

FOOD ADVERTISING SUBSIDY REFORM

A Win-Win for Fiscal and Public Health

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Executive Summary

States serve few roles more essential than ensuring access to safe, affordable food. From school meals to meat inspection to chemical ingredient safety, public food policy enjoys broad and growing support. But it also carries a high price tag. As states struggle to raise revenue for oversight of the food sector, not to mention healthcare and disability programs stressed by an epidemic of diet-related disease, eliminating subsidies for food and beverage advertising offers a solution.

Currently, states spend millions of dollars each year to subsidize food and beverage advertising through their corporate income tax codes. These laws allow businesses to immediately deduct the cost of marketing campaigns as “ordinary and necessary” business expenses. Yet much of these expenses create durable assets, such as corporate brands. Because durable assets provide long-term benefits, businesses should have to capitalize their cost and deduct it over years under standard tax law principles. Yet federal tax regulators have made an exception for advertising, and states have followed suit.

The resulting subsidy lowers the cost of advertising at the expense of other, more productive, allocations of capital. In the food economy, this distortion contributes to poor diet, loss of privacy, and a less competitive market. Food and beverage companies spend billions of dollars annually to promote an overwhelmingly unhealthy portfolio of products dominated by fast food, sugary and alcoholic beverages, candy, snacks, and other highly processed fare. Refusing to subsidize this spending could generate millions of dollars, and potentially fund programs to counter the harms caused by food marketing.

These harms are significant. Research has long established that food marketing contributes to unhealthy dietary patterns, especially among children. The concerns have grown with the advent of digital marketing, which exploits highly sensitive, personal data to identify the most effective means of manipulating consumers’ eating behavior. The tax code has encouraged food companies to act more like tech companies, investing in “big data” infrastructure to engage in ever more intrusive marketing practices. And bloated advertising budgets have acted as a barrier to entry against competitors that might otherwise win customers on better quality or lower prices.

The state’s deeply rooted tradition of regulating the food system supports singling out food and beverage advertising for subsidy reform. That tradition predates the advertising deduction, notwithstanding its historic character. Precedents for reform exist. In 1993, Congress ended a decades-old practice of allowing businesses to deduct lobbying expenses, a reform subsequently adopted into state income tax codes. More recently, the South American country of Ecuador enacted legal reforms that eliminate tax deductions for ultra-processed food marketing expenses, and other countries around the world are examining similar proposals.

Action at the state level should play a key role in catalyzing further reform. Already, state income tax codes are increasingly diverging from federal law in how they allow businesses to deduct expenses related to research, entertainment, and other categories. Nearly half of states have passed legislation explicitly decoupling their income tax bases from recent federal allowances providing for accelerated depreciation of various capital assets. State legislators can similarly opt out of adopting the federal tax code’s food advertising subsidies in their states’ income tax laws.

Some limitations apply. Reformers should steer clear of proposals that target only “unhealthy” or “child-directed” food marketing, which could encroach on advertisers’ constitutionally protected speech rights. The state’s traditional authority to oversee the food system better supports a broad-based rule, applicable to all food and beverage marketing. Despite food marketing’s harms, reforms should not aim to suppress speech, but rather reclaim revenue. Indeed, any one state’s income tax reform will do little to influence the marketing decisions of major advertisers, most of which operate in multiple jurisdictions, but it can nevertheless reallocate significant public resources to improve the food system.

The income tax originated in an era when corporate branding remained in its infancy, and as a result, advertising subsidies have taken root in tax codes around the world. But as the philosopher Bertrand Russell wrote, “the fact that an opinion has been widely held is no evidence whatever that it is not utterly absurd.” Food advertising subsidies are nothing short of absurd. As the burdens of diet-related disease drain public coffers, and the imperative becomes ever more urgent to overhaul a food system that results in one in five children developing obesity before adulthood, the time has come to reconsider this costly and harmful policy.

Introduction

Diet-related disease has devastated both public health, and public coffers in the United States.¹ Adults with obesity covered by public health insurance programs incur an estimated \$2,868 in additional annual medical expenditures, compared to other patients.² In New York state alone, researchers estimate that obesity and overweight cost the state \$5.2 billion each year.³ Undoing the damage will not come cheap. New York's universal school meals program, a particularly promising strategy for reducing childhood obesity,⁴ carried a \$340 million price tag in the state's 2026 budget.⁵ State lawmakers may cover part of the tab, however, by repealing lucrative subsidies for food and beverage companies that have exacerbated the public health crisis.

These subsidies take the form of deductions for advertising expenses. The federal tax code distinguishes between immediately deductible "ordinary and necessary" business expenses, and "capital" expenses, which must be amortized over the life of the "capital asset," whether it be a motor vehicle, a building, a patent, or a brand.⁶ As the Supreme Court has explained, deductions are the exception to the rule, and "strictly construed."⁷ Some advertising fairly qualifies for this exceptional treatment as a deductible business expense, but much of it, dedicated to fostering iconic brands or loyal customer followings, fits cleanly into the category of "capital" expenses.

Reformers have long advocated repealing subsidies for food advertising that promotes unhealthy products to children.⁸ The First Amendment, however, restricts the extent to which the government may favor one advertiser's message over another's. By contrast, states have broad authority over the food economy, and considerable leeway in how they choose to allocate tax preferences, just as they have in setting licensing, inspection, or food safety rules. A tax reform broadly applicable to all food and beverage advertising, moreover, offers the potential to raise significant revenue, which the state may dedicate to subsidize other, more salutary food sector activities, such as the provision of healthy school meals.

Advertising has long received exceptional treatment under federal corporate income tax law, and until now, states have followed federal regulators' lead, at great fiscal cost. But states need not continue footing the bill. Many state income tax codes diverge from the federal tax code's treatment of other expenses, like research funding. States' interest in promoting an efficient, competitive, and healthy food system justifies similarly breaking with the federal tax code's treatment of food advertising expenses.

The paper begins with an explanation of the advertising subsidy and how it has created an expensive tax shelter that has distorted companies' investment decisions and led to higher levels of advertising. It goes on to argue that the subsidy for food advertising, in particular, makes little sense because of associated harms to public health, privacy, and competition. The paper then examines the history of the advertising deduction, proposals for reform, including for food advertising specifically, as well as one law currently in force abroad in the South American country of Ecuador. It considers analogous state and federal tax law provisions, and constraints that the First Amendment's protections for "commercial speech" may impose on legislators. Finally, it outlines a proposal for reform and provides a model bill that requires food and beverage sellers to capitalize half of advertising expenses in excess of \$2.5 million, and to amortize the resulting "intangible asset" over five years for state income tax purposes.

A Costly Subsidy

Food reformers often aim their ire at federal Farm Bill subsidies for commodity crops like soy and corn to argue that public policy is fueling the nation's obesity crisis.⁹ But state and federal subsidies for food advertising may have a greater impact on what people eat,¹⁰ with similarly significant fiscal consequences.

The Extent of the Subsidy

The advertising tax subsidy's indirect character has helped it evade popular scrutiny, but it has created an enormous windfall for the food industry. Under current state and federal law, businesses can immediately deduct all money

spent on advertising each year as an “ordinary and necessary expense.”¹¹ This label mischaracterizes a substantial proportion of advertising expenses that create durable “capital assets.” In general, capital assets’ costs may not be deducted immediately; taxpayers instead must amortize their value over time. Assets such as well-known brands, created through advertising, are an exception to this rule.

As a rule of thumb, capital expenses generate benefits beyond the taxable year. Different advertising campaigns will have different levels of success in establishing brands, customer loyalty, or other durable benefits. Empirical research, however, indicates that, on average, most ad spending does not belong in the “ordinary and necessary expenses” category.

Economists studying a broad range of “intangible investment and capital stocks” have assigned a “capitalization factor” of 0.6 to “advertising” and “market research.”¹² In other words, they estimate that 60% of advertising expenses create a “durable asset” that lasts beyond the taxable year. The asset depreciates at an estimated annual rate of 55%,¹³ suggesting that a rule requiring companies to amortize half of ad expenditures over five years, would eliminate a subsidy rather than levy a new tax, at least under the U.S. Supreme Court’s interpretation of “ordinary and necessary” business expenses.¹⁴

The Court articulated that interpretation in its 1992 *INDOPCO, Inc. v. Commissioner* decision.¹⁵ In *INDOPCO*, the Court considered whether the Unilever corporation could deduct legal expenses associated with acquiring a supplier. The court noted that the acquisition produced “benefits beyond the year in which the expenditure is incurred,”¹⁶ a factor that was “undeniably important in determining whether the appropriate tax treatment is immediate deduction or capitalization.” The court concluded that Unilever had to capitalize the expenses, and amortize them over time, because “[d]eductions are exceptions to the norm of capitalization and are allowed only if there is clear provision for them in the Code and the taxpayer has met the burden of showing a right to the deduction.” In response to the court’s opinion, the IRS issued a revenue ruling decision declaring that “the *INDOPCO* decision does not affect the treatment of advertising costs [as ordinary and necessary expenses]

under section 162(a) of the Code.”¹⁷ However, it offered little explanation for this seemingly incongruous treatment, and as discussed below, states need not import the policy into their tax laws.

The Fiscal Impact

While the deductibility of advertising expenses may seem like an inconsequential technicality, the financial stakes are significant. In 2024, the Congressional Budget Office (CBO) estimated that requiring companies to amortize half of advertising expenses over a five-year period would raise \$83.2 billion over the next decade, while moving to a 10-year schedule would raise \$177.2 billion.¹⁸ For comparison, the CBO projected that the One Big Beautiful Bill Act’s cuts to the Supplemental Nutrition Assistance Program (SNAP, formerly known as “food stamps”), will save around \$186 billion over the next ten years, at a cost of reducing food assistance benefits to tens of millions of people (including an estimated 3.3 million families with children¹⁹) and cutting it off entirely for roughly 2.4 million people.²⁰

The CBO study considered a rule change for *all* advertising, not just ads for foods and beverages, but food companies account for much of total ad spending—16% according to the U.S. Department of Agriculture’s Economic Research Service.²¹ Applying this figure to the CBO estimates, scaling back the deductibility of food marketing expenses would save the United States between \$13 and \$28 billion over the next ten years. The same reform in a large state with a substantial business income tax, like California or New York, could save tens of millions of dollars per year.²²

Subsidizing Harm

What is the impact of states spending millions of dollars each year to subsidize food advertising? While measuring the precise effect requires comparison with a counterfactual, tax scholars have argued for decades that the subsidies create a distortionary tax shelter that promotes advertising at the expense of other investments.²³ Were the increased spending on food advertising somehow beneficial to

taxpayers, policymakers might choose to stand by the subsidy. The available evidence, however, indicates that food advertising overwhelmingly hurts constituents by degrading public health, privacy, and even competition.

Food Advertising Harms Public Health

Popular dissatisfaction with food marketing has grown in recent years²⁴ and helps to explain the Republican party's 2024 embrace of once ridiculed "nanny state"²⁵ restrictions on food advertising within the larger "Make America Healthy Again" platform. As the Trump Administration has pointed out, children's "constant exposure" to food ads—on average 15 per day—"has been linked to increased cravings for and consumption of sugary beverages and other unhealthy products."²⁶ The Administration has also targeted "ultra-processed foods," a category of food distinguished in part by its "aggressive advertising and marketing,"²⁷ which has fast become a national obsession.²⁸

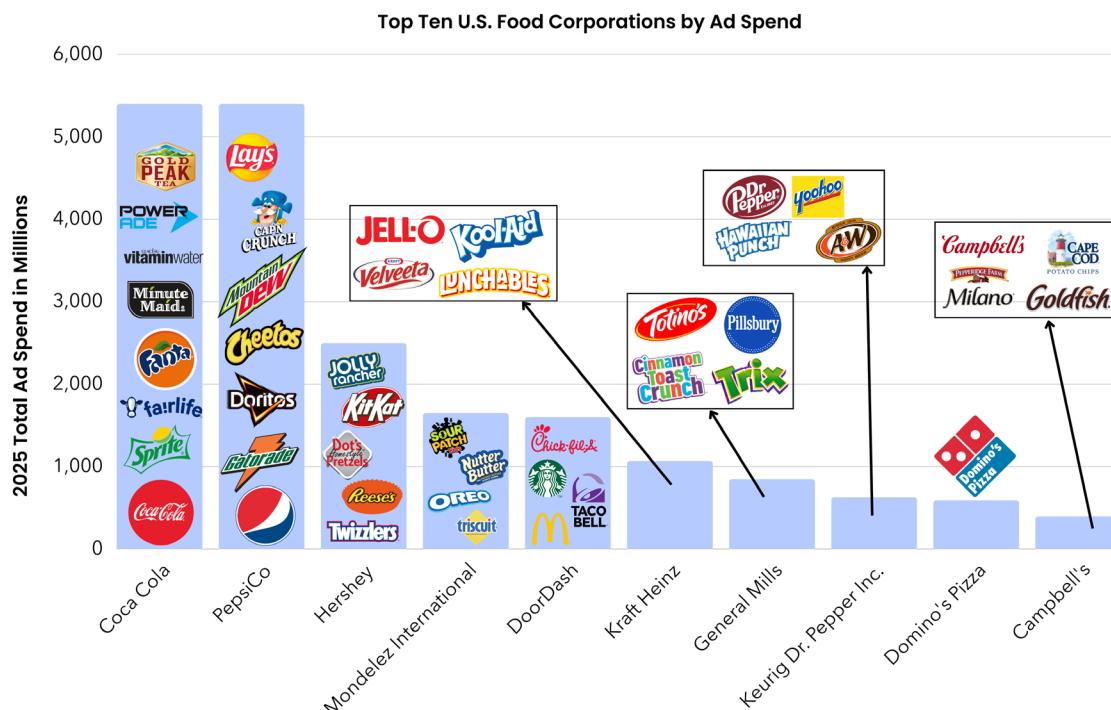
Consumers are right to be wary of food marketing. Most of it promotes unhealthy foods, and despite various voluntary initiatives to restrain their activities, food companies cannot resist the lucrative prospects of building lifelong customers by directing ads to children. State lawmakers have limited tools to shield children from food advertising. However, they can protect

their constituents' tax dollars from subsidizing this increasingly unpopular and demonstrably injurious activity.

Massive Food Advertising Expenditures Primarily Promote Unhealthy Foods

Food companies spend billions on advertising in the U.S. and show no signs of letting up. An analysis of 2017 Nielsen data indicated that food, beverage and restaurant companies spent almost \$14 billion on ads in the U.S. market.²⁹ A more recent industry estimate based on 2022 data pegs the investment at \$17.5 billion.³⁰ Coca-Cola alone spent \$5.4 billion on ads worldwide in 2025, up from \$5.1 billion in 2024.³¹ This money increasingly pays for digital advertising—72.9% of total ad spending worldwide in 2025, according to one recent analysis.³² And it overwhelmingly pushes unhealthy options.

Theoretically, the food industry might use digital advertising to identify health-conscious consumers and try to sell them "real food." Research suggests that advertisements for fruits and vegetables can significantly stoke demand for them.³³ But one brand of fruit or vegetable is largely indistinguishable from another. For consumers struggling to eat a healthier diet amidst an increasingly obesogenic food environment, exposure to food marketing may, at best,



push them toward “better for you” packaged food options,³⁴ and at worst, heighten eating disorder risk.³⁵

The table above shows the largest American food companies by advertising expenditure. As the table makes clear, these companies spend tens of billions on advertising, and specialize in sugar-sweetened beverages (arguably the single most harmful ultra-processed food),³⁶ candy bars, cookies, fast food, condiments, cereal, and other primarily unhealthy foods. The companies may advertise a few “better for you” options, such as Kraft PowerMac high protein macaroni and cheese,³⁷ but such examples are exceptional compared to more obviously problematic ones—e.g. Kraft Heinz’ Jet-Puffed marshmallows marketed with images of Frozen’s Olaf.³⁸ Moreover, products like PowerMac are generally not “better for you” than a less processed alternative (e.g. pasta with tofu).

Public health researchers have demonstrated, through a variety of methods, that food advertising overwhelmingly promotes unhealthy foods. A 2007 analysis of over 1600 hours of children’s television programming found that 72% of food ads were for “candy and snacks,” “cereal,” or “fast food,” while noting that “of the 8,854 food ads reviewed in the study, there were no ads for fruits or vegetables.”³⁹ More recently, a 2017 analysis of Nielsen data showed that “[m]ore than 80% of [U.S.] food advertising promotes fast food, sugary drinks, candy, and unhealthy snacks.”⁴⁰ This bias towards unhealthy foods applies regardless of the medium. A study of some 500 kid influencers’ YouTube videos found that over 90% of food and beverage appearances in the videos were for “unhealthy branded items” like McDonald’s.⁴¹

Compared to the billions spent to promote junk food, advertising for “real food” is scant. Under USDA’s “checkoff” program, farmers and ranchers pay a little less than a billion dollars each year in fees associated with the sale of 22 commodities, some of which fund ads like the “Got Milk?” campaign.⁴² But the checkoff program is beset by controversy, and widely viewed as serving entrenched interests, such as large meatpackers who used checkoff funding to derail country-of-origin labeling requirements that most U.S. ranchers support.⁴³ Regardless, even the most successful check-off

ad campaigns have done little to counter UPFs’ encroaching presence in the American diet. The iconic “Got Milk” campaign accompanied an historic drop in milk consumption.⁴⁴ The upshot is that a rule that targets food advertising generally will not diverge significantly from one, such as Ecuador’s or the federal Stop Subsidizing Childhood Obesity Act (SSCOA),⁴⁵ that attempts to single out UPFs or other categories of “unhealthy” food.

Food Advertisers Target Kids

Decades ago, researchers documented alarming associations between children’s exposure to fast-food TV advertising and obesity. They noted that, at the then-prevailing corporate income tax rate of 35%, “elimination of the tax deductibility of food advertising costs is equivalent to increasing the price of advertising by about 54 percent,” and estimated that the policy “would reduce fast-food restaurant messages seen on television by 48 percent and 25 percent for children and adolescents, respectively,” and consequently “reduce the number of overweight children and adolescents by 5 percent and 3 percent, respectively.”⁴⁶ With advertisers migrating away from television and towards more “personalized” marketing opportunities, children face greater risk today than ever before, as discussed further below.⁴⁷

Harmful marketing practices have taken root within a regulatory void dating back to 1978. Then, the Federal Trade Commission proposed sweeping regulations on child food marketing. But the food industry convinced legislators that it should regulate itself, and indeed, that the First Amendment allows no other solution.⁴⁸ It successfully lobbied Congress to pass the Federal Trade Commission Improvement Act of 1980, which stripped the FTC of “authority to promulgate any rule in children’s advertising” that proceeded under the theory that such ads are “unfair.”⁴⁹ And it has kept up the pressure to this day, with the latest salvo taking place in the House Appropriations Committee on April 22, 2026, when a party line vote continued the freeze on funding for completing a report on food marketing to kids, requested by Senator Sam Brownback (R-KS) over 17 years earlier.⁵⁰

Sen. Brownback's request came after a 2008 FTC report estimated that large food companies were spending \$1.6 billion annually on food marketing to kids. The report also criticized the lack of rigor in the food companies' signature self-regulatory effort, the Children's Food and Beverage Advertising Initiative (CFBAI).⁵¹ In 2006, the CFBAI committed 13 of the world's largest food corporations to the mission of "changing the nutritional profile of food and beverage products in child-directed advertising."⁵² In the two decades since its creation, a torrent of research has exposed CFBAI as an empty gesture.⁵³ To take just one example, a recent study that tracked 101 children's exposure to food ads while watching just a half-hour of videos on YouTube or YouTube Kids found that "most children aged 6 to 8 years (75%) and 36% of children aged 3 to 5 years were exposed to branded food content while watching videos." CFBAI member companies accounted for over 70% of these "brand exposures."⁵⁴

Food Advertising Harms Privacy

Privacy offers another rationale for curtailing food advertising subsidies. Food marketers have increasingly shifted to digital media, where they can leverage troves of personal data to nudge consumers towards their products. By raising the price of food advertising, state tax policy can reduce these intrusions into consumers' privacy.

Unlike billboards or television ads, digital platforms allow food companies to deploy "precise targeting practices" to reach particular audiences, such as teenagers.⁵⁵ Studies have documented teens' exposure and engagement with junk food promotions on platforms including Instagram, TikTok, YouTube, Snapchat, Twitter, Facebook, Tumblr and Vine, and provided strong evidence that the ads successfully motivate teen audiences to consume the advertised products, and consequently, to eat a less healthy diet.⁵⁶ Digital ads achieve this "success" by exploiting highly sensitive, personal data—including a teen's location and emotional state—and constantly iterating to identify the most effective means of manipulating their eating behavior.⁵⁷

As food companies embrace this surveillance-based model, advertising revenue increasingly funds a handful of giant tech corporations. Whereas a generation ago, a company

like Coca-Cola may have directed the bulk of its advertising budget to television and print media that supported local sporting events and journalism, over half of global ad revenue today gets sucked up by just five companies: Google, Meta, ByteDance (TikTok), Amazon and Alibaba.⁵⁸ This Big Tech stranglehold undercuts tax subsidy defenders' claims that ads are "a significant driver of economic activity, with a strong multiplier effect."⁵⁹

Big Tech's profits have not gone unnoticed by the food industry, however. The lucrative potential of digital, surveillance-based advertising has enticed many major food companies to reinvent themselves. As the Center for Digital Democracy recently reported, "some of the largest food and beverage corporations—including Coca-Cola, McDonald's, and Pepsi—have, in effect, transformed themselves into Big Data businesses, acquiring specialist firms, establishing large in-house operations, and hiring teams of data scientists and technology experts to direct these systems."⁶⁰ And no wonder, compared to investing in capital improvements such as less water intensive production equipment, or even research to develop healthier products, investing in advertising entails a formidable tax advantage.

This advantage helps to explain why food retailers increasingly seek to generate revenue through the sale of their customers' data, rather than sale of food to their customers. The so-called "grocery retail media" industry reached an estimated \$8.5 billion in 2024.⁶¹ As the supermarket giant Kroger explained in a recent SEC filing, "the retail media business carries an attractive margin profile relative to our traditional operations and is an important driver of our digital profitability. We intend to continue investing in the technology, talent, and collaborations needed to grow this business and expand the range of solutions we offer to advertisers."⁶² As food companies like Kroger offer more "solutions" to advertisers, however, they create new problems for the customers who depend upon them to eat.

Food Advertising Harms Competition

Finally, food advertising works against consumers' interest by stymieing competition. The evidence suggests that large companies

can exercise market power by increasing their ad budgets. By allowing companies to deduct these ad budgets—effectively making them a tax shelter—tax policy exacerbates this phenomenon.

This is not a new idea. In 1979, economists Comanor and Wilson's *Advertising and Market Power* pointed out that industries with higher advertising budgets tended to feature fewer firms, enjoying higher profits.⁶³ They hypothesized that advertising serves as a barrier to entry, insulating incumbents from upstart competitors unwilling to risk incurring the “sunk costs” associated with building a brand. Similar findings soon followed. A 1980 review on the relationship between advertising and industry consolidation, for example, noted that “the evidence suggests that television advertising has a significant positive effect on concentration” within any given industry.⁶⁴

The synergy between advertising and anti-competitive behavior rose to a new level, however, with the advent of surveillance capitalism. USDA researchers have noted how “by the mid-1980s, companies like IRI and Nielsen were running extensive consumer panels and integrating purchase and sales information with couponing, price, display, and advertising data for retailers.” The “large fixed costs” associated with this data-driven marketing allowed big firms to overtake their smaller competitors.⁶⁵ What followed was a “striking industry transformation over the last three decades.”⁶⁶ As of 2025, the top four grocery retailers account for 44.5% of sales,⁶⁷ and upwards of 69% when factoring in wholesale and buying clubs.⁶⁸

As grocery retailers have consolidated, so too has the rest of the food industry. Advertising appears to have contributed to this trend. According to a longitudinal study of advertising expenditures among 31 consumer package good (CPG) categories, across the 50 largest US metropolitan markets, over 39 months, the most “advertising intensive industries” were also the most concentrated. The authors conclude that “advertising represents a fixed and sunk cost,” and “creates economies of scale” that favor large firms.⁶⁹ This dynamic helps to explain how a “global network of UPF oligopolies” has come to dominate the U.S. food system and maintain its stature despite popular support for reforms to counter the obesity epidemic.⁷⁰

Steps Toward Eliminating Tax Subsidies for Food Advertising

Food advertising's harm to public health and especially children's health, to privacy, and to competition, along with the significant fiscal burdens associated with the status quo, should give legislators a strong incentive to reexamine subsidies for food advertising. Sheer inertia, however, will pose a formidable obstacle to reform.

Tax subsidies for advertising have a long history. The first U.S. corporate income tax implemented in 1909 may not have allowed companies to deduct advertising expenses, but the practice took hold at least as early as 1918.⁷¹ Over the years, many critics have pointed out that the long-term benefits created by advertising justify a different tax treatment.⁷² For generations, tax scholars have pointed out that advertising builds brand recognition and associated goodwill, “intangible assets” whose “costs should be capitalized under general tax principles.”⁷³ But the tax law has diverged from those principles to conform to conservative financial accounting principles. These principles call for immediately expensing advertising costs because of “uncertainty about whether an actual future economic benefit exists.”⁷⁴ As an accounting practice, immediate expensing minimizes the risk that companies deceive investors with inflated valuations. But importing this convention into fiscal policy creates a distortionary tax shelter that promotes advertising at the expense of other, more productive allocations.⁷⁵

Not all advertising produces long-lived benefits, but taken as a whole, advertising clearly generates capital assets. Food companies assign billions of dollars of value to “goodwill” associated with their brands, and indeed, if they fail to accurately account for changes in these valuations, they face regulatory consequences. In 2023, for example, the Securities and Exchange Commission questioned The Kraft Heinz Company's decision to forego an “impairment test” of its brand assets after the company's stock price fell. In response, Kraft Heinz explained that its modeling of cash flows from its “goodwill and indefinite-lived intangible assets”

in future years justified their roughly \$70 billion valuation.⁷⁶ Notably, these assets only appear on the Kraft Heinz balance sheet because ownership of Kraft Heinz changed hands, triggering acquisition accounting rules that recognize “intangible assets” like the Heinz ketchup brand. Had the original Heinz company never sold the brand, the asset would not have appeared on the company’s balance sheet. But it would have nevertheless represented tremendous value.

Such value is built through advertising. Courts have recognized as much when awarding “corrective advertising expenses” as damages for trademark infringement. Courts have justified these expenses as a means “to counteract the public confusion resulting from a defendant’s wrongful conduct.”⁷⁷ In one recent case, the Ninth Circuit upheld a \$56 million judgment against Molson Coors for trademark violation based in part on “expert testimony that estimated how long it would take [the claimant] Stone Brewing to recover its sales after corrective advertising.” In other words, the court recognized that Stone Brewing had created a valuable capital asset through advertising, and upheld an award to fund further advertising expenditures needed to restore the asset’s value following damage caused by the trademark violation.

Like the courts, members of Congress have long recognized that advertising creates capital assets, with proposals to eliminate the deduction for advertising expenses introduced as early as 1940.⁷⁸ Large fiscal stakes have motivated these efforts. In 1986, the U.S. Treasury Department estimated that a proposal to disallow twenty percent of a taxpayer’s advertising expense deduction would generate \$20 billion over five years.⁷⁹ More recently in 2024, as noted above, the Congressional Budget Office estimated that requiring companies to amortize half of advertising expenses over a five or ten-year period, in line with bipartisan legislation introduced by Democratic Senator Max Baucus and Republican House member Dave Camp a decade earlier, would raise \$83.2 billion and \$177.2 billion, respectively, over ten years.⁸⁰ These proposals reportedly surfaced in early drafts of the Tax Cuts and Jobs Act of 2017, and the One Big Beautiful Bill Act of 2025,⁸¹ with advertising industry lobbyists taking credit for keeping them out of the bills’ final versions.⁸²

While advertisers have succeeded in maintaining the status quo since 1918 for deducting advertising expenses, one longstanding exception applies: political advertising. As the Supreme Court has noted, “[s]ince 1918 regulations promulgated by the Commissioner under the Internal Revenue Code have continuously provided that expenditures for the ‘promotion or defeat of legislation’ . . . are not deductible from gross corporate income.”⁸³ The Supreme Court rejected a First Amendment challenge to these regulations in 1959 in *Cammarano v. United States*, discussed further below.

The Food Advertising Deduction

Many congressional proposals to eliminate advertising tax subsidies have targeted specific industries. In 1994, Sen. Tom Harkin introduced a bill to disallow half of tobacco companies’ ad expense deductions, with the resulting revenues designated for counter-advertising.⁸⁴ In 1997, Senator Robert Byrd introduced a bill to “end the American taxpayers’ subsidization of alcohol advertising.”⁸⁵ In 2022, Rep. Katie Porter introduced the “End Subsidies for Fossil Fuel Advertising Act,” which would eliminate deductions for expenses related to “promoting extraction, exploration, or consumption of fossil fuels.”⁸⁶ More recently, Sen. Josh Hawley garnered bipartisan support for legislation to eliminate deductions for prescription drug ads.⁸⁷ So far, none of these proposals have succeeded, with political advertising remaining the only category of advertising for which deductions are not allowed.

A proposal to end tax subsidies for junk food advertising began in 2012, when Democratic Representative Dennis Kucinich introduced the “Stop Subsidizing Childhood Obesity Act” (SSCOA).⁸⁸ The SSCOA targets “any advertisement and marketing primarily directed at children” for fast food restaurants, “food of poor nutritional quality,” and “any brand under which the majority of products are food of poor nutritional quality.”⁸⁹ In 2014, Senators Harkin and Blumenthal introduced an updated version of the bill that they argued would “encourage companies to put their creative talents toward promoting nutritious foods . . . by eliminating the nonsensical tax loophole allowing companies

to write off the cost of marketing junk food and sugary beverages to children.”⁹⁰ More versions followed. The latest, introduced in 2022 by Senators Blumenthal and Booker (and by Rep. Rosa DeLauro in the House), articulates a broad definition of “marketing” to include “advertising displays and promotions at the retail site, including preferential placement.”⁹¹

Upon its introduction, Republican critics derided the SSCOA for imposing “nanny-state taxes.”⁹² Today, these objections may carry less weight with lawmakers embracing comparatively interventionist policies like food ingredient bans, often at the state-level, under the “Make America Healthy Again” banner. As discussed more below, however, delineating “food of poor nutritional quality” for special tax treatment may invite legal challenges that a broader law targeting all food can avoid, and with little downside for public health. A broader law likewise avoids a need to distinguish “brands primarily associated with food of poor nutritional quality,” and the perverse incentives that may follow from granting brands not “primarily associated” with these foods preferential tax treatment for whatever junk food marketing they may still undertake.

¡Sí se puede! Ecuador Takes Cutting Ad Subsidies Out of the Realm of the Hypothetical

While its sponsors declined to introduce the SSCOA yet again in the most recent congressional session, the underlying idea has continued to attract attention from prominent food reformers.⁹³ Passage of a law similar to the Act, in the South American country of Ecuador, has buoyed this interest.

In December of 2023, Ecuadoran legislators amended the country’s tax code to ban taxpayers from deducting the costs and expenses of promoting or advertising “food with ultra-processed content.”⁹⁴ The law also creates an additional—150%—deduction for qualified marketing expenditures associated with a variety of activities, including “qualified” sporting events, educational institutions, and non-profit environmental protection organizations. Companies have had to comply with the law now for over two years, but the law’s impact

on food advertising remains uncertain, with no known analysis published as of this writing.

The law does not expressly define “ultra-processed content,” although earlier in 2023, Ecuador’s Ministry of Health adopted the NOVA classification system into its code of regulations.⁹⁵ NOVA groups foods into four categories “according to the extent and purpose of industrial processing,” with UPFs identifiable as those containing “food substances never or rarely used in kitchens,” or cosmetic additives.⁹⁶ NOVA does not specify an exhaustive list of ingredients that render a food “ultraprocessed,”⁹⁷ and studies have documented inconsistencies in how nutritionists code whether a given food is ultraprocessed.⁹⁸ However, researchers have continued to hone the methodology for defining UPFs, and recent analyses have noted that the vast majority of UPFs have more than one characteristic UPF ingredient. Defining UPFs solely on the basis of “cosmetic additives,” for example, yields a list that includes 98% of the products defined under a more comprehensive NOVA definition that incorporates “nonculinary” ingredients, such as high-fructose corn syrup.⁹⁹ Accordingly, a few “edge case” ingredients should not have a significant impact on advertisers’ bottom lines, but they may nevertheless pose an administrative challenge.

Further complexity may arise out of how the law treats brands that attach to both UPFs and less processed foods. The law provides that companies may deduct “in a proportional manner” the advertising expenses associated with non-UPF products, with implementing regulations to detail specific instructions for doing so. Ecuadoran authorities, however, have yet to issue those rules. This leaves open to interpretation how, for example, a company that sells a variety of UPFs and non-UPF goods and services might treat a broad range of advertising expenses. The world’s largest food corporation Nestlé, for example, has invested heavily in marketing UPFs on TikTok in Ecuador.¹⁰⁰ At the same time, Nestlé also maintains various scholarship and internship programs under the general “Nestlé” banner.¹⁰¹ To what extent Nestlé’s various marketing and brand building expenses qualify as “advertising” under Ecuador’s tax law, and how the company must assign these expenses to the UPF and non-UPF lines of its product portfolio, remains

an open question. The financial stakes could be significant. Nestlé alone spent \$17.88 trillion Swiss francs (roughly \$23 billion U.S. dollars) on “marketing and administration expenses” worldwide in 2024.¹⁰²

Despite the uncertainty surrounding its application, Ecuador’s food advertising tax reform represents a bold innovation. As discussed earlier, it breaks with over a century of corporate income tax practice originating in the United States. As experience with Ecuador’s law grows and researchers study its effect, policymakers may discover a valuable template for reform, along with pitfalls to avoid.

Analogous State and Federal Income Tax Law Provisions

While the advertising deduction enjoys a long history, federal and state tax laws have established ample precedent for scaling it back. Congress disallowed any deduction for “lobbying and political expenditures”¹⁰³ in 1993, putting them in the same category to which “political advertising” had long been relegated. Currently, many state income tax codes diverge from federal law in the deductions they allow for items such as “research and experimental” expenses, which Congress began requiring businesses to capitalize in 2017. Taken together, these policies make clear that states need not adhere to the federal tax code’s food advertising deduction.

State income tax codes vary widely in their conformity to federal law.¹⁰⁴ Following the Omnibus Budget Reconciliation Act of 1993, which removed deductions for direct (as opposed to “grass roots”) lobbying expenses that had stood for over three decades,¹⁰⁵ some states continued to allow businesses to deduct lobbying expenses. In California, for example, a ballot initiative seeking to repeal the lobbying deduction was under review in 1997. The state Attorney General estimated that the measure would generate six million dollars in additional revenue for the state.¹⁰⁶ At the federal level, eliminating the lobbying deduction was estimated to generate over \$1.2 billion from 1994–1998.¹⁰⁷ Today, state corporate income tax codes appear

to have universally adopted the disallowance of lobbying expenses, as they have adopted most other federal tax code provisions for calculating taxable income, but there are notable exceptions.¹⁰⁸

These exceptions show that states can innovate in corporate income tax policy. An early move towards state control over income tax policy came in response to the 2002 Job Creation and Worker Assistance Act,¹⁰⁹ intended as an economic stimulus. The Act allowed businesses to immediately expense an additional (“bonus”) 30% of the cost for a wide range of “qualifying property”—from trucks and tools to software and office furniture. Many states balked at the price tag. By the end of 2002, twenty-three states and the District of Columbia had passed legislation explicitly decoupling their income tax bases from the new federal allowance.¹¹⁰ This nonconformity has persisted as Congress has significantly expanded the depreciation allowance, most recently by allowing companies to immediately expense 100% of an expanded category of “qualified production property,” including some real estate holdings, under the OBBBA,¹¹¹ a provision estimated to cost the federal government \$363 billion between 2025 and 2034.¹¹²

State income tax laws also diverge from federal law in how they treat deductions for domestic and foreign research and experimental (R&E) expenditures. Prior to Congress’ passage of the Tax Cuts and Jobs Act (TCJA) of 2017, businesses could deduct “research and experimental” expenses immediately, similar to the current treatment of advertising expenses. Starting in 2022, however, businesses were required to capitalize R&E expenditures and amortize them over five years, or in the case of foreign R&E expenses, over fifteen years. The change was estimated to raise \$120 billion by 2027. Many states chose not to adopt this effective tax hike on research. Some states, like California and Texas, declined to pass updates to their tax code to track the federal R&E provision. Others—including Tennessee, Georgia, Indiana, Mississippi and New Jersey—passed legislation to carve out an exception to their state tax code’s general rule following the federal taxable income definition.¹¹³ By restoring “full expensing” of domestic (but not foreign) R&E, at an estimated cost of \$141 billion over the next ten years, the OBBBA adds another twist to the saga.

Finally, the 2017 TCJA caused a rift by eliminating deductions for certain entertainment expenses. Before the TCJA, businesses could deduct 50% of entertainment expenses related to business activity. The TCJA eliminated that deduction, generating an estimated \$23.5 billion over ten years.¹¹⁴ Several states continued to offer the deduction, however, with some, such as California and Pennsylvania, differentiating between types of corporations.

These discrepancies underscore a simple point: states have significant leeway in how they structure their income tax code. Just as state legislators may continue to offer deductions to subsidize activities they perceive as valuable, such as research, they may discontinue deductions to subsidize activity they perceived as unproductive, or even harmful, such as advertising. The extent to which legislators may subject different advertisers to different tax treatment, however, faces limits under the First Amendment to the Constitution, as discussed in the next section.

The First Amendment and Why Recent Caselaw Favors Reform Broadly Applicable to all Food and Beverage Advertising

In recent years, the U.S. Supreme Court has adopted an expansive view of the constitutional protections afforded to commercial speech, including advertising. The Supreme Court has struck down “selective taxation” policies, even where there is “no evidence of an improper censorial motive,”¹¹⁵ and it has held that the government cannot “burden[] the speech of some . . . based on disagreement with the message it conveys.”¹¹⁶ The evolution of this First Amendment jurisprudence has raised concerns that laws like the SSCOA¹¹⁷ might not survive judicial scrutiny. More specifically, laws targeting a narrow range of advertising for “unhealthy” food products may be interpreted as government censorship through differential taxation, as impermissibly vague, or as unconstitutional content or viewpoint discrimination.

A tax reform broadly applicable to food and beverage advertising may avoid these pitfalls. The Supreme Court has acknowledged that “economic regulation of commercial activity” may lawfully impose a burden on speech.¹¹⁸ States have a longstanding tradition of regulating the food system, including how food companies market their products. Today’s Court is more polarized along partisan lines than perhaps ever before,¹¹⁹ shaking confidence that any major reform that challenges prevailing conservative, anti-regulatory ideology will pass constitutional muster. However, by clawing back a subsidy rather than imposing a punitive tax, avoiding vagueness, and steering clear of impermissible content or viewpoint-based discrimination that would “interfere with the marketplace of ideas to promote the interests of the state,”¹²⁰ reformers can readily distinguish problematic precedents.

Tax or Subsidy?

Current deductibility rules subsidize advertising, and this fact provides important constitutional support for reforms to these rules. In its 1957 decision in *Cammarano v. United States*, the Supreme Court held that a “legislature’s decision not to subsidize the exercise of a fundamental right does not infringe that right.”¹²¹ In the case, owners of a beer wholesaler argued that the First Amendment entitled them to deduct their contributions to an ad campaign opposing a referendum on making the state the exclusive retailer of beer and wine in the state of Washington. The court rejected the claim. “Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code.”¹²²

This reasoning led the court in *Regan v. Taxation Without Representation Washington*, to uphold a federal law excluding organizations that engaged in substantial lobbying from tax-exempt status.¹²³ Even though the law carved out special treatment for lobbying by veterans’ organizations, the court held that the government “has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth

the money the public would pay to subsidize that lobbying, and other disadvantages that might accompany that lobbying.”¹²⁴ By the same logic, the government has the authority to determine whether subsidies for food and beverage advertising are “worth the money.”

To the extent that changing deductibility rules looks more like a punitive tax than removing a subsidy, the First Amendment scrutiny increases. In particular, the Supreme Court has treated tax laws that disfavor particular speakers or content with skepticism. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,¹²⁵ the court found that a state use tax on ink and paper consumed exclusively by large newspapers “raised the specter of government censorship through differential taxation” and demanded a compelling justification that the state could not supply. The court in *Arkansas Writers’ Project, Inc. v. Ragland*, extended this logic to content-based tax distinctions, striking down an Arkansas sales tax that exempted certain magazine categories but not others.¹²⁶

To avoid imposing a tax, food ad subsidy reform should scale back deductions for advertising only to the extent that ad expenditures produce “benefits beyond the year in which the expenditure is incurred,” consistent with the *INDOPCO* court ruling, and empirical evidence, discussed earlier.¹²⁷ In other words, some proportion of ad spend may fairly qualify as an “ordinary and necessary expense,” immediately deductible in the current tax year.¹²⁸ Allowing companies to deduct all advertising expenses below a certain threshold—e.g. \$2.5 million per year—would further undercut challenges characterizing reform as a “tax.”

Avoiding Vagueness

Reforms targeting ads for “unhealthy” food may be impermissibly vague. In *Speiser v. Randall*,¹²⁹ the Supreme Court struck down a California law “withholding tax benefits” for those refusing to adopt a loyalty oath, reasoning that the state could not do “indirectly” what the First Amendment barred it from doing directly.¹³⁰ This reasoning, carried forward in several more recent cases,¹³¹ points to a potential pitfall in laws like the SSCOA, which singles out “food of poor nutritional quality” and ads and brands “primarily directed at children.” The SSCOA’s

approach has obvious appeal insofar as it leads food sellers to prioritize the sale and promotion of “healthy” foods to vulnerable populations, but it introduces ambiguity that could trigger First Amendment protections.

Because “[v]ague laws force potential speakers to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked,” the Supreme Court has ruled that “government may regulate in the area of First Amendment freedoms only with narrow specificity.”¹³² Legislators cannot easily define a term like “food of poor nutritional quality” with “narrow specificity.” Although nutrition researchers have coalesced around a common definition of UPFs, that category only roughly overlaps with what most experts would consider “food of poor nutritional quality.” Likewise, foods that contain high amounts of sugar, salt or fat may nevertheless qualify as “healthy.”¹³³ Regulations implementing the law could potentially clear up some of the confusion, but the caselaw casts doubt on whether an administrative fix could cure the underlying constitutional defect.¹³⁴

The “void for vagueness” caselaw points to the need for a broader rule. The most defensible would apply to advertising writ large, for all products. But short of that ideal, discussed further below, a law that covers food and beverages generally, rather than just a subset of “unhealthy” foods, offers much more solid constitutional footing. By incorporating, for example, the existing definition of “food” in the Federal Food, Drug, and Cosmetic Act, with the qualification that the “food” be intended for human consumption (as opposed to pet or livestock consumption), a reform would leave little doubt as to whose products are covered.¹³⁵ Line drawing challenges remain with respect to the advertising and marketing activity covered by the law, but such an industry-wide rule does not present the same threat of a “chilling effect” that attaches to legislative schemes aimed at discouraging advertising for some foods and not others.

Content and Viewpoint Discrimination

A broader rule also fares better under the Supreme Court’s jurisprudence on content-based speech restrictions. Laws that “target speech

based on its communicative content,” according to the court’s decision in *Reed v. Town of Gilbert*, are “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”¹³⁶ The *Reed* court struck down a town’s sign ordinance that differentiated between “ideological,” “political,” and “temporary directional” signs, reasoning that any law applying to speech “because of the topic discussed or the idea or message expressed” is content-based. Overcoming the presumption of unconstitutionality is not straightforward. The *Reed* court found that the challenged ordinance was “hopelessly underinclusive” for the aesthetic and traffic safety interests it was designed to serve, but gave little indication as to how the town might have designed a sufficiently “inclusive” ordinance that was nevertheless “narrowly tailored” to serve those interests.¹³⁷

A broad reading of *Reed* and related cases is hard to reconcile with the *Regan* case discussed above. After all, the law in *Regan* targeted “lobbying,” a form of “speech,” based on its “communicative content,” i.e. content “attempting to influence legislation.”¹³⁸ It even gave a carveout to veterans’ organizations. But the lobbying restriction applied to a broad category of “ideas.” It also imposed a tax on speech, not an outright ban. In *Leathers v. Medlock*, the Supreme Court rejected a challenge to a sales tax on cable television providers, but not print media, reasoning that “differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas.”¹³⁹

Arguably, a law like the SSCOA aims to suppress the “particular idea” that consumers, including children, should purchase and enjoy the “unhealthy” foods it targets.¹⁴⁰ A regulator like the FTC might restrict some of this speech to the extent it is “unfair” or “deceptive,” but so long as the marketing is “lawful,” singling it out for special tax treatment is constitutionally suspect.¹⁴¹ By contrast, the state’s authority to regulate the food system—through food safety standards, licensing and permitting fees, labeling requirements, taxes, and subsidies¹⁴²—is rooted in foundational police powers. A rule repealing the deduction for food advertising generally, as part of a comprehensive plan to allocate

subsidies within the food system, resembles less “censorship” of a small group of speakers, and more “traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech.”¹⁴³

Regulating the Food Economy

Justice Kavanaugh’s plurality decision in *Barr v. American Association of Political Consultants*, quoted above, deserves special attention, given its seemingly absolutist decree that “above all else, the First Amendment means that government generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁴⁴ The facts of the case, however, call into question whether a food advertising subsidy reform would necessarily “restrict expression because of its . . . content” within the court’s meaning.

Barr struck down a law that exempted federal debt collectors from a longstanding ban on robocalls to cellphones. The court ruled that by *allowing* some agents to make robocalls, Congress impermissibly discriminated against other would-be robocall users. Citing *Reed*, it reasoned that “a law is content-based if ‘a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys,’” and such laws are subject to strict scrutiny.¹⁴⁵ Food ad subsidy reform, by treating similar taxpayers differently because of the content of their advertising messages (i.e. ads for food versus other products) might therefore appear to invite strict scrutiny.

Food advertising subsidy reform, however, differs from the “regulation of speech” at issue in *Barr* in important ways. For one, such a reform does not ban any speech, but merely increases its cost, and only marginally for the most active advertisers (those who spend more than, say, \$2.5 million per year on ads). The reform makes no attempt to pick winners and losers among purveyors of “healthy” or “unhealthy” foods. Rather than restricting expression, it aims primarily to generate revenue for the state. Should the state transfer that revenue towards subsidies for healthy school meals or hiring more food inspectors, the reform is even more defensible as a regulation of the food economy, and not an unconstitutional imposition on speech.

To be clear, food ad subsidy reform would necessarily differentiate “speech based on its content,” and some of the justices have suggested that fact alone represents an impermissible affront to “life under the First Amendment.”¹⁴⁶ But the most extremist First Amendment interpretation has not yet become the law of the land. Notably, the *Barr* court declined to strike down Congress’ entire ban on robocalls, opting to sever the debt collection exception from the law instead. Justice Gorsuch’s dissenting opinion, joined by Justice Thomas, argued that the “rule against cellphone robo-calls is a content-based restriction that fails strict scrutiny.” But the plurality disagreed. “That approach would disrespect the democratic process,” the Court reasoned. Erecting an impediment to states seeking to reallocate a costly and harmful food subsidy would similarly disrespect the democratic process.

Minimizing Interference With the “Marketplace of Ideas”

A final reform feature to minimize potential First Amendment conflicts relates to the law’s purpose, as evinced by its design and supporting legislative findings. Food ad subsidy reform that purports to somehow punish junk food advertisers or other disfavored speakers will invite greater scrutiny. The Supreme Court’s decision in *Sorrell v. IMS Health Inc.* is instructive.

At first blush, the case striking down a Vermont law that banned “sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors,” seems far afield of conventional “free speech” concerns. But the bill’s legislative findings raised a red flag for the Justices. Most damning, they espoused an intent to rectify a “marketplace for ideas on medicine safety and effectiveness [that] is frequently one-sided in that brand-name companies invest in expensive pharmaceutical marketing campaigns to doctors.”¹⁴⁷ In the Second Circuit Court of Appeals’ words, “The findings expressly state the legislature’s intent to interfere with the marketplace of ideas to promote the interests of the state.”¹⁴⁸

Sorrell cautions against food ad subsidy reform espousing an intent to promote the

state’s interests by reducing speech. For the reasons discussed, reform may have that effect, particularly if multiple states undertake it. However, to minimize legal risk, reform should focus on reclaiming the revenue dedicated to food ad subsidies. In fact, one state’s food ad subsidy reform would not likely have a significant impact on commercial speech, since most food companies large enough to be affected operate across many jurisdictions, and pay income tax on the basis of an apportionment formula tied to estimated in-state sales. As a design feature, earmarking reform revenue for other, non-speech related food system objectives, such as universal school meals, would further buttress claims that burdens on speech are “incidental” to what is fundamentally an economic regulation.

Abolishing the Subsidy for All Advertising Would Eliminate First Amendment Risk but Faces Greater Political Resistance

The Supreme Court’s sweeping indictments of “content-based” speech laws may convince some that food ad subsidy reform cannot go forward under the current Court, and that public health advocates would better promote a non-discriminatory law that repeals the subsidy for all advertising. This approach offers advantages beyond mere legal formalities. Scholars have long argued that a tax on advertising could help give a leg up to public media, artistic and cultural expression, independent journalism, and other salutary forms of human interaction,¹⁴⁹ breaking down a major obstacle in our collective struggle to “satisfy social, psychological, and spiritual needs.”¹⁵⁰

Yet despite the supporting evidence, laws like the Baucus-Camp proposal have never overcome the advertising industry’s opposition. In 2017, that opposition convinced lawmakers on both sides of the aisle that the ad subsidy reform would kill local business, cripple newspaper and television industries, and deprive the public of vital information.¹⁵¹ While these claims may seem hyperbolic, an industry-wide reform would represent a sweeping change, with greater potential for unforeseen consequences. Lawmakers are understandably reluctant to take up this fight.

By contrast, food ad subsidy reform allows legislators to take an incremental approach, and to respond to popular support for food system reform.

The Proposed Law

The appendix is a model bill that gives state legislators a concrete proposal for repealing food advertising subsidies. As alluded to above, the scope of covered advertising implicates important constitutional and administrative considerations. In addition to defining covered “food,” legislators must wrestle with how to define “advertising” and related and marketing activity, such as whether corporations must capitalize payments for “slotting fees” often paid to retailers in exchange for shelf space. Legislators may choose to exempt some level of advertising expenses, e.g. \$2.5 million per year, both for administrability and as a prophylactic rule protecting advertising appropriately characterized as an “ordinary and necessary” business expense under Section § 162(a) of the tax code. Finally, an exemption for taxpayers whose business activities are primarily dedicated to the sale of goods and services other than food may ease implementation without significant revenue loss.

Defining Covered Marketing

The model bill defines “qualified food or beverage marketing expenses” broadly. For the constitutional considerations discussed above, the definition applies to all “food or beverage” products, not just those that are “unhealthy” or “ultraprocessed.” It includes alcoholic beverages, the source of an average 100 calories per day for American adults, but makes no distinction between the marketing expenses for those products and any other food or beverage. Marketing goes beyond advertising under the law to include “slotting fees” and payments for search results on platforms like Amazon. Anti-trust scholars have pointed out how these payments often serve “to effectively exclude competitors.”¹⁵² The model bill’s broad definition will help to capture more tax revenue, and promote competition by raising the price that larger corporations must pay to erect a barrier to entry against smaller rivals.

The model bill allows businesses to deduct a large proportion of marketing expenses immediately. The bill exempts up to \$2.5 million spent on qualified food and beverage marketing. Like the federal bills, it treats half of expenses in excess of that amount as an “investment in brand image” to be amortized over five years.¹⁵³ The \$2.5 million exemption differs from earlier congressional proposals, which required taxpayers to capitalize half of *all* advertising expenses.¹⁵⁴ It mirrors an analogous exemption, however, in Section 179 of the federal tax code, which allows business owners to immediately expense up to \$2.5 million of certain depreciable assets.¹⁵⁵ An aggregation requirement prevents large enterprises from avoiding tax by creating related subsidiaries that could each benefit from the exemption. This requirement means a food manufacturer could not, for example, assign different brands to separate commonly controlled subsidiaries that could then each claim the exemption.

Defining Covered Taxpayers

The model bill defines “covered taxpayer” as those “primarily engaged” in making or selling food, exempting businesses for whom food sales are merely incidental. The bill specifies that businesses that receive less than 20% of gross receipts from food sales are exempt. Legislators may choose to adjust this figure upward to reduce the tax burden on small businesses and simplify the law’s implementation. Alternatively, a narrower exemption could capture certain conglomerates that, while not “primarily engaged” in making or selling food, nevertheless contribute significantly to consumers’ exposure to food marketing.

Conclusion

Not long into the second Trump Administration, Health and Human Services Secretary Robert F. Kennedy, Jr. made headlines with new Dietary Guidelines for Americans that feature an “upside down” food pyramid. As Dietary Guidelines go, the new edition represents a radical departure from established advice, particularly with respect to saturated fat.¹⁵⁶ Taking a step back, however, the new mandate to “eat real food” looks a lot like the

guidance Americans have received for generations: eat plenty of fruits and vegetables, avoid added sugars, get enough protein. These nutrition basics too often get lost in a sea of “novel” dietary advice, much of it commercially motivated.

“If you make advertising more expensive, there will be less information available to the public.”¹⁵⁷ So warned an industry lobbyist when Congress debated repealing ad subsidies back in 2017. But few would argue Americans’ dietary woes stem from a lack of information about food. In other countries, a more permissive constitutional framework has allowed legislators to simply outlaw many food advertising practices, particularly those directed to children.¹⁵⁸ In the U.S., policymakers cannot control food advertising content so directly, but they need not devote taxpayer dollars to promoting its production.

Most food advertising contributes to the obesogenic environment that nudges consumers towards poor diets. It does not deserve a subsidy. Reform can generate revenue to fund a wide variety of critical food system components, from food inspector salaries to scratch cooking facilities for schools to produce prescription programs. As with many other innovative policies, this reform entails legal risks. For the reasons discussed, however, broadly applicable reform, which does not favor one food advertiser’s message over another’s, greatly diminishes this risk. With Congress dysfunctional and voters across the political spectrum fed up with a food system that saddles one in five children with obesity by their 18th birthday, now is the time for state legislators to act.

APPENDIX

Stop Subsidizing Food Advertising Model Bill

BE IT ENACTED by the Legislature of the State:

SECTION 1. *Legislative Findings and Purpose.*

The Legislature finds and declares the following:

- (a) Economic research indicates that a majority of advertising and market research spending (“marketing expenses”) creates durable intangible assets that last beyond the taxable year.
- (b) Because marketing expenses generate future economic benefits that persist beyond the year in which the expenditure is made, they are eligible for capitalization under the United States Supreme Court’s decision in *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79 (1992).
- (c) Requiring amortization of a portion of marketing expenses is consistent with sound income measurement and with the general tax principle that expenditures generating durable future benefits should be recovered over the period of those benefits.
- (d) Allowing taxpayers to deduct marketing expenses provides a subsidy for that activity at the expense of potentially more productive allocations of capital.
- (e) State subsidies for food and beverage marketing are inconsistent with responsible stewardship of taxpayer resources and with state public health, privacy and competition protections.
- (f) Food and beverage marketing negatively influences consumers’ purchasing decisions and dietary patterns, including among children and adolescents who are particularly susceptible to advertising influences.
- (g) Diet-related chronic diseases, including obesity, type 2 diabetes, cardiovascular disease, and hypertension, impose substantial costs on state residents and on state-funded health programs, including Medicaid. Scientific studies indicate that exposure to food and beverage advertising, most of which promotes highly processed products of poor nutritional quality, is associated with greater incidence of these diseases.
- (h) This Act applies uniformly to all food and beverage marketing expenses, without regard to the content, medium, audience, or message of any particular food or beverage advertisement.

SECTION 2. *Definitions.*

As used in this Act:

- (a) “Qualifying food or beverage marketing expense” means any amount paid or incurred by a taxpayer primarily for the purpose of promoting the sale of food or beverage products to consumers, including costs of: (i) placement in any medium, including television, radio, print, digital, online, social media, outdoor, and direct mail; (ii) production, creation, or development of advertising content; (iii) payments to influencers, endorsers, or other third parties primarily for consumer-directed promotional purposes; (iv) per unit time payments made by manufacturers to retailers for shelf space (“slotting fees”); (v) payments to operators of online search engines, retail platforms, or digital marketplaces for sponsored, promoted, or preferentially ranked placement in product search results or product listings, including amounts paid on a per-click, per-impression, or per-transaction basis (“digital placement fees”); and (vi) agency or consulting fees attributable to the foregoing. “Qualifying food or beverage marketing expense” does not include: (A) amounts required by law or regulation, including mandatory nutritional labeling and required warnings; (B) product packaging and labeling costs; (D) recruitment or employment advertising; or (E) investor or shareholder communications.
- (b) “Covered taxpayer” means any person subject to the income tax imposed by this State that, in the taxable year, is primarily engaged in the manufacture, processing, distribution, or retail sale of food or beverage products for human consumption, or that derives more than twenty percent (20%) of its gross receipts from such activities.

- (c) “Food or beverage” means any article intended for human consumption as food or drink, as defined in section 201(f) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. sec. 321(f), that is intended for human consumption, including alcoholic beverages as defined in 27 U.S.C. sec. 211, but not including (i) products primarily intended for pet or livestock; (ii) tobacco products as defined in 21 U.S.C. sec. 321(rr); (iii) articles regulated exclusively as drugs under 21 U.S.C. sec. 321(g)(1) and not marketed as food; or (iv) articles regulated as medical devices under 21 U.S.C. sec. 321(h).
- (d) “Deferred food or beverage marketing expense” means the portion of a qualifying marketing expense that may not be deducted in the taxable year incurred pursuant to Section 3 of this Act.
- (g) “Secretary” means the Secretary of Revenue of this State, or the equivalent officer responsible for administration of the State income tax.

SECTION 3. *Modified Income Tax Treatment of Food and Beverage Marketing Expenses.*

- (A) **Only 50 percent of qualifying food or beverage marketing expenses allowed as deduction.** In general, the amount allowable as a deduction for any qualifying food or beverage marketing expense shall not exceed 50 percent of the amount in excess of \$2.5 million of such expense which would (but for this paragraph) be allowable as a deduction as an “ordinary and necessary” expense, as defined by 26 U.S. Code sec. 162(a), paid or incurred by a covered taxpayer during the taxable year, in addition to whatever amortization deduction may be allowed pursuant to section (2).
- (B) **Amortization of certain qualifying food or beverage marketing expenses.** Of any qualifying food and beverage marketing expenses in excess of \$2.5 million, a covered taxpayer shall:
 - (i) charge 50% of such expenditures to capital account, and
 - (ii) be allowed an amortization deduction of such expenditures ratably over such period of not less than 60 months as may be selected by the taxpayer (beginning with the month in which the taxpayer first realizes benefits from such expenditures).
- (C) **Cessation of Business.** If a covered taxpayer ceases to carry on the trade or business to which deferred qualifying food and beverage marketing expenses relate before the end of the amortization period, any unamortized balance shall be deductible in the taxable year of cessation, subject to any applicable loss limitation rules.
- (D) **Treatment of Amounts Recovered.** If a covered taxpayer recovers any portion of a qualifying food and beverage marketing expense (for example, through a rebate or credit from a media vendor), the recovered amount shall reduce the deferred advertising expense balance before reducing any amount deductible in the current year.
- (E) **Relation to Federal Tax Treatment.** To the extent a covered taxpayer has deducted a qualifying food and beverage marketing expense on its federal income tax return in the taxable year incurred, the taxpayer shall add back to State taxable income the amount of such deduction that exceeds the amount allowable under subsection (1) of this Section. The amortization deductions allowed under subsection (2) of this Section shall be treated as State-specific deductions not reflected in federal taxable income.
- (F) **Aggregation requirement.** The amount allowable as a deduction for any qualifying food or beverage marketing expense shall be calculated on a controlled-group basis.

SECTION 4. *Rulemaking Authority.*

Within one year of enactment, the Secretary shall promulgate rules and regulations necessary to implement this Act, including rules: (a) clarifying which expenditures constitute qualifying food and beverage marketing expenses under Section 2(a); (b) establishing recordkeeping requirements for covered taxpayers; (c) prescribing the method of reporting deferred food and beverage marketing expenses on State tax returns; (d) addressing the treatment of qualifying food and beverage marketing expenses paid or incurred by pass-through entities; and (e) providing guidance on the application of this Act to taxpayers using consolidated or combined reporting.

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123. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983)
124. *Regan* at 550.
125. 460 U.S. 575 (1983)
126. 481 U.S. 221 (1987)
127. *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992).
128. 26 U.S. Code § 162(a).
129. 357 U.S. 513 (1958)
130. First Amendment protection "cannot be transgressed indirectly . . . any more than it can be violated by direct enactment."
131. *Rust v. Sullivan*, 500 U.S. 173 (1991); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); *Agency for International Development v. Alliance for Open Society International*, 570 U.S. 205 (2013).
132. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 807, 131 S. Ct. 2729, 2743, 180 L. Ed. 2d 708 (2011).
133. Use of the "Healthy" Claim on Food Labeling. U.S. Food and Drug Administration. <https://www.fda.gov/food/nutrition-food-labeling-and-critical-foods/use-healthy-claim-food-labeling>
134. See *City of Chicago v. Morales*, 527 U.S. 41 (1999) (enforcement guidelines could not substitute for lack of limits in ordinance that gave officers no principled basis for determining what counted as "loitering with no apparent purpose." But see *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.")
135. 21 U.S.C. § 321(f) ("articles used for food or drink for man or other animals and chewing gum and articles used for components of any such article.").
136. 576 U.S. 155 (2015)
137. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172, ("The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem... The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not.").
138. *Regan* at 540.
139. 499 U.S. 439, 453 (1991).
140. *Id.*
141. See Central Hudson (parenthetical).
142. See <https://www.nal.usda.gov/economics-business-and-trade/agricultural-subsidies>
143. *Barr*, *supra* note 116, at 623.
144. 591 U.S. 610, 618, 140 S. Ct. 2335, 2346, 207 L. Ed. 2d 784 (2020).
145. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 618, 140 S. Ct. 2335, 2346, 207 L. Ed. 2d 784 (2020)
146. *Barr* (Gorsuch dissent).
147. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 561, 131

S. Ct. 2653, 2661, 180 L. Ed. 2d 544 (2011)

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The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 250 of these groups participate in the federation and govern it through their representatives on the organization's Board of Directors.



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