# Regulation of Food Advertising to Children in Six Jurisdictions: A Framework for Analyzing and Improving the Performance of Regulatory Instruments

Belinda Reeve & Roger Magnusson

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ABSTRACT

Childhood obesity is a public health crisis, and globally, at least 170 million young people are overweight or obese. Research identifies food marketing as a key risk factor for childhood weight gain, yet there is significant debate over how food marketing to children should be regulated. This paper analyzes regulatory controls on food marketing in six jurisdictions—the United States, United Kingdom, Australia, Ireland, Canada, and Quebec—with the aim of evaluating whether regulation in each jurisdiction exhibits the features of an effective, transparent, and accountable regulatory regime. These jurisdictions use different forms of regulation to restrict food marketing to children (e.g., self-regulation, co-regulation and statutory regulation), yet research suggests that none have been entirely successful in protecting children from exposure to marketing of unhealthy food. Drawing on the disciplines of public health and regulatory studies, we present a theoretical framework for the design of effective food advertising regulation. We use this framework to evaluate the strengths and weaknesses of regulation in each jurisdiction, and to explain why both public and private regulation has not been than successful in improving the food marketing environment. Our analysis reveals significant loopholes in the substantive provisions of regulatory instruments used to restrict food marketing to children, as well as limitations in the processes of monitoring, review, and enforcement established by each scheme. Our paper concludes by pointing to ways in which food advertising regulatory schemes could be progressively strengthened, including through the use of regulatory “scaffolds” to improve the transparency, accountability and performance of regulatory instruments.

I. INTRODUCTION

Obesity presents a serious threat to the health of children around the world. Between 1980 and 2013, the global prevalence of overweight and obesity in
children increased by 47%. Globally, at least 170 million children and adolescents (<18 years) are overweight or obese, including 41 million children aged 5 years or younger. Obesity increases children’s risk of elevated blood pressure and insulin resistance, and is a direct cause of cardiovascular disease, type 2 diabetes, fatty liver disease, sleep disorders and asthma in children and adolescents. Childhood obesity also increases the risk of adult obesity, which is linked to a wide variety of health conditions including metabolic syndrome, hypertension, type-2 diabetes, ischemic heart disease, and certain cancers. Addressing weight gain during childhood is an important priority for countries because doing so reduces the growing burden that obesity imposes on the health care system, on employers and the economy, and on affected individuals and their families.

The marketing of unhealthy foods and beverages to children has been identified as an important, modifiable risk factor affecting the dietary preferences, food choices, and weight of children. Large, transnational food companies spend vast sums of money marketing their products to young people, and the majority of this advertising is for unhealthy products such as sugar-sweetened cereals, soft drinks, confectionery, and fast food. Companies promote these products to

aa=1.
children via sophisticated marketing strategies that integrate an array of persuasive techniques and media platforms. These include television, online digital marketing (such as smartphones, and social media), product packaging, outdoor advertising, and marketing in schools. Systematic reviews find moderate to strong evidence that these promotions influence children’s food preferences, purchase requests, and actual consumption patterns, to the detriment of children’s diet-related health.

Another concern is that children are particularly vulnerable to advertising, with children under the age of seven years generally unable to distinguish between editorial and promotional content, and most children developing a critical understanding of advertising around the age of 12 years.

In 2010, the World Health Organization (WHO) released a Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children, which called on member states to introduce policy measures to reduce children’s exposure to, and the persuasive power of, unhealthy food marketing.

Many countries have encouraged voluntary action by the food industry, resulting in

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10 Andrew Cheyne et al., Food and Beverage Marketing to Youth, 3 CURRENT OBESITY REP. 440, 440-50 (2014); Cairns et al., Systematic Reviews, supra note 9, at 212; Y.M. Terry-McElrath et al., Commercialism in US Elementary and Secondary School Nutrition Environments: Trends from 2007 to 2012, 168 JAMA PEDIATRICS 234, 234 (2014). See also Kathryn C. Montgomery & Jeff Chester, Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age, 45 J. ADOLESCENT HEALTH S18 (2009); Becky Freeman et al., Digital Junk: Food and Beverage Marketing on Facebook, 104 AM. J. PUB. HEALTH e1, e1-e7 (2014).


13 See INSTITUTE OF MEDICINE, FOOD MARKETING, supra note 7.

a proliferation of industry “pledges” on responsible marketing to children.\textsuperscript{15} Some countries, such as Chile\textsuperscript{16} and South Korea,\textsuperscript{17} have introduced statutory restrictions on food marketing, while others such as the United Kingdom have taken a co-regulatory approach.\textsuperscript{18} However, self-regulation by the food industry remains the dominant approach.\textsuperscript{19} In 2016, the WHO’s Global Commission on Ending Childhood Obesity noted the failure of WHO member states to fully implement the WHO’s recommendations on food marketing to children,\textsuperscript{20} and called for greater cooperation between member states to reduce the impact of cross-border marketing of unhealthy foods and beverages.\textsuperscript{21} While the need for restrictions on the marketing of unhealthy products to children is widely accepted, the form that such restrictions should take remains heavily contested.

This paper evaluates regulatory controls on the marketing of unhealthy foods and beverages to children in six jurisdictions—the United States, United Kingdom, Ireland, Canada, Quebec, and Australia—with the aim of identifying the strengths and weaknesses of different regulatory models that are used to restrict food marketing to children. Part II of the paper surveys the regulatory landscape of children’s food advertising and describes the six regulatory regimes in detail. Part III reviews literature that evaluates the success of these regimes in reducing children’s exposure to unhealthy food marketing. Part IV draws on literature from the disciplines of public health and regulatory studies to develop a framework for evaluating whether food advertising controls in each jurisdiction contain the building blocks for a successful regulatory regime. This framework includes an analysis of the transparency of regulatory processes and the extent to which food advertisers are held accountable for their compliance with regulatory standards. These are aspects of regulation that reflect the legitimacy of the regulatory scheme and which may be strengthened, irrespective of both the content of advertising controls imposed on food advertisers and the statutory or non-statutory form of the regulatory scheme.

\textsuperscript{17} Eo rin i sik saeng hwar an jeon gwan ri teuk byeo beop [The Special Act on the Safety Management of Children’s Dietary Life], Act No. 10310, May 25, 2010 (S. Kor.);
\textsuperscript{18} See infra Section 2.b.
\textsuperscript{21} Report of the Commission on Ending Childhood Obesity, supra note 3, at 19.
In Parts V-VII of the paper, we apply our accountability framework to pinpoint the strengths and weaknesses of the food advertising regime in each jurisdiction. Our framework is applied to explore possibilities of transferring the strengths of one regulatory model to another, with the goal of enhancing the transparency, accountability and performance of regulatory instruments. Our analysis illustrates why none of the regulatory regimes we considered have been effective in protecting children from unhealthy food marketing.22

While governments play a crucial role in ensuring the accountability of regulatory regimes, regulatory reforms are often incremental and build on existing regimes. Our analysis suggests that there are opportunities for governments and industry bodies to make targeted, strategic interventions to improve the performance of both under-performing public, and private, regimes. This process—which we refer to as legislative or regulatory “scaffolding”—may provide an opportunity for governments to move beyond the “entrenched dichotomy” between voluntarism and government regulation that often pervades debates about obesity prevention.23

II. REGULATORY CONTROLS ON FOOD ADVERTIZING TO CHILDREN IN SIX JURISDICTIONS

A. The Regulatory Landscape for Children’s Food Advertising

In general, the key sources of regulation that governs the advertising of food to children include: consumer protection laws, food safety laws, broadcasting regulation, self- or co-regulatory codes developed by the media industry under broadcasting regulatory frameworks, self-regulatory systems for advertising administered by the advertising industry, and voluntary pledges on food marketing developed by the food industry. Depending on their design and scope, these instruments may variously apply to all people and products, impose restrictions that are specific to food, or impose restrictions that are specific to advertising directed to children.24

The key principle underlying the regulation of food advertising to children is that advertising should not be misleading or deceptive.25 Generally speaking, advertising regulation recognizes the special vulnerability of children to advertising, and seeks to prevent advertisers from exploiting the credulity of children, inducing them to pressure their parents or caregivers into making

22 See infra Section 3.a.
25 Id. at 10.
purchases, or encouraging children to consume products excessively. Advertising regulation often restricts the volume or timing of advertising in children’s programs or designated viewing times, the way that products are portrayed, and the use of persuasive techniques that children are particularly susceptible to, such as prizes or premium offers. More recently, governments have begun to place specific restrictions on the marketing of food products of low nutritional value to children. The regulation of the nutritional quality of advertised food products, along with their obesity-prevention objectives, are key factors that differentiate these newer forms of regulation from older regulatory restrictions on food marketing. The Quebec ban differs from the other five jurisdictions discussed here, in that it aims to protect children from exposure to all forms of advertising and marketing.

As summarized in Table 1, the implementation of food advertising controls across the six jurisdictions we examined varies according to the overall regulatory framework chosen for implementation and the more specific regulatory channel. The three regulatory channels we observed were: (1) consumer protection laws, (2) broadcasting regulation, and (3) unilateral “pledges” by food manufacturers and retailers. By ‘regulatory framework,’ we refer to the use of self-regulation, co-regulation, and statutory regulation. ‘Self-regulation’ involves the relevant industry agreeing on rules to be applied across the industry, and monitoring and enforcing these rules without the involvement of government or non-government organizations. Under ‘co-regulation,’ regulatory responsibilities are shared between public and private bodies, usually within a legislative framework. ‘Statutory regulation’ is developed and implemented by a government body, often through processes that involve consultation with the public and/or industry.

26 See, e.g., id. at 52; C. Hawkes, Self-Regulation of Food Advertising: What it Can, Could and Cannot do to Discourage Healthy Eating Habits among Children, 30 NUTRITION BULL. 374 (2005).
28 Id. at 30.
29 Id. at 29.
Table 1 Characterizing the Regulatory Regime Governing Food Advertising to Children in Six Jurisdictions

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<th>Regulatory Channel</th>
<th>Consumer protection laws</th>
<th>Broadcasting regulation</th>
<th>Food industry pledges</th>
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<td>Statutory regulation</td>
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<td>Ireland</td>
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<td>Co-regulation</td>
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<td>Australia</td>
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While the distinction between self-regulation and statutory regulation may appear clear-cut, in practice self-regulation usually operates against a backdrop of government regulation and oversight, blurring the boundaries between private, and public regulation.30 For example, the US food industry adopted the *Children’s Food and Beverage Advertising Initiative* in 2006 following a series of reports on food marketing to children by the Federal Trade Commission and the Institute of Medicine, with both organizations recommending that the industry expand self-regulatory standards for food marketing to children.31 Similar government prompts also led to the adoption of food industry pledges in Australia, with the government broadcasting authority encouraging the industry to consider how it could address

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community concerns about unhealthy food marketing to children without the need to adopt further statutory controls on food advertising.\textsuperscript{32}

These six jurisdictions illustrate how the design and scope of self-regulation varies considerably according to the level of government involvement.\textsuperscript{33}

In some jurisdictions, such as the United Kingdom, advertising self-regulation sits within a complex co-regulatory regime, while in others, the government’s role is restricted by legislative or constitutional requirements. For example, in the United States, both the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) play a role in advertising regulation. However, constitutional protections of free speech restrict the capacity of both agencies to regulate advertising and program content,\textsuperscript{34} while legislation specifically prohibits the FTC from regulating advertising on the basis of its fairness to children.\textsuperscript{35} Accordingly, the US broadcasting regulatory system relies heavily on self-regulation, including when regulating food advertising to children.\textsuperscript{36} National differences in the scope of government intervention in advertising regulatory systems must be kept in mind when proposing measures to strengthen regulatory controls.\textsuperscript{37}


\textsuperscript{33} See also Hawkes, supra note 24, at 14.


\textsuperscript{35} Federal Trade Commission Improvement Act, 15 U.S.C. § 57 a(h) (1980). The Federal Trade Commission Act grants the FTC jurisdiction over misleading and deceptive advertising. \textit{Id.} § 41. However, the US Congress removed the FTC’s power to regulate advertising to children on the grounds of unfairness following a 1976 proposal from the FTC to introduce broad-ranging rules on television advertising to children. The proposed rulemaking (known as KidVid) was motivated by concerns about dental caries in children and was based on the argument that television advertising of sugary products to children may be unfair and deceptive because of children’s inherent vulnerability to advertising. The FTC brought the KidVid rulemaking to a close prior to the introduction of the Federal Trade Commission Improvement Act of 1980 because of the inherent difficulties in identifying and regulating marketing for unhealthy products that is directed to children. See Tracy Westen, \textit{Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy}, 39 LOY. L.A. L. REV. 79 (2006); Jennifer L. Pomeranz, \textit{Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate}, 38 J. L. MED. ETHICS 98 (2010).

\textsuperscript{36} Elizabeth Handsley et al., A \textit{Children’s Rights Perspective on Food Advertising to Children}, 22 INT’L J. CHILD. RTS. 93, 103 (2014).

\textsuperscript{37} For example, in contrast to the restrictive approach taken to advertising regulation in the United States, Canada’s Supreme Court has upheld the constitutionality of Quebec’s
B. The Six Different Regulatory Models

Quebec introduced legislation to ban all commercial advertising directed to children aged 13 years and younger in 1978, and it took effect on April 30, 1980.\(^{38}\) Sections 248 and 249 of the Consumer Protection Act 1980 set out three criteria that must be considered to determine whether an advertisement targets children,\(^{39}\) while supporting regulations provide detail on the scope of the ban.\(^{40}\) Quebec’s Office of Consumer Protection (OCP) administers and enforces the Act, including the restriction on marketing to children.\(^{41}\)

Ireland introduced new rules on food advertising to children in 2013, which take effect through its statutory broadcasting regime.\(^{42}\) The Broadcasting Authority of Ireland (BAI) developed and administers the rules, which are contained in the Children’s Commercial Communications Code\(^ {43}\) and the General Communications Code.\(^ {44}\) The former prohibits commercial communications during children’s programming for foods and beverages high in fat, salt, and/or sugar (i.e., ban on advertising to children. See Irwin Toy Limited v. Quebec (Att’y Gen.), [1989] 1 S.C.R. 927 (Can.); see infra, note 142.

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\(^{39}\) See Consumer Protection Act, C.Q.L.R. 1971, c. P-40.1, § 249 (Can.) (providing that the three criteria are the nature and intended purpose of the advertised product, the nature of the advertisement itself, and the time and place it is shown).

\(^{40}\) Regulations Respecting the Application of the Consumer Protection Act, C.Q.L.R. 1971, c. P-40.1, r. 3. (Can.).


\(^{43}\) BAI Children’s Commercial Communications Code, *supra* note 42.

“HFSS” products.\textsuperscript{45} HFSS products are identified using a modified version of the nutrient-profiling model developed by the UK Food Standards Agency for the United Kingdom’s HFSS rules, which is discussed below.\textsuperscript{46} The \textit{Children’s Commercial Communications Code} also prohibits the use of certain persuasive techniques in HFSS advertising directed to children, including licensed characters, celebrities, and promotional offers.\textsuperscript{47} The \textit{General Communications Code} limits the volume of HFSS advertising on television to a maximum of 25% of sold advertising time across the broadcast day.\textsuperscript{48}

In 2008, the UK government issued restrictions on unhealthy food advertising to children through its co-regulatory system for broadcasting regulation. OfCom, the statutory regulator for the communications industries, has outsourced some of its responsibilities for broadcast advertising content to the Advertising Standards Authority (ASA), a self-regulatory organization established by the United Kingdom’s advertising industry.\textsuperscript{49} Under this arrangement, the Broadcast Committee of Advertising Practice (BCAP) writes and updates the \textit{UK Code for Broadcast Advertising} (the BCAP Code),\textsuperscript{50} while the Committee of Advertising Practice (CAP) develops and revises the \textit{Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing} (the CAP Code).\textsuperscript{51} The membership of both committees is comprised of representatives of advertisers, media owners, and other

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{45} \textit{Id.}
\item\textsuperscript{46} \textit{Id.} at r. 13. The Irish version of the UK FSA’s nutrition model exempts cheese, but requires promotions for this product to carry an on-screen message recommending that children consume only a small amount of cheese per day. \textit{See Broadcasting Authority Ireland, Children’s Commercial Communications Code Guidance Notes and Direction in Respect of Product Placement and Commercial Communications for Food (Including HFSS Food) 19 (2013), http://www.aai.ie/resources/uploads/BAI_Childrens_Commercial_Communications_Code_Guidance_Notes.pdf} [hereinafter \textit{BAI Children’s Commercial Communications Code Guidance Notes}].
\item\textsuperscript{47} \textit{See BAI Children’s Commercial Communications Code, supra note 42, at r. 6–9, 11, 13; BAI Children’s Commercial Communications Code Guidance Notes, supra note 46.}
\item\textsuperscript{48} \textit{BAI General Commercial Communications Code, supra} note 44, at r. 16.10.
\end{enumerate}
\end{footnotesize}
industry groups. The ASA administers the codes and accepts public complaints, and the ASA Council adjudicates complaints and decides if advertisements violate the codes. The Council is comprised of a mixture of industry members and laypersons, with two-thirds of its membership being independent of the industry. OfCom remains responsible for approving major changes to the BCAP Code, and for enforcing compliance where necessary. In 2007, OfCom issued revisions to the BCAP Code that aimed to reduce children’s exposure to advertising of HFSS products. OfCom’s new rules banned HFSS advertising during or around the time that programs commissioned for, principally directed to, or likely to appeal particularly to audiences below the age of 16 years are televised. HFSS products are identified using a nutrient-profiling scheme developed by the UK Food Standards Agency specifically for the HFSS rules. Programs directed to children have an audience composition with a proportion of children at least 20% higher than the proportion of children in the general population.

Additionally, the new rules restrict the use of persuasive techniques in HFSS television advertising targeted at preschool or primary school aged children, including promotions, and licensed characters, and celebrities popular with children. CAP revised the CAP Code to place similar restrictions on the use of these persuasive techniques in all food and beverage advertising targeted at preschool or primary school children in non-broadcast media, and in December 2016, CAP announced that it would also restrict HFSS advertising in digital media where more than 25% of the audience is under 16 years. In July 2017, CAP introduced new rules on HFSS advertising in non-broadcast media (including the Internet and social media sites), which will align the regulation of HFSS marketing in broadcast media.

53 SeeASA, ADVERT. STANDARDS AUTHORITY, https://www.asa.org.uk/About-ASA/Our-team/ASA-Council.aspx (last visited Feb. 16, 2017) (outlining that the ASA Council comprises eight lay and five industry members, with the composition of the Council varying according to whether it is considering a complaint about a broadcast or non-broadcast advertisement).
56 The BCAP Code, supra note 50, at r. 32.5.1.
58 OfCOM TELEVISION FOOD AND DRINK ADVERTISING, supra note 55, at 4.
59 The BCAP Code, supra note 50, at r. 13.10–13.12.
60 The CAP Code, supra note 51, at r. 15.13–15.17.
61 See infra Section 5.d.
and non-broadcast media. Advertising for HFSS products in non-broadcast media directed (through its content) to children under the age of 12 years must not include licensed characters, celebrities popular with children, or premium offers. HFSS advertising is prohibited in non-broadcast media directed to children (i.e., media that targets children under the age of 16 years, including through its creative content). HFSS advertising is prohibited in non-broadcast media where more than 25% of the audience comprises children under the age of 16 years.

Australia, Canada, and the United States rely on voluntary food industry pledges to regulate unhealthy food advertising to children. Box 1 below describes the United States’ Children’s Food and Beverage Advertising Initiative (CFBAI), which was the first national food industry pledge on marketing of unhealthy products to children. The pledges in all three jurisdictions take a similar form—they are based on a core code document drafted by the food industry, which sets forth principles for responsible food marketing to children. The main principle is that participants will only market “healthy dietary choice” products in media directed to children. Companies that join the scheme translate the main code document into an action plan that describes how they will apply these marketing principles at a company level. The codes are accompanied by processes of administration and monitoring, which are undertaken by a food industry or advertising industry body. Australia has two separate pledges, one for food

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62 The CAP Code, supra note 51, at r. 14.15, 15.15.
64 At the time of writing, the Canadian Government was undertaking public consultation on a proposal to restrict unhealthy food marketing to children through a combination of legislative and regulatory measures under the Food and Drugs Act. See Toward Restricting Unhealthy Food and Beverage Marketing to Children, HEALTH CAN. 7, https://s3.ca-central-1.amazonaws.com/ehq-production-canada/documents/attachments/9bced5c3821050c708407be04b299ac6ad286e47/000/000/006/633/original/Restricting_Marketing_to_Children.pdf (last visited Oct. 14, 2017); Restricting Marketing to Children, GOV’T OF CAN., https://www.healthyeatingconsultations.ca/marketing-to-kids (last visited Oct. 14, 2017).
66 Hawkes & Harris, supra note 15, at 1403.
manufacturers and one for the quick-service restaurant sector, while the United States and Canada each have one pledge that applies across the entire industry.  

Box 1. The US Children’s Food and Beverage Advertising Initiative (CFBAI)

The US food industry established the CFBAI in 2006 to shift advertising to children towards healthier foods and beverages. Participating companies must promote only healthier dietary choices to children under the age of 12, with healthier choice products defined by a set of uniform nutrition criteria. The CFBAI defines child-directed advertising as television, radio, print, and third-party websites where 35% or more of the audience comprises of children. Participants also agree to promote only healthier choice products in interactive games that are primarily directed to children, and to use third-party licensed characters, celebrities, and movie tie-ins only when advertising healthier products to children. Participants must not pay for or seek product placement in child-targeted media and they cannot advertise branded foods and beverages in elementary schools.

CFBAI companies develop individual pledges in accordance with the Code’s key principles, accompanied by an implementation schedule, and report annually on compliance. The Council of Better Business Bureau (“BBB”), an advertising industry body, administers the scheme by conducting independent monitoring of media covered by the CFBAI, reviews participants’ compliance reports, and investigates third party and public allegations of non-compliance. The BBB issues public reports detailing its activities and findings, and may sanction participants through measures including expulsion from the scheme and

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67 See RCMI, supra note 65; QSRI, supra note 65.

68 Children’s Food and Beverage Advertising Initiative Program, supra note 65, at 1. See also Parke Wilde, Self-Regulation and the Response to Concerns about Food and Beverage Marketing to Children in the United States, 67 NUTRITION REV. 155, 163 (2009).


70 Children’s Food and Beverage Advertising Initiative Program, supra note 65, at 1–3.

71 Id. at 2.

72 Id. at 2–3.

73 Id. at 4.

III. EVALUATING THE OUTCOMES OF RESTRICTIONS ON FOOD ADVERTISING TO CHILDREN

A growing body of literature attempts to evaluate the impact of regulatory restrictions on the marketing of food to children. Typically, this research draws upon advertising data to analyze changes in the amount of television food advertising that children view before and after the introduction of advertising controls, as well as absolute levels of exposure in the period following the introduction of new regulation. Research also measures improvements in the nutritional quality of products advertised to children after the introduction of regulation, and/or changes in the use of persuasive techniques that target young people. While the literature focuses primarily on television advertising, an increasing number of studies examine promotions through digital platforms and other media. Reports by industry bodies comprise a second strand of the literature, along with the results of evaluations of voluntary industry pledges commissioned by industry from external third parties. In some cases, existing schemes have been evaluated by government agencies, or government agencies have commissioned research organizations to review the existing research on food marketing.

75 Children’s Food and Beverage Advertising Initiative Program, supra note 65, at 4.
76 Id. at 5.
80 See, e.g., Freeman et al., supra note 10.
regulation.\textsuperscript{82} Below, we review the literature evaluating the relative success of the six food advertising regulatory regimes analyzed in this paper.\textsuperscript{83}

A. Findings of Studies Evaluating the Impact of Food Advertising Regulation

There are significant discrepancies between the findings of industry evaluations of the impact of the food industry pledges included in this study, and independent evaluations of the same initiatives. Industry evaluations report high levels of compliance with self-regulation and significant improvements in children’s food marketing environment.\textsuperscript{84} Independent research shows that in some cases, self-regulation has reduced unhealthy food advertising during the times or programs in which the pledges apply.\textsuperscript{85} Some research also indicates that self-regulation has led to modest reductions in children’s total exposure to unhealthy food marketing, although findings are mixed on this point.\textsuperscript{86} However, despite reductions in the total amount of food advertising during television programs watched by children, researchers conclude that the vast majority of food advertising seen by children continues to be for unhealthy products.\textsuperscript{87} One study of the US

\begin{itemize}
\item \textsuperscript{82} See, e.g., Lisa G. Smithers et al., \textit{Television Marketing of Unhealthy Food and Beverages to Children in Australia: A Review of Published Evidence from 2009 AUSTL. NAT’L PREVENTIVE HEALTH AGENCY} (2012), http://health.gov.au/internet/apha/publishing.nsf/Content/Television%20marketing%20to%20children%20in%20Australia; William E. Kovacic et al., \textit{supra} note 31; Leibowitz et al., \textit{supra} note 8.
\item \textsuperscript{83} We do not review literature on the efficacy of the Irish restrictions on food marketing to children, because at the time of writing the Irish regulatory regime was relatively new and there were few such studies available.
\item \textsuperscript{85} Jennifer L. Harris et al., \textit{Defining “Child-Directed Advertising” to Reduce Unhealthy Television Food Advertising}, 44 AM. J. PREVENTIVE MED. 358, 362 (2013).
\item \textsuperscript{87} See, e.g., Powell et al., \textit{supra} note 8 at, 524 (2013); DALE KUNKEL, CHILDREN NOW, THE IMPACT OF INDUSTRY SELF-REGULATION ON THE NUTRITIONAL QUALITY OF FOODS ADVERTISED ON TELEVISION TO CHILDREN 6 (2009); Dale L. Kunkel et al., \textit{Evaluating Industry Self-Regulation of Food Marketing to Children}, 49 AM. J. PREVENTIVE MED 181, 181 (2015). Research on food industry self-regulation in Australia and Canada reports similar trends. See, e.g., Lesley King et al., \textit{Industry Self Regulation of Television Food Marketing: Responsible or Responsive?}, 6 INT’L J. PEDIATRIC OBESITY e390, e394 (2011) [hereinafter King et al., \textit{Industry}]; Lesley King et al., \textit{Building the Case for Independent Monitoring of Food Advertising on Australian Television}, 16 PUB. HEALTH NUTRITION 2249, 2252 (2013) [hereinafter King et al., \textit{Building}]; M. Potvin Kent & A. Wanless, \textit{The Influence of the Children’s Food and Beverage Advertising Initiative: Change
pledge found that in 2007, before the initiative was announced, 79.4% of food advertisements in children’s programming promoted unhealthy products, according to a rating system devised by the federal Department of Health and Human Services. By 2013, four years after self-regulation was fully implemented, this figure had risen slightly to 80.5%. In other words, promotions for unhealthy products still dominate food advertising viewed by children and self-regulation does not appear to have significantly changed this.

Self-regulation appears to have been ineffectual in reducing children’s exposure to fast-food advertising—one specific category of food marketing. One study found that in 2011, the volume of fast-food advertising on Canadian television remained high (24 spots per day for each of the stations examined), and was virtually the same as it was in 2006. In Australia, fast-food promotions on television increased from 1.1 per hour in 2009 to 1.5 per hour in 2010, despite the introduction of a dedicated pledge for fast-food marketing to children in 2008. In the United States, between 2003 and 2009 children’s exposure to fast-food advertising increased by 21% among two- to five-year-old children, and by 30.8% among six- to 11-year-old children, respectively.

Evaluations of the United Kingdom’s co-regulatory restrictions reflect a pattern similar to that observed in relation to self-regulatory schemes. OfCom evaluated the HFSS rules in 2010 and found that the scheduling restrictions had completely eliminated HFSS advertising from dedicated children’s channels and children’s programming on other channels. OfCom also found that children saw approximately 37% less HFSS advertising in 2009 than in 2005. However, an independent study found that six months after the rules were implemented, more than half of all food advertisements seen by children (55.7%) were for HFSS products, compared to 43.2% six months before the rules were introduced. The researchers concluded that while the new restrictions had been effective in excluding HFSS advertising from the broadcast slots to which they applied, they

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87 Kunkel et al., supra note 87, at 83. See also Lisa M. Powell et al., Trends in the Nutritional Content of Television Food Advertisements Seen by Children in the United States, 165 ARCHIVES PEDIATRICS ADOLESCENT MED. 1078, 1083 (2011).
88 Dale L. Kunkel et al., supra note 87, at 181. See also Powell et al., supra note 88; King et al., Industry, supra note 87, at e395.
89 Kent & Wanless, supra note 87, at 561.
92 Id. at 32.
94 Id. at 4.
had not significantly reduced children’s overall exposure to HFSS advertising on television. Increased spending on outdoor, cinema, and internet food advertising also indicated that the scheduling rules simply prompted food companies to shift advertising to other media, suggesting that the restrictions did not reduce children’s total exposure to food advertising across all media.

By contrast, there is evidence that Quebec’s ban on all commercial advertising directed at children less than 13 years of age has been effective in shifting children’s consumption patterns. According to one study, the ban resulted in a reduction of US$88 million spent on fast food during 2010, and a reduction of 13.4-18.4 billion fast food calories consumed by French-speaking households. Comparisons of the Canadian pledge to the Quebec ban have also found that the ban more effectively protects children from exposure to unhealthy food advertising than self-regulation does. Nevertheless, more than 60% of all food advertising seen by French-speaking children in Quebec in 2009 was for unhealthy products, although this figure is higher for English-speaking children in Quebec and Ontario (68.3% and 68.9%, respectively). The effectiveness of the ban in Quebec may be undermined by cross-border spillover effects, such as English-language advertisements broadcast from neighboring US states and Canadian provinces, which can be viewed by Quebec children.

In summary, children continue to be exposed to a significant volume of unhealthy food marketing notwithstanding the variations in design of food advertising controls across all six jurisdictions. This conclusion holds true regardless of whether private or public regulation is used to implement restrictions on food advertising to children. However, co-regulatory and statutory restrictions appear to be more successful than self-regulation in reducing children’s exposure to unhealthy food marketing.

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97 Id. at 5.
98 HFSS ADVERTISING RESTRICTIONS, supra note 93, at 24–26.
101 See Monique P. Kent et al., Food Marketing on Children’s Television in Two Different Policy Environments, 6 PEDIATRIC OBESITY e433, e437 (2011).
103 Hawkes, supra note 24, at 20; Dhar & Baylis, supra note 100, at 799, 811.
104 See Chambers et al., supra note 86, at 41.
B. Methodological Differences Between Studies Evaluating Food Advertising Regulation

Disagreement over the impact of food marketing restrictions can be partly explained by methodological differences in studies evaluating the effectiveness of regulatory regimes. Food advertising regulation has been evaluated according to a number of outcome measures, including the frequency and/or volume of advertising during children’s peak viewing times\footnote{See, e.g., King et al., Industry, supra note 87, at e394.} and the nutritional quality of foods and beverages promoted to children,\footnote{See, e.g., Powell et al., supra note 88, at 1078.} as explained above.

Discrepancies between the findings of industry reports and independent studies can also be partly explained by variations in the way in which key terms or outcome measures are defined.\footnote{See Galbraith-Emami & Lobstein, supra note 77, at 971; Chambers et al., supra note 86, at 42.} For example, industry pledges typically define advertising to children as marketing in television programs with a viewing audience of at least 35% children, and measure the success of self-regulation based on the volume of unhealthy food marketing during these programs.\footnote{See, e.g., AUSTL. FOOD & GROCERY COUNCIL, FOOD AND BEVERAGE ADVERTISING TO CHILDREN ACTIVITY REPORT (2012), https://www.afgc.org.au/download/1357/.} However, for most of the programs children watch, children do not comprise 35% or more of the audience.\footnote{See Austl. Comm. & Media Auth., Attachment C Children’s Television Viewing Analysis of Audience Data 2001-13 29 (2015), http://www.acma.gov.au/~media/Research%20and%20Analysis/Research/pdf/Attachment%20BCchildren%20television%20viewingAnalysis%20of%20audience%20dataFinal%20pdf.pdf.} In recognition of this, independent research examines children’s exposure to food advertising during times of the day when children are most likely to be watching television.\footnote{See, e.g., King et al., Industry, supra note 87, at e390.} Not surprisingly, this research tends to find that children are exposed to much higher levels of unhealthy food marketing than is suggested by industry reports, as it incorporates a much broader range of viewing times and programs. These studies, therefore, provide a more detailed and complete picture of children’s exposure to food marketing than the industry reports.

Different definitions of key elements of food advertising regulation stem partly from disagreement between public health and food industry actors about what the aims of food advertising regulation ought to be. According to the food industry, the aim of self-regulation is to reduce the amount of advertising of unhealthy foods that targets children, and self-regulation has been successful in achieving this goal.\footnote{Corinna Hawkes, Marketing Food to Children: Changes in the Global Regulatory Environment 2004-2006, WHO 1, 52 (2007), http://apps.who.int/iris/bitstream/10665/43693/1/9789240682122_eng.pdf.} In contrast, public health advocates argue that the goal of regulation should be to reduce children’s overall exposure to food advertising—regardless of whether

\footnote{See, e.g., King et al., Industry, supra note 87, at e394.}
\footnote{See, e.g., Powell et al., supra note 88, at 1078.}
\footnote{See Galbraith-Emami & Lobstein, supra note 77, at 971; Chambers et al., supra note 86, at 42.}
\footnote{See, e.g., King et al., Industry, supra note 87, at e390.}
advertising targets children or adults—due to the impact of food marketing on children’s food preferences and choices, and in light of children’s particular vulnerability to advertising.\textsuperscript{112} The conclusion reached by independent researchers that self-regulation has failed to improve the food marketing environment rests on the finding that such restrictions have not significantly reduced children’s overall exposure to unhealthy food marketing, regardless of whether that advertising is specifically targeted at children. Accordingly, public health researchers call for self-regulation to be replaced by comprehensive statutory restrictions on food marketing to children, accompanied by effective monitoring and enforcement mechanisms.\textsuperscript{113}

IV. BUILDING A FRAMEWORK FOR EVALUATING THE REGULATION OF FOOD ADVERTISING TO CHILDREN

In this section, we present a framework for evaluating the respective strengths and weaknesses of the food advertising schemes reviewed above. Our analysis draws together two distinct streams of literature: first, public health studies that evaluate strategies for effective engagement with and regulation of business, and second; empirical and theoretical studies of regulation. We build on the public health and regulatory studies literature in order to identify some key components or “building blocks” of an effective regulatory regime. Next, we apply this framework in order to explain why existing regulatory controls in the jurisdictions we studied have failed to significantly reduce children’s exposure to food advertising. Our framework draws attention to areas where existing regulatory regimes might be incrementally strengthened, including through the use of novel regulatory strategies such as “legislative scaffolding.”

A. Accountability in the Public Health and Regulatory Studies Literature

The concept of accountability is defined in various ways, but at its essence it refers to the obligation to give account of one’s actions or level of performance to another. “The core sense of accountability implies a relationship between two

\textsuperscript{112} Id. at 53.

Regulation of Food Advertising to Children

parties, account-holder and accountor, in which the person or body held accountable (the accountor) is subject to external scrutiny from another person or body (the account-holder). Accountability, therefore, encompasses the obligation to explain or justify one’s actions, thereby enhancing transparency. However, accountability also requires effective rectification when it is found that institutions, organizations or officials are at fault or are failing to meet expectations. Hence, the full meaning of accountability includes the right of the account-holder to investigate and scrutinize the actions of the accountor by seeking information and explanations, and to impose remedies and sanctions when the performance of the accountor is unsatisfactory.

The accountability of the food industry has become a major theme in the public health literature in recent years due to the contribution of dietary risk factors to the burden of disease, the economic incentives of the processed food industry to expand markets for unhealthy products, and the growing role of the industry in the development of voluntary, preventive health measures. Public health scholars highlight a number of factors that have contributed to the lack of progress evident in many countries in reducing obesity and improving the food environment. Global factors include the deregulation of markets as a result of international trade and investment agreements, and a corresponding growth in the size and economic and political power of food corporations. Economic globalization also makes it more difficult for governments to regulate transnational companies, which may be headquartered in a developed country while having manufacturing and production operations spread across a number of developing economies.

The loosening of food corporations’ accountability to national governments, together with food corporations’ significant level of influence over national policies, has enabled them to successfully resist unwanted forms of regulation and, as community concerns have arisen over obesity and dietary risk

115 Mulgan, supra note 114, at 11.
factors, to show “leadership” by addressing perceived regulatory gaps. This is reflected in the proliferation of voluntary codes, standards and pledges developed by the global food industry, and in the emergence of public/private partnerships as vehicles for pursuing obesity and chronic disease prevention objectives. The existence of voluntary standards governing food advertising to children is part of a wider mosaic of food industry initiatives addressing other “hot button” issues including food reformulation, portion control and calorie reduction.121

Faced with these trends, public health scholars have begun to critically evaluate the performance of food industry partnerships and the conditions under which they might be successful.122 Some public health scholars have expressed a high degree of skepticism about the value of industry participation in chronic disease prevention initiatives.123 On the other hand, there is an emerging body of literature that considers strategies for encouraging more effective forms of food industry leadership, for example, in reducing salt levels in processed food.124 There remains a clear need for further research about how the design of governance and


124 See, e.g., Jacqui Webster et al., Target Salt 2025: A Global Overview of National Programs to Encourage the Food Industry to Reduce Salt in Foods, 6 NUTRIENTS 3274 (2014).
accountability mechanisms could enhance industry commitment and performance.\textsuperscript{125}

Accountability is also a central concern in the regulatory studies literature. Regulatory scholars describe the difficulty of securing accountability in contemporary conditions of “regulatory capitalism.”\textsuperscript{126} According to regulatory scholars, the current era of regulatory capitalism is characterized by growing corporatization and privatization: the proliferation of new, hybrid, regulatory instruments, and the diffusion of regulatory power between private, state, and non-state actors.\textsuperscript{127} Not only is the locus of regulation no longer centered on the state,\textsuperscript{128} but the fragmentation of regulation also means that it is more difficult to identify lines of responsibility for decision-making, i.e., who should be accountable to whom, and through what mechanisms.\textsuperscript{129}

Although the private sector increasingly participates in voluntary schemes and initiatives that ostensibly contribute to public interest goals, it is less likely than government to be subject to accountability mechanisms such as, freedom of information legislation, electoral politics, and judicial oversight. Consequently, external parties affected by private regulatory regimes are often excluded from regulatory decision-making processes, while also lacking recourse through traditional political or legal mechanisms to hold public decision makers accountable.\textsuperscript{130} Accordingly, some scholars argue that private regulatory systems are not sufficiently accountable to others, and thus are more likely to fail to meet public objectives.\textsuperscript{51} This is a significant concern given the growing use of private regulation in the era of regulatory capitalism. However, since governments are increasingly relying on private regulation to fulfill public objectives, forgoing formal or legislative forms of regulation, the public has a legitimate basis to


\textsuperscript{127} See, e.g., Julia Black, Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World, 54 Current Legal Problems 103, 111 (2001).

\textsuperscript{128} Id. at 112.


\textsuperscript{131} Id. at 152; A. Ogus, Rethinking Self-Regulation, 15 Oxford J. Legal Stud. 97 (1995); Bartle & Vass, supra note 30, at 896.
scrutinize the performance of private schemes and demand greater accountability when they fail to meet these objectives.

**B. Conceptual Components of an Accountability Framework for Food Advertising to Children**

Our model builds on work by public health scholars that describes accountability models for strengthening food industry performance and for improving the healthiness of food environments. For example, Kraak and colleagues developed a model that comprises four steps: (1) evaluating compliance; (2) communicating the results of the evaluation to stakeholders; (3) holding participants to account via the application of sanctions or rewards; and (4) strengthening regulatory regimes in response to criticism from external stakeholders. The benefit of this model is its emphasis on enforcement, i.e., “holding to account.” This is often the weak link in voluntary pledges and partnerships, not only because compliance is self-policied by food industry actors, but because the industry controls access to the information through which performance might be measured.

Clearly, enforcing the standards that impose constraints on the advertising of unhealthy food and beverages to children is a necessary step in any accountability model for strengthening food marketing regulation. Prior to this, however, governments and/or the food industry must be held accountable for developing and adopting meaningful controls. The failure of some multinational food companies to commit to the adoption of standards to regulate the advertising of unhealthy food to children is one of the most important accountability deficits at the global level. Furthermore, accountability is hardly achieved if the food advertising regulatory scheme itself does not aim to achieve a meaningful goal. Perfect compliance with weak standards will achieve little. In addition, it will be difficult to monitor the effectiveness of regulation if regulatory objectives are vague, or are not expressed in a way that is measurable. Irrespective of whether regulatory standards are imposed or voluntarily assumed, the objectives and substantive terms of regulation provide the benchmarks against which compliance can be measured, and the objectives against which regulated companies are held accountable.

Aside from the substantive content of regulatory standards, strengthening accountability also requires the regulatory scheme to be designed for accountability,

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132 Kraak et al., Accountability Framework, supra note 125, at 2467, 2477–79; Swinburn et al., supra note 23, at 2536–39.
134 Vivica I. Kraak et al., Progress Achieved in Restricting the Marketing of High-fat, Sugary and Salty Food and Beverage Products to Children, 94 BULL. WORLD HEALTH ORG. 7, 540–48 (Apr. 27, 2016).
135 Peter J. May, Regulatory Regimes and Accountability, 1 REG. & GOVERNANCE 8, 9 (2007).
and to embody principles of good governance. Good regulatory design is an important objective in its own right, quite apart from the efficacy of regulation in achieving its substantive goals. For example, regulatory schemes may be effective in achieving compliance with standards, while at the same time being unjust, lacking in transparency, denying stakeholders the opportunity to provide input into the regulatory process, and being immune from periodic review. Each of these deficiencies will undermine the legitimacy and credibility of the regulatory scheme. Accordingly, we argue that irrespective of its effectiveness in achieving stated goals, regulation should also accord with the non-instrumental values associated with good governance, such as proportionality, due process, transparency, and equity.

The purpose of this paper is to explain the performance of food advertising regulation in the six jurisdictions we studied and to encourage the design of more robust and effective systems by building accountability into every aspect of the regulatory process—from the development of regulatory standards to their administration, enforcement and review. Accordingly, we propose an accountability model based on three over-arching domains of regulatory design: (1) the substantive content of regulatory standards, voluntary or otherwise; (2) the design of regulatory processes for the administration of the regulatory scheme, and; (3) the enforcement of standards. Rather than thinking of “holding to account” as a synonym for enforcement, or as a distinct step that is focused on urging actions to improve the food environment, we would apply this concept to each of the conceptual domains in our model, as outlined in Figure 1 below. Table 1 above translates this conceptual model into concrete recommendations for an effective regulatory regime, with a particular focus on enhancing the transparency and accountability of regulation.

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137 FRIEBERG, supra note 136; Peter Cane, Administrative Law as Regulation, in REGULATING LAW 207, 210 (Christine Parker et al. eds., 2004).
This approach to accountability within the context of food advertising regulation is based on the assumption that the state should play a central role in ensuring the transparency and accountability of regulatory regimes. Drawing upon a responsive regulatory approach, it is apparent that where governments delegate regulatory functions to the private sector or to other non-government actors, close state supervision is necessary to ensure accountability. These supervisory actions include setting interim and longer-term goals for regulation to achieve, monitoring industry performance in achieving those goals, and ensuring the existence of a credible threat of state intervention if voluntary initiatives fail to achieve their objectives. This threat provides a motivation for the business sector to comply with regulation and to improve their levels of performance, so as to ward off the

139 Bartle & Vass, supra note 30.
possibility of a more demanding statutory scheme.\footnote{AYRES & BRAITHWAITE, \textit{supra} note 138, at 38–39; Bartle & Vass, \textit{supra} note 30.} \textbf{Table 2} identifies key areas where governments can use legislative or regulatory “scaffolds” to progressively strengthen under-performing schemes with more demanding requirements, in circumstances where existing schemes have failed to achieve substantial reductions in children’s exposure to unhealthy food marketing.

The following section analyzes the six food advertising regulatory schemes using the framework set out above, in order to identify strengths and weaknesses in the substantive terms and conditions of regulation, and in the regulatory processes established by each regime. This analysis concludes with recommendations for progressively strengthening the effectiveness and accountability of food advertising regulation.
Table 2: Components for Transparent and Accountable Regulatory Design

Regulatory Domain: The Substantive Content of Regulatory Standards

<table>
<thead>
<tr>
<th>Regulatory Component</th>
<th>Recommendation</th>
<th>Application to Food Advertising Regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulatory Purpose</td>
<td>There are clear, measurable objectives against which the success of regulation can be assessed.(^a)</td>
<td>The goal of the regulatory scheme is to reduce children’s exposure to, and the persuasive power of, marketing for unhealthy products.(^b)</td>
</tr>
<tr>
<td>Substantive Terms and Conditions</td>
<td>Key terms and conditions are clearly defined;(^a) regulatory rules are sufficiently expansive to achieve regulatory objectives.(^a)</td>
<td>Key definitions include the age of children, the communication channels, settings and marketing techniques to be covered, the types of foods and beverages that will be excluded from being marketed to children, and the criteria used to identify marketing to children, including factors such as the placement and content of the marketing message.(^b)</td>
</tr>
</tbody>
</table>

Regulatory domain: The design of regulatory processes

<table>
<thead>
<tr>
<th>Regulatory component</th>
<th>Recommendation</th>
<th>Application to Food Advertising Regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drafting Regulatory Rules and Scheme Design</td>
<td>Transparency and accountability mechanisms are incorporated into regulatory regimes from their very inception, including when developing substantive regulatory</td>
<td>Government agencies, public health organizations and consumer advocates can be represented in working groups</td>
</tr>
</tbody>
</table>
### Administration and Monitoring

Administration by an independent body, which monitors and enforces the scheme, and arranges for external review of its performance. Administration could be granted to an independent statutory authority or government agency, or a committee comprising equal representation of industry, government, consumer, and public health representatives. 

Monitoring includes collecting baseline data, setting process and outcome indicators and timeframes for their achievement, and collecting and evaluating data on stakeholders’ compliance and on the scheme’s success in meeting its objectives.

The administrative body widely disseminates information about the operation of the scheme, and makes public the results of monitoring and review activities, allowing for external scrutiny of the regime and for feedback that facilitates improvements in the scheme’s operation.

The administrative body should monitor the amount of unhealthy food advertising in children’s peak television viewing times and in other media against baseline data on trends in food advertising prior to the introduction of regulation. It should also monitor companies’ compliance with the initiatives, as well as the percentage of the food industry that has not joined the scheme.

### Review

Structured, regular review of the system’s operation ensures that the scheme is meeting regulatory objectives. The review framework should include the baseline data that will be collected to judge effectiveness.

The administrative body should commission an independent, third-party review of the scheme on an on-going basis.
performance indicators that can be used to measure success, and timeframes for evaluation. Reviews should be conducted by independent third parties, e.g., a professional auditing organization, or an independent body comprising a wide range of stakeholders.

### Regulatory domain: Enforcing Standards

<table>
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<th>Regulatory Component</th>
<th>Recommendation</th>
<th>Application to Food Advertising Regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complaints Handling</td>
<td>An independent and credible complaints-handling mechanism fosters public confidence in the scheme and helps to identify and remedy systemic problems with its operation. The publication of complaint determinations also enhances transparency and allows for the development of “precedent” on the operation of the scheme’s terms and conditions, and on unacceptable forms of advertising.</td>
<td>Food advertising regulation should make available an independent complaints-handling body, or allow for complaints to be made to the body administering the scheme.</td>
</tr>
<tr>
<td>Enforcement</td>
<td>A wide range of enforcement options are available, including incentives to encourage and reward high levels of compliance, “soft” enforcement measures such as persuasion, and more punitive measures for instances of serious or persistent non-compliance.</td>
<td>The administrative body should possess a range of sanctions, including negative publicity, fines and enforceable undertakings. In jurisdictions with self-regulatory regimes, governments can threaten escalation to co-regulation and legislation if regulatory objectives are not achieved by voluntary measures.</td>
</tr>
</tbody>
</table>


V. EVALUATING THE SUBSTANTIVE TERMS AND CONDITIONS OF FOOD ADVERTISING REGULATORY SCHEMES

With the exception of Quebec, the principle underlying the regulatory schemes we studied was to limit or moderate the advertising of unhealthy food products to children. The meaning and scope of this principle varied due to differing definitions of key terms used in the regimes. These key terms and concepts can be thought of as the variables or “axes” around which regulation rotates.\(^{141}\) They include the:

- objectives of regulation;
- definition of advertising that is “directed to children”;
- definition of children;
- communication channels covered by regulatory standards;
- persuasive techniques included in the regime; and
- methods used to identify products that are permitted to be advertised to children (i.e., the nutrient profiling model used by the scheme).

A. Regulatory Objective

The definition of the objective that food advertising regulatory schemes are seeking to achieve is crucial because it provides the overall standard against which to measure performance. Of the six jurisdictions, Quebec had the most far-reaching objective: to protect children from being manipulated by promotions for any kind of product, in light of the fact that young children are particularly vulnerable to the persuasive intent of advertising.\(^{142}\) The primary aim of the United Kingdom’s HFSS restrictions for broadcast advertising is to “reduce significantly the exposure of children under 16 to HFSS advertising, as a means of reducing

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\(^{142}\) See Irwin Toy Limited v. Quebec (Att’y Gen.), [1989] 1 S.C.R. 927, 987–91 (Can.). This case involved a challenge by Irwin Toy to the constitutionality of Quebec’s ban on advertising to children. *Id.* However, a majority of Canada’s Supreme Court upheld the ban, holding that while it infringed on the right to freedom of expression contained in section 2(b) of the *Canadian Charter of Rights and Freedoms* (and section 3 of Quebec’s *Charter of Human Rights and Freedoms*) the ban sought to achieve a legitimate government purpose, was a proportionate means of achieving the goal of protecting children from the persuasive intent of advertising, and was justified under section 1 of the Canadian Charter and section 9.1 of the Quebec Charter. *Id.* While the *Consumer Protection Act 1980* does not describe the purpose of the ban, the objective outlined above is taken from the Supreme Court’s judgment in *Irwin Toy Limited*. 
opportunities to persuade children to demand and consume HFSS products.”

The HFSS rules found in the Irish broadcasting codes have a similar objective: to reduce children’s exposure to, and their “emotional engagement” in, food marketing. Thus, the legislative framework that governs food marketing to children in these jurisdictions recognizes children’s vulnerability and is aligned with the WHO’s recommended objectives for regulation of food advertising to children.

Concern for children’s health was more diluted in the remaining jurisdictions we studied. The aim of the US Children’s Food and Beverage Advertising Initiative is to “shift the mix of foods in advertising primarily directed to children under age 12 … to include healthy dietary choices or better-for-you food.” The aims of the Canadian and Australian pledges are expressed in similar terms. These pledges only address child-directed marketing, and not children’s exposure to promotions that may not be directly targeted to children, but which children nevertheless find appealing and persuasive. As we demonstrate below, the less ambitious goal embodied in the US, Canadian, and Australian pledges leads to weaker standards on food advertising.

B. Advertising Directed to Children

The constraints on food advertising in the regulatory schemes we studied apply to advertising that is directed to children, or, advertising where children are the target audience. Regulatory regimes determine whether an advertisement is directed to children using varying and complex criteria. The criteria used in food industry pledges are vague and confusing, often calling for a quantitative assessment based on a number of different factors. For example, the US pledge applies to television, print media, and internet sites with an audience share of 35% or more children. It also applies to other media that are primarily directed to children based on their content or rating, such as company-owned websites and DVDs of movies. However, unlike the Canadian and Australian pledges, the US pledge permits participants to adopt their own definition of “advertising primarily directed to children under age 12,” which participants must outline in their company action plan subject to review by the program’s administrative body. This not only undermines the consistency and credibility of participants’ commitments, but also

143 OFCOM TELEVISION FOOD AND DRINK ADVERTISING, supra note 55, at 3.
145 WHO, Set of Recommendations, supra note 14, at 8.
146 Children’s Food and Beverage Advertising Initiative Program, supra note 65, at 1.
147 Canadian Children’s Food and Beverage Advertising Initiative, supra note 65, at 1; RCMI, supra note 65, at 2; QSRI, supra note 65, at 2.
148 Children’s Food and Beverage Advertising Initiative Program, supra note 65, at 3–4.
makes it difficult to determine what advertising each participant’s pledge applies to.

The audience share of media is a key factor in determining whether a medium is directed to children: the US, Canadian, and Australian pledges all restrict unhealthy food advertising in television and radio programs, print media, and internet sites with an audience share of 35% or more children. Critics argue that the use of audience threshold requirements to identify child-directed advertising is an important loophole in self-regulation, given that most television viewing by children occurs during general audience programs watched by large numbers of children and adults, although children may comprise a relatively small percentage of the audience. One study found that approximately half of all food and beverage advertisements viewed by US children were not subject to the US pledge, because they appeared during programming with an audience share of less than 35% children.

The use of audience shares to define child-targeted media is a significant weakness even in regulatory schemes with stronger audience threshold requirements than those found in food industry self-regulation. The HFSS rules contained in the United Kingdom’s BCAP Code apply to television programs that have an audience composition where the proportion of children is 20% higher than would be found in the general population. The BCAP Code also applies to children’s channels and programs designed specifically for children. An analysis of 2008 UK television data by the consumer advocacy organization “Which?” found that 16 out of the top 20 most popular programs with child viewers were excluded between 20–30%.

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The use of audience shares to define child-targeted media is a significant weakness even in regulatory schemes with stronger audience threshold requirements than those found in food industry self-regulation. The HFSS rules contained in the United Kingdom’s BCAP Code apply to television programs that have an audience composition where the proportion of children is 20% higher than would be found in the general population. The BCAP Code also applies to children’s channels and programs designed specifically for children. An analysis of 2008 UK television data by the consumer advocacy organization “Which?” found that 16 out of the top 20 most popular programs with child viewers were excluded between 20–30%.

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from the United Kingdom’s HFSS advertising restrictions, because these programs were also watched by a large adult or family audience.\textsuperscript{155}

Quebec’s legislation identifies advertising that is directed to children with reference to three variables:\textsuperscript{156}

(1) The nature and intended purpose of the advertised goods (i.e., whether they are intended for, or greatly appeal to children);

(2) The manner of presentation of the advertisement (i.e., whether it is designed to appeal to children); and

(3) The time and place that the advertisement is shown (i.e., whether large numbers of children will be exposed to the advertisement).

Quebec’s ban prohibits advertising to children for goods and services that are essentially intended for, and therefore appeal to children, as well as advertising to children for goods or services that are particularly appealing to children, but not intended to be exclusively used by them (for example, fast-food).\textsuperscript{157} Advertisers must also consider whether the message of the advertisement is designed to elicit the attention of children (for example, through the use of child characters, or songs or jingles that are especially appealing to children),\textsuperscript{158} and the proportion of children that might be exposed to the advertisement.\textsuperscript{159}

The ban applies to advertising in television programs with an audience share of 15% or more children under the age of 13 years.\textsuperscript{160} However, because all three criteria must be considered together, it also captures advertising in programs with a child audience share of less than this figure, where the show’s viewership is very high, and the product and its presentation appeal to children.\textsuperscript{161} Further, the ban captures advertising that appears to target adults, but which attracts the attention of children and/or advertises a product of particular interest to children.\textsuperscript{162} Despite its relative strength, the ban’s definition of advertising to children still permits the advertising of unhealthy food products during programs that fall within children’s peak viewing times, so long as the product is of general appeal and the content of the advertisement is not specifically designed to elicit children’s interest.\textsuperscript{163} This


\textsuperscript{156} Consumer Protection Act, C.Q.L.R. 1971, c. P-40.1 § 249 (Can.).

\textsuperscript{157} OPC, ADVERTISING DIRECTED AT CHILDREN, supra note 41, at 4.

\textsuperscript{158} Id. at 6.

\textsuperscript{159} Id. at 7.

\textsuperscript{160} Id. at 26.

\textsuperscript{161} Id.

\textsuperscript{162} OPC, ADVERTISING DIRECTED AT CHILDREN, supra note 41, at 6.

\textsuperscript{163} See Kent et al., supra note 102, at 1830; Dhar & Baylis, supra note 100, at 799, 801.
illustrates the inherent limitations of identifying a particular subset of advertising or media that are “directed to children” and applying restrictions only to that subset.

**C. The Definition of “Children”**

The schemes we examined adopt different ages as cut-off points for restrictions on advertising directed to children. Industry codes used the lowest age—children under 12 years of age—while the Irish rules adopted the highest age—individuals under 18 years of age. Advertising and broadcasting regulation typically applies to children under the age of 12, as research shows that most children are able to articulate a critical understanding of advertising by around 11 years of age, while children below the age of eight years cannot distinguish between advertising and editorial content. Accordingly, the position of advertisers and broadcasters is that while younger children need to be protected from the persuasive intent of advertising, older children do not.

However, adopting a definition of “children” that excludes those older than 12 years leaves all children vulnerable to exposure to advertising content that is targeted at older children and adults, but which younger audiences still find appealing. Emerging research suggests that older children and adults are also susceptible to the persuasive effects of food marketing, and the WHO stresses that the aim of food marketing restrictions should be to reduce the impact of marketing on children’s diet, not merely to address advertising that is directed to

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164 BAI CHILDREN’S COMMERCIAL COMMUNICATIONS CODE, supra note 42, at 11–13. The Irish Children’s Commercial Communications Code also stipulates a number of provisions that apply only to children under six years of age, those under 13 years of age, and those under 15 years of age. Id. For example, the code’s restrictions on the use of health and nutrition claims and promotional offers in HFSS advertising apply to children under 13 years of age, and the restriction on the use of celebrities applies to children aged 15 years, while the other provisions on HFSS advertising apply to children aged 18 years and under. Id.


166 INSTITUTE OF MEDICINE, FOOD MARKETING, supra note 7, at 30.


168 Julie Ralston Aoki & Elizabeth S. Moore, Self-Regulation as a Tool for Promoting Healthier Children’s Diets: Can CARU and CFBAI Do More? in ADVANCES IN COMMUNICATION RESEARCH TO REDUCE CHILDHOOD OBESITY 119, 134 (Jerome D Williams et al. eds., 2013). See also Cornelia Pechmann et al., Impulsive and Self-Conscious: Adolescents’ Vulnerability to Advertising and Promotion 24 J. PUB. POL’Y MARKETING 202 (2005); Jennifer L. Harris et al., Priming Effects of Television Food Advertising on Eating Behaviour 28 HEALTH PSYCHOL. 404 (2009); Simone Pettigrew et al., The Effects of Television and Internet Food Advertising on Parents and Children 16 PUB. HEALTH NUTRITION 2205 (2013).
children below the age at which they can understand its persuasive intent. This conclusion points to the need to include older children within the definition of “children” in order to protect all children from exposure to unhealthy food marketing that they find appealing and persuasive.

D. Media Platforms Covered by Food Advertising Constraints

Regulatory constraints on food advertising have traditionally focused on television due to its powerful influence and potential to reach a large audience. Broadcast advertising is regulated by statute in many countries; the United Kingdom and Ireland both use this regulatory channel to restrict unhealthy food marketing to children in and around children’s programs. In Ireland, the Children’s Commercial Communications Code prohibits commercial communications for HFSS food in children’s television and radio programs, but neither it nor the General Communications Code apply to non-broadcast media, leaving Irish children vulnerable to promotions for unhealthy products via social media platforms such as Facebook as well as apps and video blogs.

In the United Kingdom, food advertising regulation previously reflected the same distinction found in Ireland: the BCAP Code restricted the placement of HFSS advertising in broadcast media, but the CAP Code—which applied to non-broadcast media—did not. However, in July 2017, new rules came into force that extend the restrictions on HFSS advertising directed to persons under 16 years of age to non-broadcast media, including online advertising and advergames where more than 25% of the audience is under 16 years, or where that media is directed to children as the target audience. Despite this, public health advocates argue that

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171 BAI CHILDREN’S COMMERCIAL COMMUNICATIONS CODE, supra note 42, r. 11(4).
174 THE BCAP CODE, supra note 50, at r. 32.5.1, 13.9.
gaps remain; for example, social media sites may be widely used by older children, even though they may not make up a quarter of the audience. The CAP Code will also continue to exclude product packaging and labeling, as well as point-of-sale marketing.177

Quebec’s ban on advertising to children applies to all formats and media used to distribute commercial advertising, including television, radio, printed materials, signage, and promotional items.178 Although Quebec’s Consumer Protection Act and supporting regulations do not refer specifically to digital media,179 the Office of Consumer Protection will enforce the statutory restrictions on marketing to children in new media and emerging advertising platforms.180 However, child-directed advertising is permitted in children’s magazines, as well as in store windows, displays, and on product packaging and labeling, so long as these promotions meet certain requirements. For example, advertisements must not directly entice children to buy the advertised product.181 Advertisers apparently use these loopholes to promote unhealthy foods and beverages through product packaging and labeling that incorporates characters and images appealing to children.182

Food industry pledges in Australia and North America cover a relatively wide range of promotional channels, although there are differences in the media platforms to which each pledge applies. For example, the Australian pledges make no reference to advertising through applications on cellphones or tablets, but these are included in the US and Canadian initiatives. In common with the statutory and co-regulatory regimes, almost all of the pledges exclude product packaging and labeling, and point-of-sale displays, despite these communication channels playing an important and growing role in food marketing campaigns.183 The food industry argues that in-store promotions mainly target adults, indicating to them which

177 See THE CAP CODE, supra note 51, at 6.
178 OPC, ADVERTISING DIRECTED AT CHILDREN, supra note 41, at 3.
179 Strategy Staff, Advertising to Kids in Quebec No Picnic, STRATEGY (May 8, 2000), http://strategyonline.ca/2000/05/08/youth-quebeckids-20000508/.
180 OPC, ADVERTISING DIRECTED AT CHILDREN, supra note 41, at 3.
181 Regulations Respecting the Application of the Consumer Protection Act, C.Q.L.R. 1971, c. P-40, r. 88, 90, 91 (Can.). The Regulations also exclude promotions for a children’s entertainment event (such as a concert or television show), so long as certain conditions are met, for example, that an advertisement for a children’s product is not included in the promotion. Id.
183 Aoki & Moore, supra note 168 (noting that CARU does not exclude these media). See, e.g., Jennifer L. Harris et al., Marketing Foods to Children and Adolescents: Licensed Characters and Other Promotions on Packaged Food in Supermarkets, 13 PUB. HEALTH NUTRITION 409 (2009).
products have “child appeal.” This ignores the evidence that children are widely exposed to in-store displays and product packaging, and are influenced by these marketing techniques. In summary, our survey indicates that all six regulatory regimes exclude important communication channels through which children are exposed to unhealthy food marketing.

E. Persuasive Advertising Techniques Covered by the Codes

Mandatory and voluntary schemes governing food advertising restrict the use of certain marketing techniques that children find particularly persuasive, such as the use of licensed characters, celebrities, prizes, product placement, and premium offers. The exception is Quebec, which bans all forms of promotion to children, although the design and content of an advertisement is relevant to determining whether it is directed to children.

In Canada and the United States, signatories to the voluntary food advertising schemes commit to only use third-party licensed characters (i.e., characters from television shows or movies that are licensed to companies to use in promotions), celebrities, and movie tie-ins when marketing “healthier products” to children. By contrast, the Australian pledges do not restrict the use of licensed characters or celebrities.

The Canadian and US pledges also commit signatories not to pay for any product placements in the program or editorial content of all media directed to children under 12 years, while in Australia, participants commit to ensuring that any paid product placements relate to healthier dietary choices. US signatories must ensure that any products appearing in interactive games that are provided free or for nominal charge to children under 12 years represent healthier dietary choices. In Canada and Australia, this obligation applies to products appearing in any interactive game directed primarily to children under 12 years. The Canadian, US,
and Australian schemes do not restrict the use of prizes and premium offers in food advertising, nor the use of proprietary characters.

The UK BCAP code provides that promotional offers, licensed characters, and celebrities popular with children may not be used in broadcast HFSS advertising targeted directly at preschool and primary school-aged children. The CAP code applies similar restrictions to non-broadcast advertisements for HFSS products directed to children in these categories. The Irish Children’s Commercial Communications Code also restricts the use of licensed characters, children’s program characters, celebrities who are “widely acclaimed, or honored and/or known to children,” promotional offers, and health and nutrition claims in children’s commercial communications for HFSS products.

Ofcom claims that children saw fewer food advertisements using these persuasive techniques following the introduction of the UK HFSS rules. However, independent research suggests that the use of premium offers, celebrity endorsers, and promotional characters remains widespread in HFSS advertising during children’s peak viewing times. Restrictions on the use of certain promotional techniques in child-directed advertising do not take into account children’s exposure to advertisements that may not be intended specifically for them, but which incorporate promotional techniques that they find persuasive or appealing. Further, the HFSS rules only apply to licensed characters and celebrities that are “targeted directly at pre-school or primary school children;” this permits food advertisers to use licensed characters and endorsers in HFSS advertisements that are viewed by a large number of children in these categories, provided they also have more general appeal.

The exclusion of proprietary characters from content restrictions is an important loophole in both public and private regulatory schemes, including the HFSS rules that operate in the United Kingdom and Ireland. Food companies create and own proprietary characters such as Ronald McDonald, many of which have featured in food marketing campaigns over a long period of time and in promotions

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190 See The BCAP Code, supra note 50, at r. 13.0, 13.14. Whether an advertisement targets children is determined according to its content rather than its scheduling. Id.

191 The BCAP Code, supra note 51, at r. 15.5.

192 See BAI Children’s Commercial Communications Code, supra note 42, at 5, 11, 13 (defining “children’s commercial communications” as those that promote products, services or activities that are deemed to be of particular interest to children and/or broadcast during and between children’s programs).

193 HFSS Advertising Restrictions, supra note 93, at 44–45.


195 Id.

196 The BCAP Code, supra note 50, at r. 13.9–13.15; The CAP Code, supra note 51, at r. 15.15; Boyland et al., supra note 194, at 659.

via a wide range of communication channels.\textsuperscript{198} With the exception of Quebec and the United Kingdom,\textsuperscript{199} the regulatory regimes we analyzed also excluded brand and “product line” advertising, the latter of which involves companies promoting “healthier choice” items from a line of products that also includes less healthy alternatives.\textsuperscript{200} This loophole allows companies to advertise their master brand to children using the company’s name, characters, and other brand identity elements (but not its products); all of which assist in creating positive feelings that are transferred to the company’s products, thereby influencing children’s taste perceptions.\textsuperscript{201}

In summary, the regulatory schemes we reviewed take a very narrow view of advertising, often excluding brand advertising, product packaging and labeling, and sponsorship—each of which are used extensively by food companies to promote unhealthy products to children.\textsuperscript{202} The wide range of “escape clauses” in food advertising regulation provides one explanation as to why restrictions on food marketing have had a limited impact on improving the food marketing environment.

**F. Defining Unhealthy Foods**

Regulatory schemes for food advertising use nutrient profiling models to rank foods according to their nutritional content and to distinguish between “healthier” foods and beverages that are suitable for promoting to children, and less healthy, restricted products.\textsuperscript{203} The one exception in our study was Québec’s Consumer Protection Act, which applies to all products. However, in general, the distinction between healthy and unhealthy foods is an important axis for food advertising regulation,\textsuperscript{204} despite the significant debate over the utility of

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\textsuperscript{198} An Analysis of the Regulatory and Voluntary Landscape, supra note 197; David Lawrence, The Role of Characters in Kids Marketing, 4 YOUNG CONSUMERS 43, 45 (2003); Jessica Castonguay et al., Healthy Characters? An Investigation of Marketing Practices in Children’s Food Advertising, 45 J. NUTRITION EDUC. BEHAVIOR 571 (2013).

\textsuperscript{199} See Food: HFSS Product and Brand Advertising, ADVERT. STANDARDS AUTHORITY (June 29, 2017). The CAP and BCAP Codes apply to brand and product line advertisements where the product does not feature but the brand or product line is synonymous with HFSS products. Id.

\textsuperscript{200} Aoki & Moore, supra note 168, at 140.

\textsuperscript{201} Lawrence, supra note 198; Emma J. Boyland & Jason C. G. Halford, Television Advertising and Branding: Effects on Eating Behaviour and Food Preferences in Children, 62 APPETITE 236 (2013); Aoki & Moore, supra note 168, at 140.


\textsuperscript{203} Mike Rayner et al., Nutrient Profiling and the Regulation of Marketing to Children. Possibilities and Pitfalls, 62 APPETITE 232, 232 (2013); Hawkes & Harris, supra note 15, at 1408–99; Hawkes & Lobstein, supra note 19, at 92.

\textsuperscript{204} Handsley et al., supra note 141.
categorizing products as “healthy” or “unhealthy,” and over which products should fall into each category.\textsuperscript{205}

The voluntary schemes that operate in the United States, Canada, and Australia each use a different nutrient profile model, while the Irish regulations use a modified version of the model developed by the UK Food Standards Authority for the UK HFSS restrictions.\textsuperscript{206} Australia’s Responsible Children’s Marketing Initiative permits companies to choose their own nutrient model for identifying healthier choices, provided it is “consistent with established scientific standards or Australian government standards.”\textsuperscript{207} This has resulted in companies using an array of different models, adding to the complexity of self-regulation and undermining the consistency and transparency of participants’ commitments.\textsuperscript{208} While the Canadian and US pledges originally allowed participants to adopt the nutrient profile model of their choice, the US CFBAI introduced a uniform nutrient profiling scheme in December 2013,\textsuperscript{209} with the Canadian pledge following suit in 2014.\textsuperscript{210}

Nutrient profile models differ according to the types of nutrients considered, the reference amount, the mathematical model followed, and how the final results are presented. As a result, there are significant discrepancies in the total number of food products and kinds of products that may be marketed to children under each model.\textsuperscript{211} Typically, the nutrient profile models developed by the food industry are weaker than those created by academic research groups,

\textsuperscript{205} Rayner et al., supra note 203.
\textsuperscript{206} See BAI CHILDREN’S COMMERCIAL COMMUNICATIONS CODE, supra note 42, at 56.
\textsuperscript{207} RCML, supra note 65, at § 1.1.
\textsuperscript{208} Hebden et al., supra note 78.
\textsuperscript{210} THE CANADIAN CHILDREN’S FOOD AND BEVERAGE ADVERTISING INITIATIVE: 2014 COMPLIANCE REPORT, supra note 149, at i. The adoption of uniform nutrition criteria for use with the US pledge resulted from the US Federal Government creating an Interagency Working Group on Marketing to Children in 2009, which aimed to develop a uniform nutrient profile model that the food industry would adopt for use in the CFBAI. While the working group’s proposal was never adopted, it prompted the industry to introduce its own uniform model in 2013. See Vivica I. Kraak et al., Industry Progress to Market a Healthful Diet to American Children and Adolescents, 41 AM. J. PREVENTIVE MED. 322, 328 (2011); FTC, FOOD FOR THOUGHT (2011), http://www.ftc.gov/opa/2011/04/foodmarket.shtm; Kolish, supra note 209; Kolish & Hernandez, supra note 209.
\textsuperscript{211} Peter Scarborough et al., How Important is the Choice of Nutrient Model Used to Regulate Broadcast Advertising of Foods to Children? A Comparison Using a Targeted Data Set, 67 EUR. J. CLINICAL NUTRITION 815, 819 (2013).
government agencies, or scientific bodies. This allows a wider variety of products to be marketed to children. Nevertheless, one study comparing eight nutrient profile models found that the model used in the UK HFSS rules was the most lenient, permitting 47.4% of the television food advertisements in the sample to be broadcast. Overall, however, research suggests that a nutrient profile model developed by a government or scientific body is more likely than industry-developed models to protect children from exposure to unhealthy foods and beverages.

A more fundamental problem is that regulatory schemes allow for the promotion of products that are judged to be “healthier” according to the nutrient profiling model, rather than restricting promotion only to foods and beverages that should form the bulk of children’s dietary intake, such as fresh fruits and vegetables. Food advertising regulation may produce small improvements in the nutritional quality of food products being advertised to children, but without any substantial increase in the promotion of truly healthy foods. Furthermore, the identification of some products as “healthier choices” may create a “halo effect” that encourages parents and children to believe that these products contain essential nutrients for a healthy diet, when this is not necessarily the case. In this way, regulation may operate to legitimate the promotion of highly processed foods, rather than encouraging the consumption of foods that are essential for dietary health.

VI. EVALUATING REGULATORY PROCESSES GOVERNING FOOD ADVERTISING

The previous section reviewed some of the terms and conditions of food advertising schemes that create the substantive content of regulatory constraints on food advertising to children. In this section, we turn to strengths and weaknesses in the regulatory processes that govern the operation of each scheme, beginning with the processes used to create regulatory regimes.

212 Hannah Brinsden & Tim Lobstein, Comparison of Nutrient Profiling Schemes for Restricting the Marketing of Food and Drink to Children, 8 PEDIATRIC OBESITY 325 (2013); Hebden et al., supra note 78.
213 See, e.g., Hebden et al., supra note 211, at 817; Scarborough et al., supra note 211, at 819; Kunkel et al., supra note 87; Marlene B. Schwartz et al., Breakfast Cereal Industry Pledges to Self-Regulate Advertising to Youth: Will They Improve the Marketing Landscape?, 31 J. PUB. HEALTH POL’Y 59 (2010).
215 Id. (“[a] reduced-salt snack is better than a fully salted snack, but it may still remain a salty product”).
216 Id.
A. Rule Development and Scheme Design

In jurisdictions where food advertising to children is governed by legislation or co-regulatory schemes (i.e., Quebec, Ireland, and the United Kingdom), independent regulatory agencies led processes of rule development. In the UK, OfCom undertook a series of public consultations, surveys, and stakeholder meetings on proposed options for restricting broadcast HFSS advertising. It also commissioned research on the effects of television food advertising on children’s food preferences and consumption. The Broadcasting Authority of Ireland convened an Expert Working Group to examine the health and nutrition of Irish children, which comprised nutrition and public health policy experts from various government agencies. This was accompanied by a series of public consultations on proposed options for restricting HFSS advertising. Public consultation requirements enhance transparency and ensure that the views of civil society organizations (e.g., consumer and parent representatives, and public health organizations) are heard and considered during the process of developing food advertising standards.

By contrast, there is no evidence that the food and advertising industries in Canada, the United States, and Australia consulted with external stakeholders when developing voluntary pledges on food marketing to children. Nor does the industry do so when periodically revising the terms and conditions of these instruments. The inability of members of the public to influence decisions about the content of self-regulatory standards undermines transparency, and suggests that the purpose of these schemes is primarily to claim regulatory space and pursue business objectives rather than to address public health concerns. Governments that rely on self-regulation in addressing matters of public interest should ensure that the processes for scheme design, rule development, and review of standards are transparent and include mechanisms for incorporating feedback from representatives of children, parents, consumers, and public health organizations.


See CHILDREN’S COMMERCIAL COMMUNICATIONS CODE CONSULTATION DOCUMENT, supra note 27, at 20.


Reeve, supra note 125, at 159.
B. Administration

Throughout the six jurisdictions, a variety of organizations were responsible for the administration, monitoring and enforcement of food advertising standards. In Quebec and Ireland, government regulatory agencies are solely responsible for the administration of the relevant regulations. In the United Kingdom, regulatory responsibility is shared between the government broadcasting regulator, OfCom, and industry-based partners. Advertising industry self-regulatory organizations administer the US and Canadian pledges, while a food industry trade association, the Australian Food and Grocery Council, administers the Australian pledges.

Information about the operation of the US, Canadian, and Australian pledges, including annual reports and results of monitoring activities, is made publicly available on each scheme’s website, ensuring a degree of transparency. However, in practice, there is little scope for public “voice” in the operation of these schemes; for example, through community consultation or representation on governing committees. Nor is there any formal role for government in the administration of these schemes. Rather, administration of the food industry pledges we analyzed is almost entirely industry-based, with limited capacity for external stakeholders to hold industry actors accountable for the effective operation of each scheme.

One of the benefits of co-regulation is that government agencies can establish mechanisms to hold industry partners accountable for their performance in enforcing regulatory standards. In the United Kingdom, OfCom engages in a form of “meta-regulation” by providing oversight of the private organizations that undertake most administrative activities within the co-regulatory scheme for broadcast advertising. The Advertising Standards Authority (ASA) and the Advertising Industry and the Australian Food and Grocery Council administer the US and Canadian pledges, while a food industry trade association, the Australian Food and Grocery Council, administers the Australian pledges.


225 One exception is that two external representatives sit on the committee that administers the Australian pledges. However, industry representatives comprise the three other committee members, limiting the influence that these two external representatives on the development and administration of the scheme. See RCMI, supra note 65, at 8; QSRI, supra note 65, at 8.

226 See Christine Parker, Meta-Regulation: Legal Accountability for Corporate Social Responsibility? in DOREEN MCBARNET, AURORA VOICULESCU AND TOM CAMPBELL (eds), The New Corporate Accountability: Corporate Social Responsibility and the Law 5 (2007); Bronwen Morgan, The Economisation of Politics: Meta-regulation as a Form of Non-Judicial Legality 12(4) SOC. & LEGAL STUDS. 490 (2003). In contrast to the co-regulatory scheme for broadcast advertising, non-broadcast advertising is governed by a self-regulatory
Broadcast Committee of Advertising Practice (BCAP) must report regularly to OfCom against agreed-upon performance indicators. OfCom approves changes to the BCAP code, and reserves the right to introduce new rules where needed. Both OfCom and its industry partners are held accountable to consumers through formal public consultation mechanisms. For example, the Communications Act 2003 (UK) requires OfCom to establish a Communications Consumer Panel for the purpose of consulting formally with the public in decision-making about its functions. Accountability to consumers is also strengthened by the complaints handling mechanism administered by the ASA, by research on consumer views on advertising, and by the publication of annual plans and reports by the ASA and CAP.

Regulatory capture can affect the work of public regulators, just as it can affect the work of industry-based regulators. Independent regulatory agencies such as OfCom also face concerns about their accountability and legitimacy, as these bodies wield significant regulatory power, but their members are neither elected nor directly accountable to elected officials. However, while public regulatory bodies can lack democratic accountability, they are much more likely than private regulators to be subject to legal and judicial accountability measures. For example, the BAI is subject to the requirements of the Irish Freedom of Information Act, while under the Broadcasting Act 2009, its obligations include consulting with the public when preparing new broadcasting codes, and preparing annual reports to the Minister on its functions and activities.

These accountability measures reflect a feature of regulation that is present when food advertising standards are administered by a public or independent body, scheme, meaning that OfCom does not play the same oversight role in respect of the CAP Code and its administration by the ASA and CAP. Id. Memorandum of Understanding, supra note 49. Id. at 6. Communications Act 2003, ch. 1, § 16 (U.K.), https://www.legislation.gov.uk/ukpga/2003/21/section/16; OfCom and Consumer Panel Memorandum of Understanding, OfCOM (U.K.) (July 5, 2010), http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/communications-consumer-panel/memorandum-of-understanding/; Welcome to the Communications Consumer Panel, COMMUNICATIONS CONSUMER PANEL, http://www.communicationsconsumerpanel.org.uk/ (last visited Feb. 16, 2017).


but often absent or diminished with industry-based administration—namely, the presence of an account holder who is legally empowered to evaluate the performance of an advertiser, industry-based regulatory body, or other entity. 236 Although governments have the ability to hold industry-based regulators accountable for their performance in ensuring that food advertisers comply with the industry’s voluntary standards, we found little evidence that governments are monitoring the performance of the food industry pledges that operate in Canada, the United States, and Australia. This is despite the fact that governments in these countries have opted for private regulatory mechanisms to pursue public objectives, namely, improving the food advertising environment and its impacts on children’s nutrition and obesity.

C. Monitoring of Performance and Compliance

The absence of independent, systematic monitoring mechanisms was a key limitation of the regulatory regimes we examined, and reflects a common theme in food advertising regulation more generally. 237 The industry bodies that administer food industry pledges monitor schemes by: (1) reviewing participants’ self-reports on compliance; (2) reviewing complaints, and; (3) undertaking their own research on the volume and nature of unhealthy food advertising directed to children. 238 However, public health advocates raise concerns about the efficacy and transparency of industry-based monitoring systems. 239 For example, self-assessment by pledge signatories is problematic, since by reporting on their own interpretation of code principles, food companies are essentially “marking their own exam papers.” 240 Effective self-assessment requires signatories to provide complete information about their advertising practices and compliance processes 241—something that signatories are unlikely to do if it would damage their reputation or commercial interests. 242 Furthermore, industry bodies do not release the compliance reports of individual companies, 243 further undermining transparency and defeating public scrutiny. 244

236 Kraak et al., Accountability Framework, supra note 125, at 2467, 2472; Swinburn et al., supra note 23, at 2535.
237 Hawkes, supra note 111, at 46.
238 See, e.g., 2015 ANNUAL COMPLIANCE REPORT FOR THE RCMI AND QSRI, supra note 84; THE CANADIAN CHILDREN’S FOOD AND BEVERAGE ADVERTISING INITIATIVE: 2014 COMPLIANCE REPORT, supra note 149; Kolish et al., supra note 74.
239 See, e.g., King et al., Building, supra note 87.
241 See also King et al., Industry, supra note 87.
243 Wilde, supra note 68, at 157.
244 Aoki & Moore, supra note 168, at 143.
Industry-based monitoring aims to ensure that companies are complying with the requirements of pledges and that the initiatives are, in fact, reducing unhealthy food marketing directed to children, as defined in the relevant pledge. By contrast, the WHO recommends that the main objective of food advertising restrictions should be to reduce children’s exposure to unhealthy food marketing. Industry self-monitoring does not assess the performance of pledge signatories against this goal, given its narrow focus on “child-directed” advertising. This helps to explain why the food industry believes its voluntary initiatives are highly successful, despite their limited impact on children’s level of exposure to unhealthy food advertising.

Trade associations occupy a precarious position in food advertising regulation since they function both as industry lobby groups and as regulators. Such organizations face a conflict of interest between their commitment to providing effective monitoring of self-regulation and the need to protect the industry’s reputation and serve the interests of member companies. This tension can impair the ability of industry bodies to act as effective regulators, and may explain why industry monitoring of food advertising regulation tends to be narrow and selective in its reporting criteria. A stronger self-regulatory system for food advertising to children would assign administration and monitoring to an independent body with no conflict of interest, and require reporting against mandatory process and outcome indicators linked to the objective of reducing unhealthy food marketing to children.

The government-based regulatory systems in our sample also failed to meet criteria for effective monitoring, although for different reasons. The key issue here was lack of transparency, with little information available on how, or if, regulatory agencies monitor the impact of food advertising regulation. Quebec’s Office of Consumer Affairs states that it monitors compliance with the Consumer Protection Act, but gives little detail on whether, and how it monitors restrictions on advertising to children. The same is also true of the Broadcasting Authority of Ireland in respect of Ireland’s HFSS rules. The apparent lack of systematic

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245 See WHO, Set of Recommendations, supra note 14, at 8.


247 See Rees, supra note 246; Gunningham & Rees, supra note 242.


monitoring reflects a common problem in command-and-control regulation, namely a lack of resources for effective monitoring of compliance. This makes it difficult to identify non-complying companies and to impose appropriate sanctions.252

In the United Kingdom, the ASA has primary responsibility for ensuring compliance with the restrictions on food advertising to children contained in the CAP and BCAP Codes.253 The ASA undertakes spot checks on advertising in all media, and conducts surveys of advertisements published by sectors where there is unsatisfactory compliance with the BCAP and CAP codes, or where community concerns arise in relation to that sector.254 In 2007, 2008, and 2009 the ASA conducted three surveys of compliance with broadcast and non-broadcast HFSS advertising content restrictions,255 and in 2013-2014 the ASA and CAP undertook new research and compliance work on food advertising, prompted by the expansion of the ASA’s responsibility for online advertising.256 In 2015, ASA announced plans for further monitoring of compliance with rules for online marketing of food and beverages to children.257 On these measures, ASA appears to be a proactive and responsive regulator, although its activities do not quite extend to regular, systematic monitoring of the impact of the HFSS restrictions against process and outcome indicators, as suggested by WHO recommendations on food marketing to children.258

The authority monitors compliance with broadcast advertising codes, but it does not offer any details on how it monitors compliance with the HFSS restrictions. See Id.


254 Id.

255 The 2009 survey found a compliance rate of 99.4% with the content restrictions. See ADVERT. STANDARDS AUTHORITY, COMPLIANCE REPORT FOOD AND SOFT DRINK ADVERTISING SURVEY (2009), https://www.asa.org.uk/asset/65A6A0EA-4929-429E-BE671113D113813/.


258 WHO, Set of Recommendations, supra note 14, at 11.
D. Independent Review of Regulatory Restrictions

Periodic review of public and private regulatory schemes governing food advertising is an important accountability mechanism because it helps to determine whether the scheme is meeting its objectives and ensures that any changes to the scheme reflect the concerns of affected parties.\textsuperscript{259} One of the strengths of statutory and co-regulatory schemes is that there is often a legislative requirement for periodic review. The Irish \textit{Broadcasting Act} 2009 requires the Broadcasting Authority of Ireland to review its broadcasting codes every four years, and to report to the relevant Minister.\textsuperscript{260} In the United Kingdom, the \textit{Communications Act} 2003 requires OfCom “to set, and from time to time to review and revise” the broadcasting codes of conduct.\textsuperscript{261} While OfCom has outsourced this function to BCAP, it may request that BCAP review the BCAP Code, and it retains oversight authority of code conditions.\textsuperscript{262} Quebec’s \textit{Consumer Protection Act} requires the Office of Consumer Protection to “supervise” the application of the Act, although there is no express requirement for review of the Act’s provisions.\textsuperscript{263}

The food industry pledges included in our study varied in their requirements for regular review. The Canadian pledge does not mention review of the scheme at all. The US initiative requires review every five years,\textsuperscript{264} but fails to prescribe how the review process should operate; for example, whether it will be conducted by an independent third party or by an industry body. The Australian pledges were reviewed by an independent consultant in 2012 (leading to revisions to the scheme), but the code documents do not include regular review as an ongoing requirement.\textsuperscript{265} In summary, both statutory and voluntary schemes could be


\textsuperscript{262} Memorandum of Understanding, \textit{supra} note 49, at ¶ 33.

\textsuperscript{263} Consumer Protection Act, C.Q.L.R. 1971, c. P-40.1, § 292(a) (Can.).

\textsuperscript{264} Children’s Food and Beverage Advertising Initiative Program, \textit{supra} note 65, at 5.

\textsuperscript{265} The Quick Service Industry pledge was also separately reviewed in 2010 by a not-for-profit health organisation. \textit{See} AUSTL. FOOD 7 GROCERY COUNCIL, FINAL REPORT ON THE COMPLIANCE OF SIGNATORIES TO THE AUSTRALIAN QUICK SERVICE RESTAURANT INDUSTRY INITIATIVE FOR RESPONSIBLE ADVERTISING TO CHILDREN 10 (2011), https://ifballiance.org/documents/2015/07/qsi-compliance-report-2011.pdf; Susannah Tymms, \textit{Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes}, AUSTL. FOOD & GROCERY
strengthened by requiring independent review of their effectiveness in achieving their overall objective, using a set of clearly defined indicators.266

VII. EVALUATING ENFORCEMENT OF REGULATORY STANDARDS FOR FOOD ADVERTISING

This section evaluates the six jurisdictions in our study in terms of the third set of concepts in our accountability framework; that is, in terms of the capacity of the regulatory scheme to enforce the rules or standards on food advertising to children that operate in each jurisdiction.

A. Complaints-Handling Mechanisms

Complaint-handling mechanisms are an important accountability mechanism that facilitate both consumer participation in the regulatory scheme and consumer scrutiny of advertisers’ conduct. The US food industry pledge did not establish any explicit procedures for consumer complaints, significantly undermining the accountability of US food advertisers. In contrast, the Australian and Canadian pledges permit consumers to make complaints to an independent complaints-handling body, which forms part of the advertising industry’s self-regulatory system in each country.267

In the United Kingdom, the ASA investigates consumer complaints about breaches of the HFSS rules,268 and may respond either through an informal investigation process resulting in an informal settlement with the advertiser concerned, or a formal investigation, which results in a ruling by the ASA Council based on recommendations from the ASA.269 Complaints about breaches of the Quebec ban can be made to the Office of Consumer Protection,270 while complaints

266 WHO, Set of Recommendations, supra note 14, at 12.
267 See THE CANADIAN CHILDREN’S FOOD AND BEVERAGE ADVERTISING INITIATIVE: 2014 COMPLIANCE REPORT, supra note 149, at 2; RCMI, supra note 65, at r. 5.7-5.9; QSRI, supra note 65, at r. 5.7-5.8.
269 BROADCAST COMPLAINT HANDLING PROCEDURES, supra note 268, at ¶ 29–45.
270 Consumer Protection Act, C.Q.L.R. 1971, c. P-40.1, § 292(b) (Can.); Filing a Complaint Against a Merchant, OFFICE DE LA PROTECTION DU CONSOMMATEUR,
about breaches of the Irish broadcasting codes are directed to broadcasters in the first instance but may be referred by an unsatisfied complainant to the Broadcasting Authority of Ireland. Each of the complaints-handling schemes mentioned above has attracted criticism for lack of transparency, accessibility, and independence. Although the ASA will hear complaints from consumers about breaches of the Canadian food industry pledge, there are few details available about how complaints will be handled. The 2014 annual report on the scheme notes that there were no consumer complaints to the ASC during that year, suggesting that consumers were either unaware that complaints could be made or how to make them. In contrast, procedures for hearing complaints about breach of the Australian pledges are outlined in the main code document. The Advertising Standards Board hears complaints about non-compliant advertisements and makes full reports of its determinations publicly accessible, opening up the Australian scheme to a degree of external scrutiny.

In addition to the difficulties of accessing the complaints-handling body, would-be complainants may also experience procedural barriers to laying complaints. For example, Quebec’s Office of Consumer Protection has dismissed complaints because they are not supported by sufficient evidence, such as photographs of the allegedly non-compliant advertisement. Australia’s Advertising Standards Board may refuse to consider a complaint about an advertisement that is no longer running, appears in media that falls outside of the food industry’s pledges, or is published or broadcast by a company that is not a signatory to the pledges. These limitations in the coverage of the scheme reduce


272 See, e.g., Jeffery, supra note 38, at 249–253.


274 Id. For a similar critique of advertising complaints-handling mechanisms, see Hawkes, supra note 24, at 17.

275 See RCMI, supra note 65, at § 5.7–5.9; QSRI, supra note 65, at § 5.7–5.9.

276 Reeve, supra note 125, at 149, 155–156.

277 Id., at 149, 158; Advertising Directed at Children, supra note 182.


the number of complaints that are accepted and may create a false impression of consumers’ low level of concern about food advertising and high levels of compliance by food advertisers. 280

Researchers and advocacy groups have challenged the impartiality of advertising complaints-handling bodies, suggesting that their decisions often favor the food industry at the expense of children’s wellbeing. 281 In 2012, Sustain, a UK food advocacy group, laid 27 complaints with the ASA against 19 websites that targeted children to promote unhealthy products. Only two complaints were partially upheld, with another two resolved through informal discussions with the companies involved. 282 It was argued that the ASA Council’s determinations set a high threshold for finding that an online advertisement encouraged excessive consumption, 283 and that informal settlement of complaints undermined the transparency of the complaints-handling mechanism. They challenged the independence of the ASA, given the overlapping roles of ASA and CAP staff members, 284 and the fact that the authority is wholly funded from levies on UK advertisers. 285 A similar critique can be made of the advertising complaints-handling mechanisms in Canada and Australia, which are also funded by the advertising industry, while ostensibly being independent of it. 286

B. Enforcement

Self-regulatory, co-regulatory and statutory schemes vary significantly in terms of their capacity to enforce compliance or to provide remedies for non-compliance with food advertising standards. The Australian and US pledges refer to the expulsion of non-compliant companies from the scheme or relevant trade

280 Reeve, supra note 125, at 149, 158.
281 See, e.g., Jeffery, supra note 38, at 249–53.
283 Id. Both the CAP and BCAP Codes prohibit advertising that encourages excessive consumption of food. See THE BCAP CODE, supra note 50, at r. 15.4; THE CAP CODE, supra note 51, at r. 13.3.
284 Clark & Powell, supra note 282. The ASA and CAP share an executive that carries out the day-to-day functions of the advertising self-regulatory system. See THE CAP CODE, supra note 51, at 102.
285 Clark & Powell, supra note 282, at 38.
industry association as a form of sanction for non-compliance.\textsuperscript{287} However, expulsion is highly unlikely,\textsuperscript{288} and apart from an order by the complaint-hearing body to the advertiser to remove or revise a non-compliant advertisement,\textsuperscript{289} few other remedies are available. There is no evidence that industry regulators take enforcement action against companies that fail to comply with the pledges,\textsuperscript{290} and in practice, they appear to rely upon persuasion and peer pressure to convince pledge participants to improve compliance. The lack of effective enforcement leaves industry-based schemes vulnerable to free riding and undermines the ability of the scheme to hold participants accountable for their non-compliance.\textsuperscript{291}

In contrast to industry-based schemes, government regulators have an extensive array of remedial tools with which to enforce statutory or co-regulatory restrictions on food advertising. For example, the Broadcasting Authority of Ireland may respond to breaches of the Children’s Commercial Communications Code and the General Communications Code with compliance notices, warning notices, formal investigation, financial penalties, and prosecution.\textsuperscript{292} In the United Kingdom, the ASA also has a range of options for responding to non-broadcast advertisements that breach the CAP Code.\textsuperscript{293} For instance, online advertisers that fail to comply with ASA rulings are “named and shamed” on the ASA’s website.\textsuperscript{294} In the case of the BCAP Code, the United Kingdom’s co-regulatory scheme requires

\textsuperscript{287} See Children’s Food and Beverage Advertising Initiative Program, supra note 65, at 4; Tymms, supra note 265, at 62.
\textsuperscript{288} Ayres & Braithwaite, supra note 138, at 36.
\textsuperscript{290} See, e.g., 2015 Annual Compliance Report for the RCM and QSRl, supra note 84. The bodies that administer food industry self-regulation claim that there are very high rates of compliance with the codes (i.e., almost 100%), implying that enforcement action is largely unnecessary. Id. However, it appears that any breaches are dealt with informally through conversations between the non-compliant company and the regulator. Id.
pre-clearance of broadcast advertisements to ensure compliance. Following broadcast or publication of an advertisement, the ASA can respond to breaches of the code by ordering the withdrawal, rescheduling, or modification of the offending advertisement. Broadcasters are required to comply with the BCAP Code as a condition of their license, and broadcasters who fail to comply with either the Code or ASA rulings may be referred to OfCom. OfCom has a range of penalties that it can apply, such as directing the broadcast of a correction, fines, and the shortening or revocation of broadcasting licenses (although not in respect of public service broadcasters). In summary, the ASA has primary responsibility for enforcing the regulatory system, and it has focused its enforcement methods on persuasion and “soft” enforcement methods, resolving cases informally wherever possible. While soft enforcement strategies may be effective, this is only the case if the regulator is willing to escalate towards more punitive measures if companies fail to comply with the terms of their pledges or with other advertising standards.

Finally, although government regulators may have access to a wider range of enforcement measures than industry-based regulators, they may be unwilling or unable to use them. For example, in Quebec, breaches of the Consumer Protection Act can be prosecuted and penalized with significant fines.

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295 The BCAP Code, supra note 50, at r. 11.13. Only certain categories of radio advertisements must be pre-cleared prior to broadcast, including those for food, nutrition, and food supplements. Id.

296 Ofcom has contracted out these functions to the ASA under its co-regulatory arrangement with the authority. See Communications Act 2003, ch. 21, § 325(5) (U.K.), https://www.legislation.gov.uk/ukpga/2003/21/section/325; Memorandum of Understanding, supra note 49, at 11–12; The BCAP Code, supra note 50, at 5. The ASA may also require broadcasting of an advertisement to be suspended during an investigation if it considers public harm may result. Broadcast Complaint Handling Procedures, supra note 268, at ¶¶ 18–19.


298 See Broadcast Complaint Handling Procedures, supra note 268, at ¶ 51; Memorandum of Understanding, supra note 49, at 12–13.


300 Ayres & Braithwaite, supra note 138, at 19.

Consumer Protection can also seek voluntary undertakings\textsuperscript{302} and injunctions\textsuperscript{303} to prevent companies from advertising to children.\textsuperscript{304} In several cases, food advertisers have pleaded guilty.\textsuperscript{305} However, as noted above, because the Office of Consumer Protection does not monitor the ban on advertising to children, it is less likely that these powers will ever be used or that advertisers will be held accountable for non-compliance.

VIII. CONCLUSION

The marketing of unhealthy foods and beverages to children is an important and modifiable determinant of children’s food preferences and diets.\textsuperscript{306} The WHO has recommended that member states should reduce children’s exposure to, as well as the power of, marketing for food products that are high in saturated fats, trans-fatty acids, free sugars, and salt.\textsuperscript{307}

This paper evaluated regulatory controls on unhealthy food and beverage marketing across six jurisdictions: the United States, the United Kingdom, Ireland, Canada, Quebec, and Australia. Across these jurisdictions, food advertising controls take a variety of regulatory forms; namely, voluntary industry pledges (United States, Canada, Australia), co-regulatory codes (United Kingdom), and statutory standards (Ireland, Quebec). Independent research indicates that the majority of food advertising viewed by children is for unhealthy products,\textsuperscript{308} and that regulatory schemes for food advertising have been largely unsuccessful in reducing children’s level of exposure to unhealthy food marketing, although co-regulatory and statutory regulatory mechanisms appear to be more effective in achieving this goal than the voluntary pledges administered by food industry bodies.\textsuperscript{309} On the other hand, evaluations carried out by or on behalf of the food industry claim that self-regulatory pledges have been highly successful, with high levels of compliance by advertisers and significant reductions in unhealthy food advertising directed to children.

In order to disentangle these competing claims and to evaluate the performance of statutory, co-regulatory and voluntary food advertising regimes, we developed a model that assessed three domains of regulatory design: (1) the substantive content of regulatory standards themselves; (2) the design of regulatory

\begin{itemize}
\item Id. § 316.
\item See OPC, Advertising Directed at Children, supra note 41, at 18.
\item Hastings et al., supra note 7; INSTITUTE OF MEDICINE, FOOD MARKETING, supra note 7, at 2.
\item See, e.g., Powell et al., supra note 8; KUNKEL, supra note 87; King et al., Industry, supra note 87; King et al., Building, supra note 87; Kent & Wanless, supra note 87.
\item Chambers et al., supra note 86.
\end{itemize}
processes for the administration of the regulatory scheme, and; (3) mechanisms for enforcement (Figure 1). We analyzed a set of regulatory variables within each of these domains in order to highlight areas where weak design has contributed to the weak performance of regulatory instruments in the various jurisdictions.

The key finding was that statutory and co-regulatory schemes were more likely than voluntary schemes to have effective accountability mechanisms built into each of the regulatory components of the scheme, including scheme design and development, administration, monitoring, review, and enforcement. Statutory and co-regulatory schemes also contained stronger, mandatory standards against which to hold actors accountable. However, each of the schemes we studied had limitations, both in respect of their substantive terms and conditions, and the regulatory processes established by each scheme. Perhaps the most important benefit of our approach is that it enabled us to identify ways in which both public and private regulatory instruments might be strengthened.

Beginning with the substantive terms and definitions that comprise the standards governing food advertising to children: children are more likely to be protected if the regulatory scheme aims to significantly reduce their exposure to advertising and promotion of HFSS foods (United Kingdom and Ireland), as distinct from merely encouraging food advertisers to shift their advertising in the direction of healthier choices (United States, Canada, and Australia).

Clearly, the definition of “children” is critical to ensuring the size of the audience protected from HFSS advertising. Stronger food advertising schemes define children as individuals under 18 years of age (Ireland), while weaker food advertising schemes define “children” as those 11 years or younger, ensuring that such schemes have no application to children 12 years and above.

The regulatory systems also distinguish between food advertising that is “directed to” children and advertising directed to adult or general audiences. Children are more likely to be protected if the scheme uses clear, uniform criteria for defining advertising to children. Where a child share of audience threshold applies, children are more likely to be protected from exposure to HFSS advertising where that threshold is low (e.g. 15% or more, as in Quebec), rather than when it is higher (e.g. 35% in the United States, Canada, Australia). On the other hand, child audience threshold limits do not protect children from exposure to unhealthy food advertising in circumstances where the medium or program in question has a large total audience comprising adults and young people who fall outside the definition of “children.” Since large numbers of children watch adult programs, imposing regulatory constraints on HFSS advertising based on time of day within the jurisdiction where the program is viewed, streamed or downloaded has the benefit of simplicity and prevents advertisers from manipulating rules to their own advantage.310 However, as Quebec illustrates, the manner of presentation of the advertisement, and the product advertised, may be used to identify advertising that is plainly designed to appeal to children, irrespective of the time at which it is broadcast.311

310 Handsley et al., supra note 141.
311 Consumer Protection Act, C.Q.L.R. 1971, c. P-40.1 § 249 (Can.).
In Ireland and the United Kingdom, until July 2017 mandatory controls on food advertising only applied to television and radio advertising, leaving advertising on the internet, social media, email, tablets, and mobile devices to voluntary standards and codes. Children are more likely to be protected from HFSS advertising if the regulatory scheme applies to all media—including digital media—that are accessed by children and at all locations where food advertising occurs. In addition, children are more likely to be protected if legislative constraints or pledges extend to product packaging and labeling and in-store displays including point-of-sale. Yet, all the schemes we reviewed excluded food promotions in these settings. Similarly, children are more likely to be protected if the food advertising regulatory scheme either restricts the use of promotional techniques that children find particularly persuasive to non-HSSF foods, or prohibits them completely. These forms of marketing include offering prizes and premiums, the use of licensed characters and celebrities, and paid product placements. A narrow definition of “advertising” in food advertising regulatory schemes may permit brand and “product line” advertising, product packaging and labeling, and sponsorship to occur in ways that are inconsistent with the aim of reducing children’s exposure to the promotion of HFSS foods.

Food advertising regulatory schemes typically use nutrient profiling models to distinguish between healthier foods that may be advertised, and less healthy foods, which are subject to restrictions. Nutrient profiling models developed by the food industry are typically weaker than those developed by government or scientific bodies; it follows that children are more likely to be protected from exposure to advertising for HFSS foods if the nutrient profiling model used to identify these foods has been established by a body that is independent of the food and advertising industries and that has no conflict of interest. Similarly, children will be better protected if the foods that are permitted to be advertised meet minimum nutritional criteria, as distinct from merely being “healthier” relative to similar products on the market.

This paper has stressed that irrespective of the scope or breadth of the food advertising regulatory scheme, as embodied in its substantive terms and conditions, good governance is an important objective in its own right that supports public confidence in the scheme. A key component of good governance is ensuring the transparency and accountability of regulation. In jurisdictions where food advertising is governed by legislation, independent agencies led processes of rule development and scheme design, conducting public consultations and commissioning research in ways that enhanced transparency and permitted stakeholders’ views to be heard. By contrast, there is no evidence that the food industry bodies that developed the voluntary schemes included in our study (United States, Canada, Australia) provided the opportunity for external stakeholders to participate in the development of standards. The impression that voluntary, industry-administered schemes were developed in order to claim regulatory space and to stave off regulation is strengthened by the absence of community participation in the administration or periodic review of these schemes.

Independent monitoring of compliance with the standards governing food advertising to children is critical to the performance of and to public’s confidence
in each scheme, but was lacking in all of the schemes. The credibility of food advertising schemes will be increased if the scheme provides for systematic, external monitoring of participants’ compliance, rather than self-assessment by companies themselves, as is the case with food industry self-regulation. Transparency and public confidence in the legitimacy of the scheme will be further improved where the results of monitoring are made publicly available. Periodic, independent review of the performance of the regulatory scheme in meeting its objectives is an important accountability mechanism and provides the basis for amending standards, closing loopholes, and improving administration and enforcement mechanisms.

The complaints-handling processes we reviewed in the course of this study varied widely in terms of their capacity to demand accountability from food advertisers. Complaints-handling processes are more likely to encourage advertisers to comply with their obligations where explicit procedures exist that members of the public can navigate in order to make a complaint, when complaints are investigated by a body that has no conflict of interest and is independent of the food and advertising industries, and where serious breaches are referred upwards to media regulators. Public reporting of complaints determinations is critical and in many jurisdictions may provide one of the few ways in which food advertisers may be held to account for compliance with voluntary standards. More generally, the absence of enforcement measures that provide realistic, proportionate remedies for breaches of food industry pledges undermines incentives for compliance with food advertising controls and create free rider problems. By contrast, regulators administering statutory and co-regulatory schemes were empowered to issue compliance notices, warning notices, and fines (Ireland), to seek voluntary undertakings and injunctions (Quebec), to publicly “name and shame” non-compliant advertisers, or to require advertisers to broadcast a correction (United Kingdom).

In summary, while this study found that statutory and co-regulatory schemes governing food advertising contained stronger accountability mechanisms than voluntary schemes, the fact remains that legislated controls remain unrealistic in many jurisdictions. The absence of a fully legislated scheme does not mean, however, that government has no capacity to create a healthier food advertising environment. Consistent with a responsive regulatory approach, governments may seek to influence industry conduct by creating a credible threat of state intervention where voluntary initiatives fail to achieve the goals for performance set by government. As demonstrated in this paper, food advertising schemes consist of many variables, and governments may also choose to intervene “interstitially” within the fabric of an existing, voluntary or co-regulatory scheme, adding discrete regulatory requirements in order to “scaffold” under-performing regulatory instruments. This process of regulatory scaffolding may occur in negotiation with the industry, or through the exercise of regulatory or legislative powers.

There is substantial room for improvement in all the schemes we studied, irrespective of whether the regulatory instruments were mandatory or voluntary. Nevertheless, from the regulatory instruments we studied, it appeared that statutory and co-regulatory schemes are more likely than voluntary pledges to hold food
advertisers accountable for meeting meaningful objectives in relation to marketing to children, and for that reason to be better vehicles for reducing children’s exposure to unhealthy food advertising.