

**REGULATION OF FOOD ADVERTISING TO CHILDREN IN SIX JURISDICTIONS: A
FRAMEWORK FOR ANALYZING AND IMPROVING THE PERFORMANCE OF
REGULATORY INSTRUMENTS**

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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%.¹ Globally, at least 170 million children and adolescents (<18 years) are overweight or obese,² including 41 million children aged 5 years or younger.³ 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.⁴ 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.⁵ 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.⁶

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.⁷ Large, transnational food companies spend vast sums of money marketing their products to young people,⁸ and the majority of this advertising is for unhealthy products such as sugar-sweetened cereals, soft drinks, confectionery, and fast food.⁹ Companies promote these products to

¹ Marie Ng et al., *Global, Regional, and National Prevalence of Overweight and Obesity in Children and Adults During 1980–2013: A Systematic Analysis for the Global Burden of Disease Study 2013*, 384 LANCET 766 (2014).

² *Prioritizing Areas for Action in the Field of Population-Based Prevention of Childhood Obesity*, WHO 1, 11 (2012), http://apps.who.int/iris/bitstream/10665/80147/1/9789241503273_eng.pdf?ua=1.

³ *Report of the Commission on Ending Childhood Obesity*, WHO 1, 2 (2016), http://apps.who.int/iris/bitstream/10665/204176/1/9789241510066_eng.pdf.

⁴ Megan Kelsey et al., *Age-Related Consequences of Childhood Obesity*, 60 GERONTOLOGY 222, 222 (2014); Tim Lobstein et al., *Obesity in Children and Young People: A Crisis in Public Health*, 5 OBESITY REV. 1, 4 (2004).

⁵ Markus Juonala et al., *Childhood Adiposity, Adult Adiposity, and Cardiovascular Risk Factors*, 365 NEW ENG. J. MED. 1876, 1882 (2011); L.J. Lloyd et al., *Childhood Obesity and Risk of the Adult Metabolic Syndrome: A Systematic Review*, 36 INT'L J. OBESITY 1, 1 (2012); Kelsey et al., *supra* note 4, at 1; Natalie The et al., *Association of Adolescent Obesity with Risk of Severe Obesity in Adulthood*, 304 J. AM. MED. ASS'N 2042, 2042 (2010); A.S. Singh et al., *Tracking of Childhood Overweight into Adulthood: A Systematic Review of the Literature*, 9 OBESITY REV. 474, 483 (2008).

⁶ *Report of the Commission on Ending Childhood Obesity*, *supra* note 3, at 7.

⁷ Gerard Hastings et al., *The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence*, WHO (2006); INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, *FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY?* 226–318 (J. Michael McGinnis et al., eds., 2006) [hereinafter INSTITUTE OF MEDICINE, *FOOD MARKETING*].

⁸ Jon Leibowitz et al., *A Review of Food Marketing to Children and Adolescents* F.T.C. 5 (2012) (discussing that in 2009 companies spent US \$1.8 billion on advertising to people between the ages of 2 and 17 years in the United States alone); Lisa M. Powell et al., *Nutritional Content of Food and Beverage Products in Television Advertisements Seen on Children's Programming*, 9 CHILDHOOD OBESITY 524 (2013).

⁹ See, e.g., Georgina Cairns et al., *The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008*, WHO 1, 14 (2009),

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.¹⁰ 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.¹¹ 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,¹² and most children developing a critical understanding of advertising around the age of 12 years.¹³

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.¹⁴ Many countries have encouraged voluntary action by the food industry, resulting in

[hereinafter Cairns et al., *Extent, Nature and Effects*]; Georgina Cairns et al., *Systematic Reviews of the Evidence on the Nature, Extent and Effects of Food Marketing to Children*, 62 *APPETITE* 209, 212 (2013) [hereinafter Cairns et al., *Systematic Reviews*]; Bridget Kelly et al., *Children's Exposure to Food Advertising on Free-to-air Television: An Asia-Pacific Perspective*, 31 *HEALTH PROMOTION INT'L* 144, 147 (2016).

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).

¹¹ *See* Gerard Hastings et al., *Review of the Research on the Effects of Food Promotion to Children*, CENTRE FOR SOCIAL MARKETING (2003), https://www.researchgate.net/publication/242490173_Review_Of_Research_On_The_Effects_Of_Food_Promotion_To_Children; INSTITUTE OF MEDICINE, *FOOD MARKETING*, *supra* note 7; Cairns et al., *Extent, Nature and Effects*, *supra* note 9; Cairns et al., *Systematic Reviews*, *supra* note 9.

¹² *See* Sonia Livingstone & Ellen Helsper, *Advertising Foods to Children: Understanding Promotion in the Context of Children's Daily Lives*, Dep't of Media & Comm. 1, 2 (2004), https://www.ofcom.org.uk/_data/assets/pdf_file/0017/23921/appendix2.pdf.

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

¹⁴ *See Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children*, WHO (2010), <http://www.who.int/dietphysicalactivity/marketing-food-to-children/en/> [hereinafter WHO, *Set of Recommendations*]. *See also A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children*, WHO (2012), http://apps.who.int/iris/bitstream/10665/80148/1/9789241503242_eng.pdf?ua=1 [hereinafter WHO, *A Framework for Implementing the Set of Recommendations*]; *Global Action Plan for the Prevention and Control of Non-Communicable Diseases 2013-2020*, WHO, ¶¶ 31–32 (2013), http://apps.who.int/iris/bitstream/10665/94384/1/9789241506236_eng.pdf?ua=1.

a proliferation of industry “pledges” on responsible marketing to children.¹⁵ Some countries, such as Chile¹⁶ and South Korea,¹⁷ have introduced statutory restrictions on food marketing, while others such as the United Kingdom have taken a co-regulatory approach.¹⁸ However, self-regulation by the food industry remains the dominant approach.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,²⁰ and called for greater cooperation between member states to reduce the impact of cross-border marketing of unhealthy foods and beverages.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.

¹⁵ Corinna Hawkes & Jennifer Harris, *An Analysis of the Content of Food Industry Pledges on Marketing to Children*, 14 PUB. HEALTH NUTRITION 1403, 1403 (2011).

¹⁶ Law No. 41.193, Junio 26, 2015, Diario Oficial [D.O.] (Chile); C. Corvalán et al., *Structural Responses to the Obesity Epidemic and Non-Communicable Diseases Epidemic: the Chilean Law of Food Labeling and Advertising*, 14 OBESITY REV. 2, 79–87 (2013).

¹⁷ Eo rin I sik saeng hwar an jeon gwan ri teuk byeol beop [The Special Act on the Safety Management of Children’s Dietary Life], Act No. 10310, May 25, 2010 (S. Kor.); Soyoung Kim et al., *Restriction of Television Food Advertising in South Korea: Impact on Advertising of Food Companies*, 28 HEALTH PROMOTION INT’L 17, 17–25 (2013).

¹⁸ See *infra* Section 2.b.

¹⁹ Corinna Hawkes & Tim Lobstein, *Regulating the Commercial Promotion of Food to Children: A Survey of Actions Worldwide* 6 INT’L J. PEDIATRIC OBESITY 83, 89 (2011).

²⁰ *Report of the Commission on Ending Childhood Obesity*, *supra* note 3, at 18. See also WHO, Sixty-Third World Health Assembly Res. WHA63.14, *Marketing of Food and Non-Alcoholic Beverages to Children* (21 May 2010), http://apps.who.int/gb/ebwha/pdf_files/WHA63-REC1/WHA63_REC1-en.pdf; WHO, *Set of Recommendations*, *supra* note 14.

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.

²³ Boyd Swinburn et al., *Strengthening of Accountability Systems to Create Healthy Food Environments and Reduce Global Obesity* 385 LANCET 2534, 2542 (2015).

²⁴ Corinna Hawkes, *Marketing Food to Children: The Global Regulatory Environment*, WHO 1, 7 (2004), <http://apps.who.int/iris/bitstream/10665/42937/1/9241591579.pdf>.

²⁵ *Id.* at 10.

purchases, or encouraging children to consume products excessively.²⁶ 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.²⁷ Under 'co-regulation,' regulatory responsibilities are shared between public and private bodies, usually within a legislative framework.²⁸ 'Statutory regulation' is developed and implemented by a government body, often through processes that involve consultation with the public and/or industry.²⁹

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).

²⁷ BROADCASTING AUTHORITY IRELAND, CHILDREN'S COMMERCIAL COMMUNICATIONS CODE CONSULTATION DOCUMENT 29 (2011), http://www.childrensrights.ie/sites/default/files/submissions_reports/files/BAI-ChildrenCommercialCommunicationsCodeConsultationDocument0811_0.pdf.

²⁸ *Id.* at 30.

²⁹ *Id.* at 29.

Table 1 Characterizing the Regulatory Regime Governing Food Advertising to Children in Six Jurisdictions

Regulatory Channel Regulatory Framework	Consumer protection laws	Broadcasting regulation	Food industry pledges
Statutory regulation	Quebec	Ireland	
Co-regulation		United Kingdom	
Self-regulation			United States Canada Australia

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

³⁰ See Ian Bartle & Peter Vass, *Self-Regulation within the Regulatory State: Towards a New Regulatory Paradigm?*, 84 PUB. ADMIN. 885, 888–90 (2007).

³¹ See INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE (Jeffrey P. Koplan et al. eds., 2005); INSTITUTE OF MEDICINE, FOOD MARKETING, *supra* note 7, at 297; F.T.C., PERSPECTIVES ON MARKETING, SELF-REGULATION AND CHILDHOOD OBESITY: A REPORT ON A JOINT WORKSHOP OF THE FEDERAL TRADE COMMISSION & THE DEPARTMENT OF HEALTH & HUMAN SERVICES 39–48 (2005), <https://www.ftc.gov/sites/default/files/documents/reports/perspectives-marketing-self-regulation-childhood-obesity-report-joint-workshop-federal-trade/perspectivesonmarketingself-regulationchildhoodobesityftcandhhsreportonjoint-workshop.pdf>; William E. Kovacic et al., *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, F.T.C. 1, 81 (2008), <https://www.ftc.gov/sites/default/files/documents/reports/marketing-food-children-and-adolescents-review-industry-expenditures-activities-and-self-regulation/p064504food-mktingreport.pdf>; Leibowitz et al., *supra* note 8, at 93–103.

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

These six jurisdictions illustrate how the design and scope of self-regulation varies considerably according to the level of government involvement.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,³⁴ while legislation specifically prohibits the FTC from regulating advertising on the basis of its fairness to children.³⁵ Accordingly, the US broadcasting regulatory system relies heavily on self-regulation, including when regulating food advertising to children.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.³⁷

³² See, e.g., AUSTL. COMM. & MEDIA AUTHORITY REVIEW OF THE CHILDREN'S TELEVISION STANDARDS 2005: REPORT OF THE REVIEW 9 (2008), <https://www.acma.gov.au/-/media/Diversity-Localism-and-Accessibility/Report/pdf/Report-of-the-CTS-Review-2008-pdf.pdf?la=en>.

³³ See also Hawkes, *supra* note 24, at 14.

³⁴ AUSTL. COMM. & MEDIA AUTHORITY, INTERNATIONAL APPROACHES TO AUDIOVISUAL CONTENT REGULATION – A COMPARATIVE ANALYSIS OF THE REGULATORY FRAMEWORK 18–19 (2011), http://archive.acma.gov.au/webwr/_assets/main/lib310665/international_approaches_to_av_content_reg.pdf. See U.S. CONST. amend. I; Communications Act, 47 U.S.C. § 326 (1934); FCC, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION 8 (2008), https://www.fcc.gov/sites/default/files/public_and_broadcasting.pdf.

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. *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 rule-making (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, *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, *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).

³⁶ Elizabeth Handsley et al., *A Children's Rights Perspective on Food Advertising to Children*, 22 INT'L J. CHILD. RTS. 93, 103 (2014).

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.

³⁸ Bill Jeffery, *The Supreme Court of Canada's Appraisal of the 1980 Ban on Advertising to Children in Quebec: Implications for "Misleading" Advertising Elsewhere*, 39 *LOY. L.A. L. REV.* 237, 239–40 (2006).

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.).

⁴¹ *See* OFFICE DE LA PROTECTION DU CONSOMMATEUR, ADVERTISING DIRECTED AT CHILDREN UNDER 13 YEARS OF AGE: GUIDE TO THE APPLICATION OF SECTIONS 248 AND 249 CONSUMER PROTECTION ACT (2012), http://www.opc.gouv.qc.ca/fileadmin/media/documents/consommateur/sujet/publicite-pratique-illegale/EN_Guide_publicite_moins_de_13_ans_vf.pdf [hereinafter OPC, ADVERTISING DIRECTED AT CHILDREN].

⁴² *BAI Issues Rules on Food Advertising to Children*, BROADCASTING AUTHORITY IRELAND, <http://www.bai.ie/index.php/2013/06/bai-issues-rules-on-food-advertising-to-children/> (last visited Feb. 16, 2017). These rules are additional to those already found in the *Children's Commercial Communications Code* on promoting foods and beverages to children, including rules prohibiting misleading and deceptive food advertising, and those requiring that health and nutrition messages be broadcast in advertisements for fast food and confectionary. *See* BROADCASTING AUTHORITY IRELAND, BAI CHILDREN'S COMMERCIAL COMMUNICATIONS CODE 11–12 (2013), http://www.bai.ie/wordpress/wp-content/uploads/201308_CCCC_English_vFinal.pdf [hereinafter BAI CHILDREN'S COMMERCIAL COMMUNICATIONS CODE].

⁴³ BAI CHILDREN'S COMMERCIAL COMMUNICATIONS CODE, *supra* note 42.

⁴⁴ BROADCASTING AUTHORITY IRELAND, BAI GENERAL COMMERCIAL COMMUNICATIONS CODE r. 8.4(3) (2017), <http://www.bai.ie/en/codes-standards/#al-block-2> [hereinafter BAI GENERAL COMMERCIAL COMMUNICATIONS CODE].

“HFSS” products).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.⁴⁶ The *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.⁴⁷ The *General Communications Code* limits the volume of HFSS advertising on television to a maximum of 25% of sold advertising time across the broadcast day.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.⁴⁹ Under this arrangement, the Broadcast Committee of Advertising Practice (BCAP) writes and updates the *UK Code for Broadcast Advertising* (the BCAP Code),⁵⁰ while the Committee of Advertising Practice (CAP) develops and revises the *Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing* (the CAP Code).⁵¹ The membership of both committees is comprised of representatives of advertisers, media owners, and other

⁴⁵ *Id.*

⁴⁶ *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. 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 BAI CHILDREN’S COMMERCIAL COMMUNICATIONS CODE GUIDANCE NOTES].

⁴⁷ 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.

⁴⁸ BAI GENERAL COMMERCIAL COMMUNICATIONS CODE, *supra* note 44, at r. 16.10.

⁴⁹ Memorandum of Understanding between the Off. of Comm. (U.K.) and the Advert. Standards Authority (Broadcast) Limited and the Broadcast Committee of Advert. Prac. Limited and the Broadcast Advert. Standards Board of Fin. Limited (Oct. 2014) (on file at https://www.ofcom.org.uk/__data/assets/pdf_file/0029/79472/memorandum_of_understanding_2014.pdf) [hereinafter Memorandum of Understanding] (operating for ten years and renewed in 2014).

⁵⁰ BROADCAST COMMITTEE OF ADVERT. PRAC., THE BCAP CODE: THE UK CODE OF BROADCAST ADVERTISING (2010), <https://www.asa.org.uk/asset/846F25EB-F474-47C1-AB3FF571E3DB5910.97855BAF-833F-4B75-9E10729E8807C7B8/> [hereinafter THE BCAP CODE].

⁵¹ COMMITTEE ADVERT. PRAC., THE CAP CODE: THE UK CODE OF NON-BROADCAST ADVERTISING, SALES PROMOTION & DIRECT MARKETING (2014), <https://www.asa.org.uk/asset/47EB51E7-028D-4509-AB3C0F4822C9A3C4.2831C223-9EDB-4A6A-95BC8573B96CFB50/> [hereinafter THE CAP CODE].

industry groups.⁵² 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.⁵³ OfCom remains responsible for approving major changes to the BCAP Code, and for enforcing compliance where necessary.⁵⁴

In 2007, OfCom issued revisions to the BCAP Code that aimed to reduce children's exposure to advertising of HFSS products.⁵⁵ 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.⁵⁶ HFSS products are identified using a nutrient-profiling scheme developed by the UK Food Standards Agency specifically for the HFSS rules.⁵⁷ 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.⁵⁸

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.⁵⁹ 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,⁶⁰ 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.⁶¹ 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

⁵² *Our Committees*, COMMITTEE ADVERT. PRAC., <http://www.cap.org.uk/About-CAP/Who-we-are/Our-committees.aspx> (last visited Oct. 14, 2017).

⁵³ *See ASA Council*, 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).

⁵⁴ *Co-Regulation of Broadcast Advertising*, ADVERT. STANDARDS AUTHORITY, <https://www.asa.org.uk/about-asa-and-cap/about-regulation/self-regulation-and-co-regulation.html> (last visited Oct. 14, 2017).

⁵⁵ OFF. OF COMM. (U.K.), TELEVISION FOOD AND DRINK ADVERTISING TO CHILDREN: FINAL STATEMENT (2007), https://www.ofcom.org.uk/__data/assets/pdf_file/0028/47746/Television-Advertising-of-Food-and-Drink-Products-to-Children-Final-statement-.pdf [hereinafter OFCOM TELEVISION FOOD AND DRINK ADVERTISING].

⁵⁶ THE BCAP CODE, *supra* note 50, at r. 32.5.1.

⁵⁷ *Id.*; DEPT. OF HEALTH (U.K.), NUTRIENT PROFILING TECHNICAL GUIDANCE (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216094/dh_123492.pdf.

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.⁶² 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.⁶³

Australia, Canada, and the United States rely on voluntary food industry pledges to regulate unhealthy food advertising to children.⁶⁴ **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.⁶⁵ 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.⁶⁶ Australia has two separate pledges, one for food

⁶² THE CAP CODE, *supra* note 51, at r. 14.15, 15.15.

⁶³ THE CAP CODE, *supra* note 51, at r. 15.18. *See also* *Children: Food*, ADVERT. STANDARDS AUTHORITY, <https://www.asa.org.uk/advice-online/children-food.html#place> (last visited Oct. 14, 2017).

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/9bced5c3821050c708407be04b299ac6ad286e47/000/006/633/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).

⁶⁵ *See* AUSTL. FOOD & GROCERY COUNCIL, RESPONSIBLE CHILDREN'S MARKETING INITIATIVE § 1.1 (2014), <http://plesk.s78744.gridserver.com/doc-library/category/11-general-documents.html?download=1001%3Aupdated-rcmi-1-january-2014> [hereinafter RCMI]; AUSTL. FOOD & GROCERY COUNCIL, QUICK SERVICE RESTAURANT INITIATIVE FOR RESPONSIVE ADVERTISING AND MARKETING TO CHILDREN § 1.1 (2014), https://www.iabaustralia.com.au/uploads/uploads/2016-01/1452214800_32b4990d63369ebc8f31b0bbc780f9a0.pdf [hereinafter QSRI]; *Canadian Children's Food and Beverage Advertising Initiative*, ADVERT. STANDARDS CAN. 2 (2016), http://www.adstandards.com/en/childrensinitiative/CCFBAI_EN.pdf; *Children's Food and Beverage Advertising Initiative Program and Core Principles Statement*, COUNCIL OF BETTER BUS. BUREAUS 1 (4th ed., 2013), <https://www.bbb.org/globalassets/local-bbbs/council-113/media/cfbai/enhanced-core-principles-fourth-edition-with-appendix-a.pdf> [hereinafter *Children's Food and Beverage Advertising Initiative Program*].

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.⁶⁷

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.⁶⁸ 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.⁶⁹ The CFBAI defines child-directed advertising as television, radio, print, and third-party websites where 35% or more of the audience comprises of children.⁷⁰ 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.⁷¹ Participants must not pay for or seek product placement in child-targeted media and they cannot advertise branded foods and beverages in elementary schools.⁷²

CFBAI companies develop individual pledges in accordance with the Code’s key principles, accompanied by an implementation schedule, and report annually on compliance.⁷³ 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.⁷⁴ The BBB issues public reports detailing its activities and findings, and may sanction participants through measures including expulsion from the scheme and

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).

⁶⁹ Boston BBB, *CFBAI Celebrates New Year with New Uniform Nutrition Criteria for Child-Directed Advertising*, PATCH (Jan., 17 2014), https://patch.com/massachusetts/andover/cfbai-celebrates-new-year-with-new-uniform-nutrition-criteria-for-childdirected-advertising_043ef0f5.

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.

⁷⁴ See Elaine D. Kolish et al., *The Children’s Food and Beverage Advertising Initiative in Action: A Report on Compliance and Progress During 2014*, COUNCIL OF BETTER BUS. BUREAUS (2015), <https://www.bbb.org/globalassets/shared/media/cfbai/cfbai-annualreport-2015.pdf>.

notifying regulatory authorities of breaches in the appropriate circumstances.⁷⁵
 The program is subject to independent review at least once every five years.⁷⁶

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.⁷⁷ Research also measures improvements in the nutritional quality of products advertised to children after the introduction of regulation,⁷⁸ and/or changes in the use of persuasive techniques that target young people.⁷⁹ While the literature focuses primarily on television advertising, an increasing number of studies examine promotions through digital platforms and other media.⁸⁰ 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.⁸¹ 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.

⁷⁷ See, e.g., S. Galbraith-Emami & T. Lobstein, *The Impact of Initiatives to Limit the Advertising of Food and Beverage Products to Children: A Systematic Review*, 14 OBESITY REV. 960, 962 (2013).

⁷⁸ See, e.g., Jennifer L. Harris et al., *Fast Food Marketing FACTS 2013: Measuring Progress in Nutrition and Marketing to Children and Teens*, YALE RUDD CENTER (2013), http://fastfoodmarketing.org/media/FastFoodFACTS_Report.pdf; Ameena Batada et al., *Nine Out of 10 Food Advertisements Shown During Saturday Morning Children's Television Programming are for Foods High in Fat, Sodium, or Added Sugars, or Low in Nutrients*, 108 J. AM. DIETETIC ASS'N 673 (2008); Lana Hebden et al., *Regulating the Types of Foods and Beverages Marketed to Children: How Useful are Food Industry Commitments?* 67 NUTRITION DIETETICS 258 (2010).

⁷⁹ See, e.g., Lana Hebden et al., *Art of Persuasion: An Analysis of Techniques Used to Market Foods to Children*, 47 J. PAEDIATRICS CHILD HEALTH 776 (2011).

⁸⁰ See, e.g., Freeman et al., *supra* note 10.

⁸¹ For example, the *EU Pledge* commissioned three independent third parties to monitor compliance with the pledge, including Accenture, BDRC Continental, and the European Advertising Standards Alliance. See EU PLEDGE 2014 MONITORING REPORT (2014), http://www.eu-pledge.eu/sites/eu-pledge.eu/files/reports/EU_Pledge_2014_Monitoring_Report.pdf.

regulation.⁸² Below, we review the literature evaluating the relative success of the six food advertising regulatory regimes analyzed in this paper.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.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.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.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.⁸⁷ One study of the US

⁸² See, e.g., Lisa G. Smithers et al., *Television Marketing of Unhealthy Food and Beverages to Children in Australia: A Review of Published Evidence from 2009* AUSTRALIAN PREVENTIVE HEALTH AGENCY (2012), <http://health.gov.au/internet/anpha/publishing.nsf/Content/Television%20marketing%20of%20unhealthy%20food%20and%20beverages%20to%20children%20in%20Australia>; William E. Kovacic et al., *supra* note 31; Leibowitz et al., *supra* note 8.

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.

⁸⁴ See, e.g., AUSTRALIAN FOOD & GROCERY COUNCIL, 2015 ANNUAL COMPLIANCE REPORT FOR THE RCMI AND QSRI 6 (2015), <http://www.afgc.org.au/our-expertise/health-nutrition-and-scientific-affairs/advertising-to-children/>.

⁸⁵ Jennifer L. Harris et al., *Defining "Child-Directed Advertising" to Reduce Unhealthy Television Food Advertising*, 44 AM. J. PREVENTIVE MED. 358, 362 (2013).

⁸⁶ See Stephanie A. Chambers et al., *Reducing the Volume, Exposure and Negative Impacts of Advertising for Foods High in Fat, Sugar and Salt to Children: A Systematic Review of the Evidence From Statutory and Self-Regulatory Actions and Educational Measures*, 75 PREVENTIVE MED. 32, 41 (2015).

⁸⁷ See, e.g., Powell et al., *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., *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., *Industry Self Regulation of Television Food Marketing: Responsible or Responsive?*, 6 INT'L J. PEDIATRIC OBESITY e390, e394 (2011) [hereinafter King et al., *Industry*]; Lesley King et al., *Building the Case for Independent Monitoring of Food Advertising on Australian Television*, 16 PUB. HEALTH NUTRITION 2249, 2252 (2013) [hereinafter King et al., *Building*]; M. Potvin Kent & A. Wanless, *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%.⁸⁸ 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.⁸⁹

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 2006.⁹⁰ 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 2008.⁹¹ 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.⁹²

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.⁹³ OfCom also found that children saw approximately 37% less HFSS advertising in 2009 than in 2005.⁹⁴ 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.⁹⁵ The researchers concluded that while the new restrictions had been effective in excluding HFSS advertising from the broadcast slots to which they applied,⁹⁶ they

in Children's Exposure to Food Advertising on Television in Canada between 2006-2009, 38 INT'L J. OBESITY 558, 558 (2014).

⁸⁸ 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).

⁸⁹ 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.

⁹⁰ Kent & Wanless, *supra* note 87, at 561.

⁹¹ Lana A. Hebden et al., *Advertising of Fast Food to Children on Australian Television: The Impact of Industry Self-Regulation*, 195 MED. J. AUSTL. 20, 22 (2011).

⁹² Powell et al., *supra* note 88, at 1080.

⁹³ OFF. OF COMM. (U.K.), HFSS ADVERTISING RESTRICTIONS: FINAL REVIEW 27 (2010), <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/hfss-review-final.pdf> [hereinafter HFSS ADVERTISING RESTRICTIONS].

⁹⁴ *Id.* at 32.

⁹⁵ Jean Adams et al., *Effect of Restrictions on Television Food Advertising to Children on Exposure to Advertisements for "Less Healthy" Foods: Repeat Cross-Sectional Study*, 7 PLOS ONE 1, 4 (2012).

⁹⁶ *Id.* at 4.

had not significantly reduced children's overall exposure to HFSS advertising on television.⁹⁷ 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,⁹⁸ suggesting that the restrictions did not reduce children's total exposure to food advertising across all media.⁹⁹

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.¹⁰⁰ 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.¹⁰¹ 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).¹⁰² 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.¹⁰³

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.¹⁰⁴

⁹⁷ *Id.* at 5.

⁹⁸ HFSS ADVERTISING RESTRICTIONS, *supra* note 93, at 24–26.

⁹⁹ PETER LUNT & SONIA LIVINGSTONE, MEDIA REGULATION: GOVERNANCE AND THE INTERESTS OF CITIZENS AND CONSUMERS 154 (2012).

¹⁰⁰ Tirtha Dhar & Kathy Baylis, *Fast-Food Consumption and the Ban on Advertising to Children: The Quebec Experience*, 48 J. MKT. RES. 799, 810 (2011). Another study found that English-speaking children in Montreal reported more children's cereals in their home than French-speaking children, which the study attributed to English-speaking children's exposure to cross-border US English-language advertising. Marvin E. Goldberg, *A Quasi-Experiment Assessing the Effectiveness of TV Advertising Directed to Children*, 27 J. MKT. RES. 445 (1990).

¹⁰¹ See Monique P. Kent et al., *Food Marketing on Children's Television in Two Different Policy Environments*, 6 PEDIATRIC OBESITY e433, e437 (2011).

¹⁰² Monique P. Kent et al., *A Nutritional Comparison of Foods and Beverages Marketed to Children in Two Advertising Policy Environments*, 20 OBESITY 1829, 1835 (2012).

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 times¹⁰⁵ and the nutritional quality of foods and beverages promoted to children,¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ However, for most of the programs children watch, children do not comprise 35% or more of the audience.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ 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

¹⁰⁵ See, e.g., King et al., *Industry*, *supra* note 87, at e394.

¹⁰⁶ See, e.g., Powell et al., *supra* note 88, at 1078.

¹⁰⁷ See Galbraith-Emami & Lobstein, *supra* note 77, at 971; Chambers et al., *supra* note 86, at 42.

¹⁰⁸ See, e.g., AUSTL. FOOD & GROCERY COUNCIL, FOOD AND BEVERAGE ADVERTISING TO CHILDREN ACTIVITY REPORT (2012), <https://www.afgc.org.au/download/1357/>.

¹⁰⁹ See AUSTL. COMM. & MEDIA AUTH., ATTACHMENT B CHILDREN'S TELEVISION VIEWING ANALYSIS OF AUDIENCE DATA 2001-13 29 (2015), <http://www.acma.gov.au/~media/Research%20and%20Analysis/Research/pdf/Attachment%20BChildrens%20television%20viewingAnalysis%20of%20audience%20dataFinal%20p df.pdf>.

¹¹⁰ See, e.g., King et al., *Industry*, *supra* note 87, at e390.

¹¹¹ 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.

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.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.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

¹¹² *Id.* at 53.

¹¹³ See, e.g., S. MacKay et al., *A Comprehensive Approach to Protecting Children from Unhealthy Food Advertising*, OBESITY POL’Y COALITION 1, 28–29 (2011), https://fahan.s3.amazonaws.com/assets/159/protecting-children-email1_final_13_04_11.pdf?1305266127; Boyd Swinburn et al., *The “Sydney Principles” for Reducing the Commercial Promotion of Foods and Beverages to Children*, 11 PUB. HEALTH NUTRITION 881, 883 (2007); *Recommendations for an International Code on Marketing of Foods and Non-Alcoholic Beverages to Children*, CONSUMERS INT’L 9 (2008), https://s3.eu-central-1.amazonaws.com/ps-wof-web-dev/site_media/uploads/ConsumersInternationalMarketingCode.pdf; *Manual for Monitoring Food Marketing to Children*, CONSUMERS INT’L 6 (2011), <http://www.consumersinternational.org/media/795222/food-manual-english-web.pdf>.

parties, account-holder and accountant, in which the person or body held accountable (the accountant) is subject to external scrutiny from another person or body (the account-holder).¹¹⁴ 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 accountant by seeking information and explanations, and to impose remedies and sanctions when the performance of the accountant is unsatisfactory.¹¹⁵

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,¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹

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 regulation¹²⁰ and, as community concerns have arisen over obesity and dietary risk

¹¹⁴ RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 15 (2003).

¹¹⁵ MULGAN, *supra* note 114, at 11.

¹¹⁶ Stephen Lim et al., *A Comparative Risk Assessment of Burden of Disease and Injury Attributable to 67 Risk Factors and Risk Factor Clusters in 21 Regions, 1990-2010: A Systematic Analysis for the Global Burden of Disease Study 2010*, 380 LANCET 2224, 2224 (2012).

¹¹⁷ See, e.g., Anna B. Gilmore et al., *Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?*, 33 J. PUB. HEALTH 2 (2011).

¹¹⁸ Swinburn et al., *supra* note 23, at 2537; Phillip Baker et al., *Trade and Investment Liberalization and Asia's Noncommunicable Disease Epidemic: A Synthesis of Data and Existing Literature*, 10 GLOBALIZATION & HEALTH 66 (2014); Anne M. Thow & Ben McGrady, *Protecting Policy Space for Public Health Nutrition in an Era of International Investment Agreements*, 92 BULL. WORLD HEALTH ORG. 139, 139-45 (2014).

¹¹⁹ David Vogel, *The Private Regulation of Global Corporate Conduct: Achievements and Limitations*, 49 BUS. & SOC'Y 68, 73 (2010).

¹²⁰ Duff Wilson & Janet Roberts, *How Washington Went Soft on Childhood Obesity*, REUTERS (Apr. 27, 2012), <http://www.reuters.com/article/2012/04/27/us-usa-foodlobby->

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

idUSBRE83Q0ED20120427; *A Red Light for Consumer Information*, CORPORATE EUROPE OBSERVATORY (June 10 2010), <http://corporateeurope.org/news/red-light-consumer-information>; J. Mindell et al., *All in this Together: The Corporate Capture of Public Health*, 345 BRIT. MED. J. e8082 (2012).

¹²¹ Tamara Elliott et al., *A Systematic Interim Assessment of the Australian Government’s Food and Health Dialogue*, 200 MED. J. AUSTRAL. 92, 92–95 (2014); Clare Panjwani & Martin Caraher, *The Public Health Responsibility Deal: Brokering a Deal for Public Health, But on Whose Terms?*, 114 HEALTH POL’Y 163 (2014); Shu Wen Ng & Barry Popkin, *The Healthy Weight Commitment Foundation Pledge: Calories Purchased by U.S. Households with Children, 2000-2012*, 47 AM. J. PREVENTIVE MED. 520 (2014).

¹²² Lee Johnston & Diane Finegood, *Cross-Sector Partnerships and Public Health: Challenges and Opportunities for Addressing Obesity and Noncommunicable Diseases Through Engagement with the Private Sector*, 36 ANN. REV. PUB. HEALTH 255, 255–58 (2015); C. Knai et al., *Has a Public-Private Partnership Resulted in Action on Healthier Diets in England? An Analysis of the Public Health Responsibility Deal Food Pledges*, 54 FOOD POL’Y 1 (2015); Vivica Kraak et al., *Balancing the Benefits and Risks of Public-Private Partnerships to Address the Global Double Burden of Malnutrition*, 15 PUB. HEALTH NUTRITION 503–17 (2011); Anna Bryden et al., *Voluntary Agreements Between Government and Business – A Scoping Review of the Literature with Specific Reference to the Public Health Responsibility Deal*, 110 HEALTH POL’Y 186, 186 (2013); Lisa Sharma, et al., *The Food Industry and Self-regulation: Standards to Promote Success and to Avoid Public Health Failures*, 100 AM. J. PUB. HEALTH 240, 240–45 (2010); Derek Yach et al., *The Role and Challenges of the Food Industry in Addressing Chronic Disease*, 6 GLOBALIZATION HEALTH 1, 6 (2010).

¹²³ See, e.g., Kelly D. Brownell, *Thinking Forward: The Quicksand of Appeasing the Food Industry*, 9 PLOS MED. 1 (2012); Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?* 87 MILBANK Q. 259 (2009); David Stuckler & Marion Nestle, *Big Food, Food Systems, and Global Health*, 9 PLOS MEDICINE e1001242 (2012).

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.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.”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.¹²⁷ Not only is the locus of regulation no longer centered on the state,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.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.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.¹³¹ 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

¹²⁵ See, e.g., Belinda Reeve, *Private Governance, Public Purpose? Assessing Transparency and Accountability in Self-Regulation of Food Advertising to Children*, 10 *BIOETHICAL INQUIRY* 149 (2013); Vivica I. Kraak et al., *An Accountability Framework to Promote Healthy Food Environments*, 17 *PUB. HEALTH NUTRITION* 2467, 2470 (2014) [hereinafter Kraak et al., *Accountability Framework*]; Vivica I. Kraak et al., *A Q Methodology Study of Stakeholder’s Views About Accountability for Promoting Healthy Food Environments in England Through The Responsibility Deal Food Network*, 49 *FOOD POL’Y* 207, 208 (2014); Swinburn et al., *supra* note 23.

¹²⁶ David Levi-Faur, *The Global Diffusion of Regulatory Capitalism* 598 *AME. ACAD. POL. & SOC. SCI.* 12, 13 (2005); JOHN BRAITHWAITE, *REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER* vii (2008); David Levi-Faur, *Regulatory Capitalism and the Reassertion of the Public Interest*, 27 *POL’Y SOC’Y* 181 (2009).

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).

¹²⁸ *Id.* at 112.

¹²⁹ BRONWEN MORGAN & KAREN YEUNG, *AN INTRODUCTION TO LAW AND REGULATION: TEXT AND MATERIALS* 11 (2007).

¹³⁰ Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 *REG. GOVERNANCE* 137, 138 (2008).

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.¹³² 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-policed by food industry actors, but because the industry controls access to the information through which performance might be measured.¹³³

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.¹³⁴ 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.¹³⁵

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

¹³² Kraak et al., *Accountability Framework*, *supra* note 125, at 2467, 2477–79; Swinburn et al., *supra* note 23, at 2536–39.

¹³³ Swinburn et al., *supra* note 23, at 2536. *See also* Christine Parker & Vibeke Nielsen, *The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism*, 5 ANN. REV. L. & SOC. SCI. 45, 59 (2009).

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).

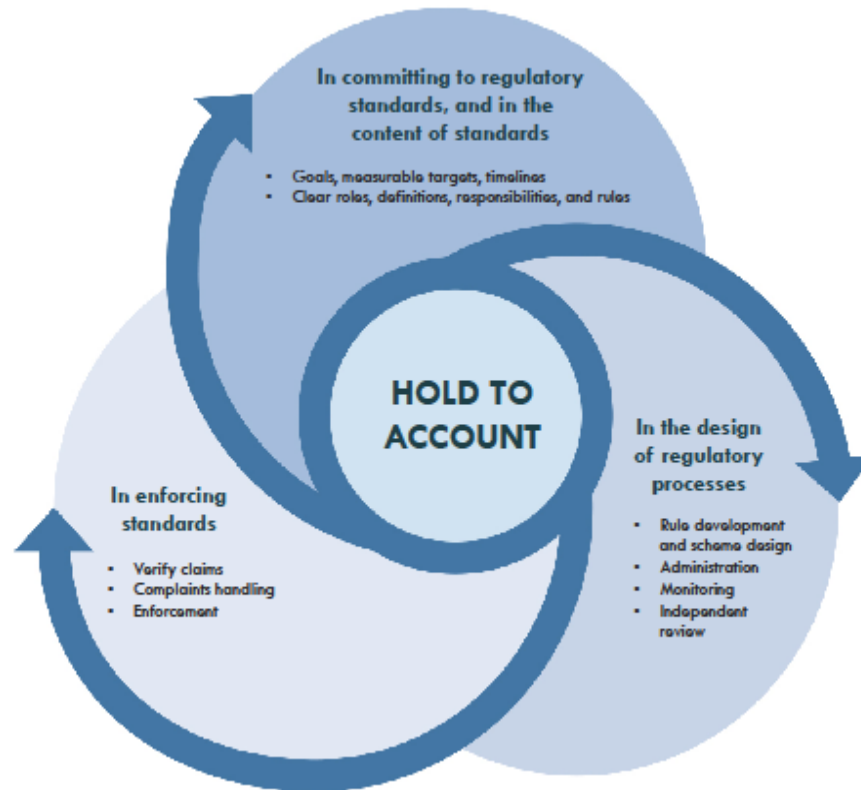
and to embody principles of good governance. Good regulatory design is an important objective in its own right, quite apart from the efficacy of regulation in achieving its substantive goals. For example, regulatory schemes may be effective in achieving compliance with standards, while at the same time being unjust, lacking in transparency, denying stakeholders the opportunity to provide input into the regulatory process, and being immune from periodic review.¹³⁶ 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.¹³⁷

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.

¹³⁶ ARIE FRIEBERG, *THE TOOLS OF REGULATION* 263 (2010).

¹³⁷ FRIEBERG, *supra* note 136; Peter Cane, *Administrative Law as Regulation*, in *REGULATING LAW* 207, 210 (Christine Parker et al. eds., 2004).

Figure 1: An Accountability Model for Strengthening the Regulation of Food Advertising to Children



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,¹³⁸ 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,¹³⁹ 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

¹³⁸ IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 158–63 (1992).

¹³⁹ Bartle & Vass, *supra* note 30.

possibility of a more demanding statutory scheme.¹⁴⁰ **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.

¹⁴⁰ AYRES & BRAITHWAITE, *supra* note 138, at 38–39; Bartle & Vass, *supra* note 30.

Table 2: Components for Transparent and Accountable Regulatory Design

Regulatory Domain: The Substantive Content of Regulatory Standards		
Regulatory Component	Recommendation	Application to Food Advertising Regulation
Regulatory Purpose	There are clear, measurable objectives against which the success of regulation can be assessed. ^a	The goal of the regulatory scheme is to reduce children's exposure to, and the persuasive power of, marketing for unhealthy products. ^b
Substantive Terms and Conditions	Key terms and conditions are clearly defined; ^a regulatory rules are sufficiently expansive to achieve regulatory objectives. ^a	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
Regulatory domain: The design of regulatory processes		
Regulatory component	Recommendation	Application to Food Advertising Regulation
Drafting Regulatory Rules and Scheme Design	Transparency and accountability mechanisms are incorporated into regulatory regimes from their very inception, including when developing substantive regulatory	Government agencies, public health organizations and consumer advocates can be represented in working groups

	rules and in determining scheme design.	drafting regulatory rules. Alternatively, consultation with external stakeholders could take place.
Administration and Monitoring	<p>Administration by an independent body, which monitors and enforces the scheme, and arranges for external review of its performance.^{a,c}</p> <p>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.</p> <p>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.^c</p>	<p>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.</p> <p>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.</p>
Review	Structured, regular review of the system's operation ensures that the scheme is meeting regulatory objectives. ^{d-f} 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.^e Reviews should be conducted by independent third parties, e.g., a professional auditing organization,^e or an independent body comprising a wide range of stakeholders.^e

Regulatory domain: Enforcing Standards

Regulatory Component	Recommendation	Application to Food Advertising Regulation
Complaints Handling	An independent and credible complaints-handling mechanism fosters public confidence in the scheme and helps to identify and remedy systemic problems with its operation. ^g 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. ^h	Food advertising regulation should make available an independent complaints-handling body, or allow for complaints to be made to the body administering the scheme.
Enforcement	A wide range of enforcement options are available, ^{e,g-i} 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. ^j	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.

^a AUSTRALIAN COMPETITION AND CONSUMER COMMISSION [ACCC], GUIDELINES FOR DEVELOPING EFFECTIVE VOLUNTARY INDUSTRY CODES OF CONDUCT 6 (2011), <https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>.

^b WORLD HEALTH ORGANISATION, SET OF RECOMMENDATIONS ON THE MARKETING OF FOODS AND NON-ALCOHOLIC BEVERAGES TO CHILDREN 8 (2010), <http://www.who.int/dietphysicalactivity/marketing-food-to-children/en/>.

^c Boyd Swinburn et al., *Strengthening of Accountability Systems to Create Healthy Food Environments and Reduce Obesity*, 385 LANCET 2534 (2015).

^d Lisa L. Sharma et al., *The Food Industry and Self-regulation: Standards to Promote Success and to Avoid Public Health Failures*, 100 AM. J. PUB. HEALTH 240 (2010).

^e DEPT. TREASURY FIN. (Vict.), VICTORIAN GUIDE TO REGULATION, 27 (August 2011), <http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Victorian-guide-to-regulation>.

^f OFF. CONSUMER AFF. (Can.), VOLUNTARY CODES: A GUIDE FOR THEIR DEVELOPMENT AND USE, 16 (1998), <http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca00863.html>.

^g TASKFORCE ON INDUSTRY SELF-REGULATION (Austl.), INDUSTRY SELF-REGULATION IN CONSUMER MARKETS 73 (2000), <http://archive.treasury.gov.au/contentitem.asp?ContentID=1123>.

^h Directorate-General for Health and Consumer Protection, SELF-REGULATION IN THE EU ADVERTISING SECTOR: A REPORT OF SOME DISCUSSION AMONG INTERESTED PARTIES, EUROPEAN COMMISSION, 21 (2006), http://ec.europa.eu/consumers/hot_topics/report_advertising_en.htm.

ⁱ IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE REGULATION DEBATE (1992).

^j Andrew King & Michael Lenox, *Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program*, 43 ACAD. MGMT. J. 698 (2000).

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

¹⁴¹ Elizabeth Handsley et al., *Regulatory Axes on Food Advertising to Children on Television*, 6 AUSTL. & N.Z. HEALTH POL’Y 1 (2009).

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.”¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵

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.”¹⁴⁶ The aims of the Canadian and Australian pledges are expressed in similar terms.¹⁴⁷ 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.¹⁴⁸ 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.

¹⁴⁴ BAI, DRAFT BAI GENERAL AND CHILDREN’S COMMERCIAL COMMUNICATIONS CODES CONSULTATION DOCUMENT 10 (2012), http://www.bai.ie/wordpress/wp-content/uploads/201203_ConsultDoc_English_vFinal.pdf.

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.¹⁴⁹ 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,¹⁵⁰ although children may comprise a relatively small percentage of the audience.¹⁵¹ 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.¹⁵²

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.¹⁵³ The BCAP Code also applies to children's channels and programs designed specifically for children.¹⁵⁴ 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

¹⁴⁹ See RCMI, *supra* note 65, at 3; QSRI, *supra* note 65, at 3; ADVERT. STANDARDS CAN., THE CANADIAN CHILDREN'S FOOD AND BEVERAGE ADVERTISING INITIATIVE: 2014 COMPLIANCE REPORT 2 (2014), <http://www.adstandards.com/en/childrensinitiative/2014ComplianceReport.pdf>; *Children's Food and Beverage Advertising Initiative Program*, *supra* note 65, at 3–4. Some pledge participants choose to use a lower audience share of between 20–30%.

¹⁵⁰ AUSTL. COMM. & MEDIA AUTHORITY, CHILDREN'S VIEWING PATTERNS ON COMMERCIAL, FREE-TO-AIR AND SUBSCRIPTION TELEVISION. REPORT ANALYZING AUDIENCE AND RATINGS DATA FOR 2001, 2005 AND 2006, 27 (2007), <https://www.acma.gov.au/-/media/Diversity-Localism-and-Accessibility/Report/pdf/Childrens-viewing-patterns-on-commercial-free-to-air-and-subscription-television.PDF?la=en>.

¹⁵¹ See, e.g., Jennifer L. Harris et al., *Sweet Promises: Candy Advertising to Children and Implications for Industry Self-Regulation* 95 *APPETITE* 585, 595 (2015); Harris et al., *supra* note 85.

¹⁵² Harris et al., *supra* note 85.

¹⁵³ BAI CHILDREN'S COMMERCIAL COMMUNICATIONS CODE, *supra* note 42, at r. 11.4. (exemplifying that the Irish HFSS rules are more permissive, defining children's programs as those that "are commonly referred to as such and/or have an audience profile of which over 50% are under 18 years of age").

¹⁵⁴ THE CAP CODE, *supra* note 51, at r. 15.18; Sarah Boseley, *Junk Food Ads Targeting Children Banned in Non-broadcast Media*, *GUARDIAN* (Dec. 7, 2016), <https://www.theguardian.com/society/2016/dec/08/junk-food-ads-targeting-children-banned-in-non-broadcast-media>.

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

Quebec's legislation identifies advertising that is directed to children with reference to three variables: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).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),¹⁵⁸ and the proportion of children that might be exposed to the advertisement.¹⁵⁹

The ban applies to advertising in television programs with an audience share of 15% or more children under the age of 13 years.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.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.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.¹⁶³ This

¹⁵⁵ *Food Fables – the Second Sitting. The Truth Behind How Food Companies Target Children, WHICH?* (U.K.) 1, 8 (2008), <http://studyres.com/doc/7816891/food-fables-the-second-sitting--the-truth-behind-how-food?page=1>.

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

¹⁵⁷ OPC, ADVERTISING DIRECTED AT CHILDREN, *supra* note 41, at 4.

¹⁵⁸ *Id.* at 6.

¹⁵⁹ *Id.* at 7.

¹⁶⁰ *Id.* at 26.

¹⁶¹ *Id.*

¹⁶² OPC, ADVERTISING DIRECTED AT CHILDREN, *supra* note 41, at 6.

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.¹⁶⁴ Advertising and broadcasting regulation typically applies to children under the age of 12,¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ Emerging research suggests that older children and adults are also susceptible to the persuasive effects of food marketing,¹⁶⁸ 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

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.*

¹⁶⁵ COUNCIL OF BETTER BUS. BUREAUS, CHILDREN’S FOOD AND BEVERAGE ADVERTISING INITIATIVE, WHAT “CHILD-DIRECTED ADVERTISING” MEANS UNDER CFBAI 2 (2014), <https://www.bbb.org/globalassets/local-bbbs/council-113/media/cfbai-audience-definitions-aug-2014.pdf>.

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

¹⁶⁷ WHO, *A Framework for Implementing the Set of Recommendations*, *supra* note 14. See also OFCOM TELEVISION FOOD AND DRINK ADVERTISING, *supra* note 55, at 13–14.

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.¹⁶⁹ 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.¹⁷⁰ 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,¹⁷¹ but neither it nor the *General Communications Code* apply to non-broadcast media,¹⁷² leaving Irish children vulnerable to promotions for unhealthy products via social media platforms such as Facebook¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵ Despite this, public health advocates argue that

¹⁶⁹ WHO, *A Framework for Implementing the Set of Recommendations*, *supra* note 14, at 21.

¹⁷⁰ DAVID ROLPH ET AL., *MEDIA LAW: CASES, MATERIALS AND COMMENTARY* 70 (2010).

¹⁷¹ BAI CHILDREN’S COMMERCIAL COMMUNICATIONS CODE, *supra* note 42, r. 11(4).

¹⁷² BAI GENERAL COMMERCIAL COMMUNICATIONS CODE, *supra* note 44, at 5. The Irish advertising industry runs a self-regulatory system for advertising based on a voluntary code of conduct, which applies to advertising in non-broadcast media. See ADVERT. STANDARDS AUTHORITY FOR IRELAND, *MANUAL OF ADVERTISING SELF-REGULATION WITH THE CODE OF STANDARDS FOR ADVERTISING, PROMOTIONAL AND DIRECT MARKETING IN IRELAND* (6th ed., 2007), http://www.asai.ie/wp-content/uploads/ASAI-CODEBOOK_REVISED7.6c_2014.pdf.

¹⁷³ Mimi Tatlow-Golden, *Who’s Feeding the kids Online?: Digital Food Marketing and Children in Ireland*, IRISH HEART FOUNDATION (2016), https://irishheart.ie/wp-content/uploads/2016/12/web__whos_feeding_the_kids_online_report_2016.compressed.pdf.

¹⁷⁴ THE BCAP CODE, *supra* note 50, at r. 32.5.1, 13.9.

¹⁷⁵ ADVERT. STANDARDS AUTHORITY, CAP CONSULTATION: FOOD AND SOFT DRINK ADVERTISING TO CHILDREN REGULATORY STATEMENT (Dec. 8, 2016), at 25, <https://www.asa.org.uk/asset/98337008-FA03-481B-92392CB3487720A8/>.

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.¹⁷⁶ 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

¹⁷⁶ *Children's Online Junk Food Ads Banned by Industry*, BBC NEWS (Dec. 8, 2016), www.bbc.com/news/health-38239259.

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.*

¹⁸² *Advertising Directed at Children*, COALITION POIDS, <http://www.cqpp.qc.ca/en/our-priorities/food-marketing/advertising-directed-at-children/> (last visited Oct. 14, 2017).

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.”¹⁸⁴ This ignores the evidence that children are widely exposed to in-store displays and product packaging, and are influenced by these marketing techniques.¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹ In Canada and Australia, this obligation applies to products appearing in *any* interactive game directed primarily to children under 12 years. The Canadian, US,

¹⁸⁴ COUNCIL OF BETTER BUS. BUREAUS, PROPOSED VOLUNTARY PRINCIPLES FOR MARKETING FOOD TO CHILDREN 32 (Apr. 28, 2011), <http://www.bbb.org/storage/0/Shared%20Documents/CFBAI%20IWG%20Comment%207-14-2011.pdf>; Aoki & Moore, *supra* note 168, at 137.

¹⁸⁵ Aoki & Moore, *supra* note 168, at 137. *See, e.g.*, Dafina Rexha et al., *The Effect of Availability, Point of Purchase Advertising and Sampling on Children’s First Independent Food Purchases*, 16 J. PROMOTION MGMT. 148 (2010).

¹⁸⁶ OPC, ADVERTISING DIRECTED AT CHILDREN, *supra* note 41, at 6.

¹⁸⁷ THE CANADIAN CHILDREN’S FOOD AND BEVERAGE ADVERTISING INITIATIVE: 2014 COMPLIANCE REPORT, *supra* note 149, at 2; *Children’s Food and Beverage Advertising Initiative Program*, *supra* note 65, at 3.

¹⁸⁸ *Children’s Food and Beverage Advertising Initiative Program*, *supra* note 65, at ¶ 4; *Canadian Children’s Food and Beverage Advertising Initiative*, *supra* note 65; RCMI, *supra* note 65.

¹⁸⁹ *Children’s Food and Beverage Advertising Initiative Program*, *supra* note 65, at 3.

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.¹⁹⁰ The CAP code applies similar restrictions to non-broadcast advertisements for HFSS products directed to children in these categories.¹⁹¹ 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.¹⁹²

OfCom claims that children saw fewer food advertisements using these persuasive techniques following the introduction of the UK HFSS rules.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶

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,¹⁹⁷ many of which have featured in food marketing campaigns over a long period of time and in promotions

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 CAP 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.

¹⁹⁴ Emma J Boyland et al., *Persuasive Techniques Used in Television Advertisements to Market Foods to UK Children*, 58 *APPETITE* 658 (2012).

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.

¹⁹⁷ *An Analysis of the Regulatory and Voluntary Landscape Concerning the Marketing and Promotion of Food and Drink to Children*, NATIONAL HEART FORUM 43–44 (2011), <http://www.heartforum.co.uk/our-work/policy/nutrition/marketing-food-and-drink-to-children/> [hereinafter *An Analysis of the Regulatory and Voluntary Landscape*].

via a wide range of communication channels.¹⁹⁸ With the exception of Quebec and the United Kingdom,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.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.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.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.²⁰³ The one exception in our study was Quebec’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,²⁰⁴ despite the significant debate over the utility of

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).

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.*

²⁰⁰ Aoki & Moore, *supra* note 168, at 140.

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.

²⁰² Jill Sherriff & Mike Daube, *Cricket: Notching up Runs for Food and Alcohol Companies?* 34 AUSTL. & N.Z. J. PUB. HEALTH 19, 19–23 (2009); Bridget Kelly et al., *Food and Drink Sponsorship of Children’s Sport in Australia: Who Pays?*, 26 HEALTH PROMOTION INT’L 188 (2010).

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 1408–09; Hawkes & Lobstein, *supra* note 19, at 92.

²⁰⁴ Handsley et al., *supra* note 141.

categorizing products as “healthy” or “unhealthy,” and over which products should fall into each category.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.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.”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.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 2013,²⁰⁹ with the Canadian pledge following suit in 2014.²¹⁰

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.²¹¹ Typically, the nutrient profile models developed by the food industry are weaker than those created by academic research groups,

²⁰⁵ Rayner et al., *supra* note 203.

²⁰⁶ See BAI CHILDREN’S COMMERCIAL COMMUNICATIONS CODE, *supra* note 42, at 56.

²⁰⁷ RCMI, *supra* note 65, at § 1.1.

²⁰⁸ Hebden et al., *supra* note 78.

²⁰⁹ Elaine D. Kolish, *The Children’s Food and Beverage Advertising Initiative White paper on CFBAI’s Uniform Nutrition Criteria*, COUNCIL OF BETTER BUS. BUREAUS (2011), <http://www.bbb.org/us/childrens-food-and-beverage-advertising-initiative/info/>; Elaine D. Kolish & Magdalena Hernandez, *The Children’s Food and Beverage Advertising Initiative: A Report on Compliance and Progress During 2011*, COUNCIL OF BETTER BUS. BUREAUS ii (2012), <http://www.bbb.org/us/childrens-food-and-beverage-advertising-initiative/info/>.

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.

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.²¹² 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.²¹³ 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.²¹⁴

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.²¹⁵ 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.²¹⁶ 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 legitimize the promotion of highly processed foods, rather than encouraging the consumption of foods that are essential for dietary health.²¹⁷

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 Scarborough et al., *supra* note 211, at 817.

²¹⁴ See, e.g., Hebden et al., *supra* note 78; 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 T. Lobstein & S. Davies, *Defining and Labelling “Healthy” and “Unhealthy” Food*, 12 PUB. HEALTH NUTRITION 331, 332 (2008).

²¹⁶ *Id.* (“[a] reduced-salt snack is better than a fully salted snack, but it may still remain a salty product”).

²¹⁷ *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.²¹⁸ It also commissioned research on the effects of television food advertising on children's food preferences and consumption.²¹⁹ 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.²²⁰ This was accompanied by a series of public consultations on proposed options for restricting HFSS advertising.²²¹ 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,²²² 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.²²³ 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.

²¹⁸ See *Tougher New Food and Drink Rules Come into Effect in Children's Media*, ADVERT. STANDARDS AUTHORITY (June 30, 2017), <https://www.asa.org.uk/news/tougher-new-food-and-drink-rules-come-into-effect-in-children-s-media.html> (explaining that the ASA also undertook public consultation in designing its rules for HFSS advertising in non-broadcast media).

²¹⁹ LUNT & LIVINGSTONE, *supra* note 99, at 152, 156–57. See OFF. OF COMM. (U.K.), TELEVISION ADVERTISING OF FOOD AND DRINK PRODUCTS TO CHILDREN: FINAL STATEMENT (2007), http://stakeholders.ofcom.org.uk/consultations/foodads_new/statement/.

²²⁰ See CHILDREN'S COMMERCIAL COMMUNICATIONS CODE CONSULTATION DOCUMENT, *supra* note 27, at 20.

²²¹ *Id.*; *Consultation: Stage 2: March 2012-May 2012*, BAI, <http://www.bai.ie/en/bai-launches-consultation-on-draft-general-and-childrens-commercial-communications-codes/>; DRAFT BAI GENERAL AND CHILDREN'S COMMERCIAL COMMUNICATIONS CODES CONSULTATION DOCUMENT, *supra* note 144.

²²² Richard Mulgan, *Accountability Issues in the New Model of Governance* 6–7 (Discussion Paper No. 91 2002), <http://firgoa.usc.es/drupal/files/No91Mulgan.pdf>.

²²³ 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.²²⁴ 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.²²⁵ 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.²²⁶ The Advertising Standards Authority (ASA) and the

²²⁴ *Welcome to the Children's Food and Beverage Advertising Initiative*, COUNCIL OF BETTER BUS. BUREAUS, <https://www.bbb.org/council/the-national-partner-program/national-advertising-review-services/childrens-food-and-beverage-advertising-initiative/> (last visited Feb. 16, 2017); *Canadian Children's Food and Beverage Advertising Initiative*, *supra* note 65; *Advertising to Children*, AUSTL. FOOD & GROCERY COUNCIL <http://www.afgc.org.au/our-expertise/health-nutrition-and-scientific-affairs/advertising-to-children/> (last visited Feb. 17, 2017).

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.²²⁷ OfCom approves changes to the BCAP code, and reserves the right to introduce new rules where needed.²²⁸ 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.²²⁹ 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.²³⁰

Regulatory capture can affect the work of public regulators,²³¹ just as it can affect the work of industry-based regulators.²³² 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.²³³ 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.²³⁴ For example, the BAI is subject to the requirements of the Irish *Freedom of Information Act* 2014,²³⁵ 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.*

²²⁷ Memorandum of Understanding, *supra* note 49.

²²⁸ *Id.* at 6.

²²⁹ 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).

²³⁰ LUNT & LIVINGSTONE, *supra* note 99, at 67. See ADVERT. STANDARDS AUTHORITY ADVERTISING REGULATION: THE BALANCE IS SHIFTING: ANNUAL REPORT 2015 (2015), <https://www.asa.org.uk/asset/DE51023B-D940-4665-A72EA0DDE3E8816E/>.

²³¹ See Toni Makkai & John Braithwaite, *In and Out of the Revolving Door: Making Sense of Regulatory Capture*, 12 J. PUB. POL'Y 61 (1992).

²³² See, e.g., Joseph Rees, *Development of Communitarian Regulation in the Chemical Industry*, 19 L. POL'Y 477, 506 (1997).

²³³ Giandomenico Majone, *Regulatory Legitimacy in REGULATING EUR.* 284, 284 (Giandomenico Majone ed., 1996).

²³⁴ Mark Thatcher, *Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation*, 25 W. EUR. POL. 125, 142 (2002).

²³⁵ See BROADCASTING AUTHORITY OF IRELAND, ANNUAL REPORT 2015 29 (2015), <http://www.bai.ie/en/bai-annual-report-2015-published/>.

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 processes²⁴¹—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.

²⁴⁰ NEIL GUNNINGHAM & DARREN SINCLAIR, LEADERS AND LAGGARDS: NEXT-GENERATION ENVIRONMENTAL REGULATION 143 (2002).

²⁴¹ See also King et al., *Industry*, *supra* note 87.

²⁴² Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 L. POL’Y 363, 384 (1997).

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.²⁴⁵ 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.²⁴⁶ This tension can impair the ability of industry bodies to act as effective regulators,²⁴⁷ and may explain why industry monitoring of food advertising regulation tends to be narrow and selective in its reporting criteria.²⁴⁸ 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.²⁴⁹

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*,²⁵⁰ 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.²⁵¹ The apparent lack of systematic

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

²⁴⁶ See generally JOSEPH REES, *HOSTAGES OF EACH OTHER: THE TRANSFORMATION OF NUCLEAR SAFETY SINCE THREE MILE ISLAND* (1994); Gunningham & Rees, *supra* note 242.

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

²⁴⁸ Lesley A. King et al., *Consultancy Report on Inappropriate Food Marketing to the National Preventative Taskforce*, INST. OBESITY, NUTRITION & EXERCISE 1, 28 (2009), [http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/0FBE203C1C547A82CA257529000231BF/\\$File/commpaper-inap-food-mark-king.pdf](http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/0FBE203C1C547A82CA257529000231BF/$File/commpaper-inap-food-mark-king.pdf). See also WHO, *A Framework for Implementing the Set of Recommendations*, *supra* note 14, at 40–45.

²⁴⁹ WHO, *A Framework for Implementing the Set of Recommendations*, *supra* note 14, at 11.

²⁵⁰ *About the Office*, OFFICE DE LA PROTECTION DU CONSOMMATEUR, <http://www.opc.gouv.qc.ca/en/opc/office/mission-mandates/> (last visited Feb. 17, 2017).

²⁵¹ BROADCASTING AUTHORITY IRELAND, *BAI COMPLIANCE AND ENFORCEMENT POLICY* 10 (2014), <http://www.bai.ie/index.php/bai-compliance-and-enforcement-policy/>.

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.*

²⁵² NEIL GUNNINGHAM ET AL., SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY 45 (1998).

²⁵³ *About Regulation*, ADVERT. STANDARDS AUTHORITY, <https://www.asa.org.uk/About-ASA/About-regulation.aspx> (last visited Feb. 17, 2017).

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-0929-429E-BE6671113D113813/>.

²⁵⁶ *Annual Reports*, ADVERT. STANDARDS AUTHORITY, <https://www.asa.org.uk/advice-and-resources/resource-library/annual-reports.html> (last visited Oct. 14, 2017). The ASA's work included assessing the impact of the HFSS rules using complaint statistics, decisions, and other information; commissioning and publishing a literature review on the impact of digital and online marketing of food and drink products to children; and undertaking a survey of online food advertising, in order to identify any gaps in the HFSS restrictions, and any instances of non-compliance. *See e.g.*, ADVERT. STANDARDS AUTHORITY, MAKING ADS CLEAR: ANNUAL REPORT 2013 23 (2013), <https://www.asa.org.uk/asset/7F0C9DFF-E75C-4AEE-BFD2FFFD68BBFE8B/>. *See Our History*, ADVERT. STANDARDS AUTHORITY, <http://asa.org.uk/About-ASA/Our-history.aspx> (last visited Feb. 17, 2017); Barbie Clarke & Siv Svanaes, *Literature Review of Research on Online Food and Beverage Marketing to Children*, FAMILY KIDS & YOUTH (2014), <https://www.asa.org.uk/asset/CD73763F-8619-4939-BE6421D122566EA7/>.

²⁵⁷ ADVERT. STANDARDS AUTHORITY, ASA HOT TOPIC: FOOD AND DRINK 3 (undated), <https://studylib.net/doc/18530034/asa-hot-topic-food-and-drink---advertising-standards-auth> (last visited Oct. 14, 2017).

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.²⁵⁹ One of the strengths of statutory and co-regulatory schemes is that there is often a legislative requirement for periodic review. The Irish *Broadcasting Act* 2009 requires the Broadcasting Authority of Ireland to review its broadcasting codes every four years, and to report to the relevant Minister.²⁶⁰ In the United Kingdom, the *Communications Act* 2003 requires OfCom “to set, and from time to time to review and revise” the broadcasting codes of conduct.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.²⁶² Quebec’s *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.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,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.²⁶⁵ In summary, both statutory and voluntary schemes could be

²⁵⁹ AUSTRALIAN COMPETITION & CONSUMER COMMISSION, GUIDELINES FOR DEVELOPING EFFECTIVE VOLUNTARY INDUSTRY CODES OF CONDUCT 6 (2011), <https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>; OFF. CONSUMER AFF. (Can.), VOLUNTARY CODES: A GUIDE FOR THEIR DEVELOPMENT AND USE 12–13 (1998), <http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca00863.html>.

²⁶⁰ Broadcasting Act 2009 § 45(3) (Act No. 18/2009) (Ir.), <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/pdf>.

²⁶¹ Communications Act 2003 § 319 (U.K.), <http://www.legislation.gov.uk/ukpga/2003/21/section/319>.

²⁶² Memorandum of Understanding, *supra* note 49, at ¶ 33.

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

²⁶⁴ *Children’s Food and Beverage Advertising Initiative Program*, *supra* note 65, at 5.

²⁶⁵ The Quick Service Industry pledge was also separately reviewed in 2010 by a not-for-profit health organisation. See AUSTRALIAN FOOD & 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/qsri-compliance-report-2011.pdf>; Susannah Tymms, *Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes*, AUSTRALIAN 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

COUNCIL, 1, 62 (2012), <http://www.afgc.org.au/industry-codes/advertising-to-children/rcmi/rcmi-reports-2009.html>.

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.

²⁶⁸ See Lesley Hitchens, *Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting*, AUSTL. COMM. & MEDIA AUTHORITY 1, 9 (2010), <http://www.acma.gov.au/Industry/Broadcast/Radio/Commercial-radio-standards/review-of-commercial-radio-standards-radio-i-acma>. The ASA can also bring enforcement action on its own initiative or where matters are brought to its attention by CAP.; ADVERT. STANDARDS AUTHORITY, BROADCAST COMPLAINT HANDLING PROCEDURES ¶ 17 (2008), <https://www.asa.org.uk/asset/518CC7C3-3E04-4924-B28BBB9D53664286.8529753C-D2A0-40DE-9773A2720991CDAA/>.

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.²⁷¹

Each of the complaints-handling schemes mentioned above has attracted criticism for lack of transparency, accessibility, and independence.²⁷² 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,²⁷³ suggesting that consumers were either unaware that complaints could be made or how to make them.²⁷⁴ In contrast, procedures for hearing complaints about breach of the Australian pledges are outlined in the main code document.²⁷⁵ 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.²⁷⁶

In addition to the difficulties of accessing the complaints-handling body, would-be complainants may also experience procedural barriers to laying complaints.²⁷⁷ 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.²⁷⁸ 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.²⁷⁹ These limitations in the coverage of the scheme reduce

<http://www.opc.gouv.qc.ca/en/consumer/complaint-against-merchant/how-to-file/> (visited Oct. 14, 2017).

²⁷¹ See Broadcasting Act 2009 §§ 47–48 (Act No. 18/2009) (Ir.), <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/pdf>; *A Guide for Listeners & Viewers to the Complaints Process & the Broadcasting Authority of Ireland 2014*, BROADCASTING AUTHORITY IRELAND (2014), [http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-A32NLB1833156-en/\\$File/A%20Guide%20for%20Listeners%20&%20Viewers%20to%20the%20Complaints%20Process%202014.pdf](http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-A32NLB1833156-en/$File/A%20Guide%20for%20Listeners%20&%20Viewers%20to%20the%20Complaints%20Process%202014.pdf).

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

²⁷³ THE CANADIAN CHILDREN'S FOOD AND BEVERAGE ADVERTISING INITIATIVE: 2014 COMPLIANCE REPORT, *supra* note 149, at 7.

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.

²⁷⁸ See, e.g., *Complaints Lodged*, COALITION POIDS, <http://www.cqpp.qc.ca/en/our-priorities/food-marketing/advertising-directed-at-children/complaints-lodged/> (last visited Feb. 17, 2017) (providing the OPC's response to the Weight Coalition's complaint about the "Nickels" children's menu). See also *Advertising Directed at Children*, *supra* note 182.

²⁷⁹ *Frequently Asked Questions*, ADVERT. STANDARDS BUREAU, <http://www.adstandards.com.au/process/frequentlyaskedquestions/> (last visited Sept. 24, 2017); C. Mills et al., *End the Charade! The Ongoing Failure to Protect Children from*

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

Unhealthy Food Marketing, OBESITY POL'Y COALITION 1, 10 (2015), <http://www.opc.org.au/downloads/submissions/end-the-charade.pdf>.

²⁸⁰ Reeve, *supra* note 125, at 149, 158.

²⁸¹ See, e.g., Jeffery, *supra* note 38, at 249–53.

²⁸² Malcolm Clark & Charlie Powell, *Through the Looking Glass: A Review of the Topsy Turvy World of the Regulations that are Supposed to (But Don't) Protect Children from Online Marketing of Junk Food*, CHILDREN'S FOOD CAMPAIGN 8, 9–10 (2013), http://www.sustainweb.org/publications/through_the_looking_glass/.

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.

²⁸⁶ See *Self-Regulation*, ADVERT. STANDARDS BUREAU (Austl.), <https://adstandards.com.au/about/self-regulation> (last visited Feb. 19, 2017); *Fostering Community Confidence in Canadian Advertising*, ADVERT. STANDARDS CAN., <http://www.adstandards.com/en/AboutASC/aboutASC.aspx> (last visited Feb. 19, 2017); Jeffery, *supra* note 38, at 249–53.

industry association as a form of sanction for non-compliance.²⁸⁷ However, expulsion is highly unlikely,²⁸⁸ and apart from an order by the complaint-hearing body to the advertiser to remove or revise a non-compliant advertisement,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,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.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.²⁹² In the United Kingdom, the ASA also has a range of options for responding to non-broadcast advertisements that breach the CAP Code.²⁹³ For instance, online advertisers that fail to comply with ASA rulings are “named and shamed” on the ASA’s website.²⁹⁴ In the case of the BCAP Code, the United Kingdom’s co-regulatory scheme requires

²⁸⁷ See *Children's Food and Beverage Advertising Initiative Program*, *supra* note 65, at 4; Tymms, *supra* note 265, at 62.

²⁸⁸ AYRES & BRAITHWAITE, *supra* note 138, at 36.

²⁸⁹ See ADVERT. STANDARDS CAN., STANDARDS COUNCIL ORGANISATION AND PROCEDURE 3 (2015), <http://www.adstandards.com/en/ConsumerComplaints/Standards-Council-Procedure.pdf>; *Notification of the Outcome*, ADVERT. STANDARDS BUREAU (Austl.), <https://adstandards.com.au/complaint-process/notification-outcome> (last visited Oct. 14, 2017).

²⁹⁰ See, e.g., 2015 ANNUAL COMPLIANCE REPORT FOR THE RCMI AND QSRI, *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.*

²⁹¹ Andrew King & Michael Lenox, *Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program* 43 ACAD. MGMT. J. 698 (2000).

²⁹² Broadcasting Act 2009 (Act No. 18/2009) (Ir.), <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/pdf>. See also BROADCASTING AUTHORITY IRELAND, BAI COMPLIANCE AND ENFORCEMENT POLICY 10–15 (2014), <http://www.bai.ie/blog/2014/11/19/bai-launches-new-compliance-and-enforcement-policy/>.

²⁹³ See *Sanctions: Broadcast Sanctions*, ADVERT. STANDARDS AUTHORITY, <https://www.asa.org.uk/Industry-advertisers/Sanctions/Broadcast.aspx> (last visited Oct. 14, 2017); *Sanctions: Non-Broadcast Sanctions*, ADVERT. STANDARDS AUTHORITY, <http://asa.org.uk/Industry-advertisers/Sanctions/Non-broadcast.aspx> (last visited Oct. 14, 2017); THE BCAP CODE, *supra* note 50, at 5.

²⁹⁴ See *Non-Compliant Online Advertisers*, ADVERT. STANDARDS AUTHORITY, <https://www.asa.org.uk/Rulings/Non-compliant-online-advertisers.aspx> (last visited Oct. 14, 2017).

pre-clearance of broadcast advertisements to ensure compliance.²⁹⁵ 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.²⁹⁶

Broadcasters are required to comply with the BCAP Code as a condition of their license,²⁹⁷ and broadcasters who fail to comply with either the Code or ASA rulings may be referred to OfCom.²⁹⁸ 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).²⁹⁹ In summary, the ASA has primary responsibility for enforcing the co-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.³⁰⁰

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,³⁰¹ and the Office of

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.

²⁹⁷ See Communications Act 2003, ch. (2003) 21, § 325(1)(a) (U.K.), <https://www.legislation.gov.uk/ukpga/2003/21/section/325>; OFF. OF COMM. (U.K.), PROCEDURES FOR THE CONSIDERATION OF STATUTORY SANCTIONS FOR BREACHES OF BROADCAST LICENSES ¶ 1.7 (2013), http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/proceduresjuly2013/Procedures_for_consideration.pdf; OFF. OF COMM. (U.K.), TELEVISION LICENSABLE CONTENT SERVICES, GUIDANCE NOTE FOR LICENSE APPLICANTS ¶ 12 (2013), https://www.ofcom.org.uk/_data/assets/pdf_file/0020/10883/tlcs_guidance.pdf.

²⁹⁸ See BROADCAST COMPLAINT HANDLING PROCEDURES, *supra* note 268, at ¶ 51; Memorandum of Understanding, *supra* note 49, at 12–13.

²⁹⁹ See, e.g., Communications Act 2003, ch. 21, §§ 236–38, 241 (U.K.), <https://www.legislation.gov.uk/ukpga/2003/21/section/236>; Broadcasting Act 1990, c. 42, §§ 40–42 (1990) (U.K.), <https://www.legislation.gov.uk/ukpga/1990/42/contents>; PROCEDURES FOR THE CONSIDERATION OF STATUTORY SANCTIONS FOR BREACHES OF BROADCAST LICENSES, *supra* note 297, at ¶ 1.11.

³⁰⁰ AYRES & BRAITHWAITE, *supra* note 138, at 19.

³⁰¹ Consumer Protection Act, C.Q.L.R. 1971, c. P-40.1, §§ 215, 277–79, 282, 283 (Can.).

Consumer Protection can also seek voluntary undertakings³⁰² and injunctions³⁰³ to prevent companies from advertising to children.³⁰⁴ In several cases, food advertisers have pleaded guilty.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.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.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,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.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

³⁰² Consumer Protection Act, C.Q.L.R. 1971, c. P-40.1, §§ 314–16.

³⁰³ *Id.* § 316.

³⁰⁴ See OPC, ADVERTISING DIRECTED AT CHILDREN, *supra* note 41, at 18.

³⁰⁵ See BROADCAST COMPLAINT HANDLING PROCEDURES, *supra* note 268; Guilty Pleas, COALITIONPOIDS, <http://www.cqpp.qc.ca/en/our-priorities/food-marketing/marketing-to-kids/guilty-pleas/> (last visited Jan. 8, 2018).

³⁰⁶ Hastings et al., *supra* note 7; INSTITUTE OF MEDICINE, FOOD MARKETING, *supra* note 7, at 2.

³⁰⁷ *Report of the Commission on Ending Childhood Obesity*, *supra* note 3, 1–50; WHO, *Set of Recommendations*, *supra* note 14; WHO, *A Framework for Implementing the Set of Recommendations*, *supra* note 14.

³⁰⁸ 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.

³⁰⁹ Chambers et al., *supra* note 86.

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.

