principles to guide local governments in determining how to address the problem of food marketing to young children in a way that is (1) effective and (2) complies with the law.



- **Think broadly about marketing.** Marketing consists of much more than traditional advertising. Although the First Amendment may make it difficult to regulate junk food advertising such as TV ads, there's no constitutional obstacle to regulating non-speech marketing practices, such as where things are located in a store or how much they cost.



- **Land use is locally controlled.** Most local governments can use zoning to limit the density of restaurants or other retail outlets that sell and market unhealthy foods, particularly in areas frequented by children (e.g., near schools and parks).



- **It's possible to regulate certain forms of speech.** Consider implementing rules that limit advertising without referring to its content, such as by limiting all outdoor signage or billboards for safety or aesthetic reasons.



- **Voluntary approaches are almost always legal.** This can include implementing suggested guidelines or working with industry to self-regulate. However, voluntary efforts may be less effective than regulation.



- **The government is able to share information about unhealthy food.** Localities can issue public service announcements that promote healthy food or expose the harms caused by junk food and junk food marketing.



- **It's generally legal to regulate marketing in public schools and public childcare settings.** This is particularly true when regulating the marketing of products that can't be sold or served in those settings.



- **Government can use its power as a market participant.** Government officials can limit what foods are available on government property. For example, a city could implement nutrition standards for food sold in city buildings, and it could limit the marketing in city buildings of products that don't meet those standards.



- **There is more leeway to regulate speech in places that haven't traditionally been open to the public for speech purposes.** For example, local governments may be able to limit food and beverage advertising on public transit and in transit stations, though there may be practical difficulties in defining what advertising is and isn't permitted.

Connecting with parents and community groups as well as with local stakeholders and advocates is a good way to start to address unhealthy food marketing to young children. They are likely to be keenly aware of the types of marketing in local communities, and will be natural allies in developing and implementing policies.

For example, the City of Baldwin Park adopted a citywide Healthy Corner Store Policy in 2014. The policy aims to promote healthier eating and increase access to fresh produce and healthier foods by establishing an incentive program for corner stores that create healthy store environments and by outlining best practices for healthy marketing, signage, and floor plans. The following are steps policymakers can take to address unhealthy marketing in their communities, using the example of healthy corner stores.

- 1. Identify a policy target:** Baldwin Park focused on food offerings and marketing in corner stores after determining that those stores outnumbered grocery stores and produce vendors by a ratio of 6:1 in the local community.
- 2. Engage stakeholders:** Youth and community members were instrumental in the Baldwin Park effort. They surveyed the existing landscape and worked directly with corner stores to define the problem and develop a solution.
- 3. Involve decision makers:** City, school district, and health department staff members got involved early in the process.
- 4. Set goals and priorities:** The Baldwin Park policy defines specific goals, including the development of healthy market guidelines and the establishment of a task force.
- 5. Pass the policy:** After extensive ground work to improve the healthfulness of local corner stores, the city council formally adopted the policy in October 2014.
- 6. Implement:** The policy's success will require ongoing efforts to ensure that its goals are being met.

For **promising strategies** to consider in your community, see the list found in *Policy Options to Address Unhealthy Food Marketing*. For a **detailed legal analysis** of policies to address food marketing to young children, see the full report, *Marketing Matters: A White Paper on Strategies to Reduce Unhealthy Food and Beverage Marketing to Young Children*.

Policy Options to Address Unhealthy Food and Beverage Marketing to Children



In-Store Environments

- **Healthy checkout aisle policies**, which require items placed in one or more checkout aisles to meet certain nutrition standards
- **Regulating product placement**, such as limiting what is placed in “end caps” or requiring certain products to be placed behind the counter to prevent shoplifting or grabbing by young children
- **Regulating product pricing**, such as through minimum price laws, by limiting discounts, or by requiring proportional pricing, in which there is no per unit discount for larger volume sales
- **Prohibiting unhealthy food and sugar-sweetened beverage sales in stores whose primary business is not selling food**, such as toy or electronics stores
- **Regulating in-store signage**, either through content-neutral limits on signage (e.g., restrictions on window coverings for safety or aesthetic reasons) or by requiring certain signs promoting healthy foods or safety warning labels
- **Regulating sampling and food giveaways**, for food safety or other non-communicative reasons



Red lights indicate **low** levels of feasibility and/or high levels of risk.



Yellow lights indicate **moderate** levels of feasibility and risk.



Green lights indicate the **highest** level of feasibility and the lowest level of risk.



Government Procurement and Vending

- **Setting nutrition standards for food purchased by government to be distributed to dependent community members** – such as children in public childcare settings – subject to limits imposed by federal or state law
- **Adopting healthy vending standards**, which would set nutrition standards for food to be sold directly to citizens on government property



Government Property and Government Sponsorship

- **Adopting a sponsorship policy** with clear criteria for selecting private sponsors



Marketing in Childcare Settings and Schools

- **Direct restrictions on food marketing in schools and childcare settings**, to the extent allowed by state law
- **Setting nutrition standards for the childcare setting**, to the extent allowed by state law
- **Limiting screen time and media use**, to the extent allowed by state law



In-Restaurant Environment

- **Regulating the nutritional quality of children's meals or beverages in children's meals**, with or without an accompanying toy
- **Regulating product pricing**, such as through minimum price laws by requiring proportional pricing in which there is no per unit discount for larger volume sales
- **Regulating restaurant signage**, either through content-neutral limits on signage or by requiring certain signs promoting healthy foods or safety warning labels
- **Requiring menu labeling** above and beyond that required by federal law
- **Requiring the provision of free tap water**



Hospital Infant Formula Giveaways

- Voluntary programs to stop formula giveaways at local hospitals
- Prohibiting the giveaway of free infant formula by hospitals



Public Transit and Government Property (e.g., Park and Rec)

- Regulating advertising on school buses
- Regulating the content of advertising on public property, particularly on property that has not traditionally been open to all kinds of speech
- Regulating advertising on public transit vehicles and on bus shelters/transit stations



Healthy Zoning

- Limiting unhealthy food outlets and mobile vending near sites frequented by young children, like childcare facilities or playgrounds



Taxation and Tax Incentives

- A local tax on sugar-sweetened beverages and/or unhealthy foods
- A content-neutral tax on local advertising sales



Broadcast TV/Cable/Satellite/Radio and Other Transmitted Media

- Enforcement of existing federal and state false advertising laws, by a district attorney or city or county counsel's office
- Industry self-regulation, encouraged by local jurisdictions and targeted at local television or radio outlets
- Direct regulation of television and radio advertising, though this may be difficult given the legal climate
- Requiring coding of food advertisements using V-chip technology, though this may face legal and practical hurdles



Print Media (Magazines, Newspapers)

- **Enforcement of existing federal and state false advertising laws** (by a district attorney or city or county counsel's office)
- **Industry self-regulation**, encouraged by local jurisdictions and targeted at local print media outlets
- **Direct regulation of local print media targeting young children**, though this may be difficult given the legal climate



Digital Media

- **Enforcement of existing federal and state false advertising laws**, by a district attorney or city or county counsel's office
- **Direct regulation of digital media**, including by regulating the local use of technologies that enable location-based digital marketing



Outdoor Advertising

- **Local-government-funded public service announcements** related to healthy eating and physical activity
- **Voluntary restraints on billboard content by owners of billboards or by those buying billboard space**, encouraged by local government
- **Content-neutral regulation of billboard locations**, for safety and aesthetic reasons
- **Content-neutral regulation of electronic billboards**, for safety and aesthetic reasons
- **Content-neutral regulation of sandwich boards and other non-billboard outdoor signs**, for safety and aesthetic reasons

For a detailed legal analysis of policies to address food marketing to young children, see the full report, ***Marketing Matters: A White Paper on Strategies to Reduce Unhealthy Food and Beverage Marketing to Young Children.***

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- prohibited for children under two;
 - prohibited during meal and snack times (snacks may be provided during occasional group activities);
 - prohibited when any child in the group is between birth through twenty-three months of age;
 - limited for all other groups whether teaching staff-directed or a child-selected activity;
 - limited to thirty minutes or less per day for each child or group;
 - limited to one hour or less per evening for each child or group in evening or overnight care.
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