

## Revisiting the Regulation Debate: The Effect of Food Marketing on Childhood Obesity

NICOLE E. HUNTER\*

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### I. INTRODUCTION

In the past decade, obesity has become a widely acknowledged epidemic.<sup>1</sup> Studies show that two-thirds of American adults are either over-

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\* J.D. Candidate, Franklin Pierce Law Center (2009); M.A., Peace and Development Studies, University of Limerick, Ireland (2003); B.S., Philosophy and Political Science, University of Scranton (2002). The author extends her thanks to Professor Margaret Sova McCabe for her help developing this note.

1. Obesity is a public health problem because it “involve[s] significant collective action problems.” David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress’s Response to the Obesity Epidemic*, 14 VA. J. SOC. POL’Y & L. 357, 362 (2007) (quoting Mark A. Hall, *The Scope and Limits of Public Health*, 46 PERSP. BIOLOGY & MED. S199, S204 (2003)). This means that “individuals acting in their own self-interest . . . will not effectively address the problem because they do not internalize some of the major costs or benefits of action or non-action.” *Id.* For example, most Americans do not realize that their tax dollars pay for medical care and disability costs related to other people’s obesity. *Id.*

weight or obese.<sup>2</sup> Adult obesity rates have grown from 15% in 1978–1980 to 32% in 2003–2004.<sup>3</sup> This epidemic is particularly troubling because of its effect on children.<sup>4</sup> The rate of childhood obesity more than tripled from 1980 to 2004, and approximately twenty-five million children are now either obese or overweight.<sup>5</sup>

Despite the widespread concern regarding childhood obesity, there is broad divergence of opinion regarding responsibility for the crisis. Whether the government, food industry, or parents are accountable has become the focus of much debate. Public health groups have attempted various strategies to confront childhood obesity, such as litigation,<sup>6</sup> legislation, and government regulation. While many researchers and advocates agree that government should play an affirmative role with respect to childhood obesity, they are very much divided over what that role should be.<sup>7</sup> For example, although none of these acts has become law, eighty-six bills have been proposed regarding obesity since the 106th Congress.<sup>8</sup> Thirteen bills in the 109th Congress dealt specifically with childhood obesity.<sup>9</sup> Although some

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2. TRUST FOR AMERICA'S HEALTH, F AS IN FAT: HOW OBESITY POLICIES ARE FAILING IN AMERICA 5 (2007), available at <http://healthyamericans.org/reports/obesity2007/Obesity2007Report.pdf>.

3. *Id.*

4. Caleb E. Mason, *Doctrinal Considerations for Fast-Food Obesity Suits*, 40 TORT TRIAL & INS. PRAC. L.J. 75, 96 (2004) (noting that children are at risk for some of the most serious obesity-related diseases, such as diabetes and asthma).

5. TRUST FOR AMERICA'S HEALTH, *supra* note 2, at 10. According to the Centers for Disease Control and Prevention, data from two National Health and Nutrition Examination Surveys show that prevalence of childhood obesity is increasing. *HHS Launches Childhood Overweight and Obesity Prevention Initiative*, HHS News Release (U.S. Dep't of Health & Human Servs., Washington, DC), Nov. 27, 2007, available at <http://www.hhs.gov/news/press/2007pres/11/pr20071127a.html>. For children aged two to five years, the prevalence increased from 5% to 13.9%; for those aged six to eleven years, prevalence increased from 6.5% to 18.8%; and for those aged twelve to nineteen years, prevalence increased from 5% to 17.4%. *Id.*

6. Much has been written about the advantages and disadvantages of litigation as a public health strategy in the obesity crisis. See, e.g., Richard C. Ausness, *Tell Me What You Eat, and I Will Tell You Whom to Sue: Big Problems Ahead for "Big Food"?*, 39 GA. L. REV. 839 (2005); Brooke Courtney, *Is Obesity Really the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation*, 15 ANNALS HEALTH L. 61 (2006); Joseph McMenamin & Andrea Tiglio, *Not the Next Tobacco: Defenses to Obesity Claims*, 61 FOOD & DRUG L.J. 445 (2006); Joseph M. Price & Rachel F. Bond, *Litigation as a Tool in Food Advertising: Consumer Protection Statutes*, 39 LOY. L.A. L. REV. 277 (2006); Sarah Taylor Roller et al., *Obesity, Food Marketing and Consumer Litigation: Threat or Opportunity?*, 61 FOOD & DRUG L.J. 419 (2006).

7. Stephen D. Sugarman & Nirit Sandman, *Fighting Childhood Obesity Through Performance-Based Regulation of the Food Industry*, 56 DUKE L.J. 1403, 1408 (2007).

8. Jess Alderman et al., *Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED. & ETHICS 90, 94 (2007).

9. *Id.* For example, the 109th Congress drafted the Prevention of Childhood Obesity Act "[t]o amend the Public Health Service Act to provide for the coordination of Federal Government policies and activities to prevent obesity in childhood, to provide for State childhood obesity prevention and control, and to establish grant programs to prevent childhood obesity within homes, schools, and communities." Prevention of Childhood Obesity Act, S. 799, 109th Cong. (2005). Additionally, Congress drafted the Childhood Obesity Reduction Act "[t]o reduce and prevent childhood obesity by encouraging schools and school districts to develop and implement local, school-based programs designed to

urge the government to inform the public about healthy eating and healthy activities, they also argue that governmental action going beyond informational and educational functions would be too oppressive.<sup>10</sup> Many advocates call for government oversight more robust than merely mandating calorie disclosures at fast-food restaurants, labels on grocery products, and nutrition education in public schools.<sup>11</sup>

Others are calling on the food industry to take action. As stated by the Surgeon General:

[The food industry] has a vital role in the prevention of overweight and obesity. Through the production and distribution of food and other consumer products, [the food industry] exerts a tremendous impact on the nutritional quality of the food we eat and the extent of physical activity in which we engage. [The food industry] can use that leverage to create and sustain an environment that encourages individuals to achieve and maintain a healthy or healthier body weight.<sup>12</sup>

Although food manufacturers defend against their role in this public health crisis by insisting individuals take personal responsibility for their health conditions, even the staunchest critics of regulation acknowledge that children are vulnerable and susceptible to marketing.<sup>13</sup> Therefore, public health advocacy groups and government agencies have recently turned their focus to the role of food marketing to children through television, as well as in schools, movies, playgrounds, through toys, and similar child-oriented strategies.<sup>14</sup>

This note will demonstrate how the food industry plays a critical role in the obesity epidemic. Part II will examine various marketing strategies to explain how food marketing affects food preferences. This section argues that marketing strategies have contributed to childhood obesity. Part III will examine the history of the failed regulation attempt in the 1970s and the development of the Children's Advertising Review Unit (CARU).

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reduce and prevent childhood obesity, promote increased physical activity, and improve nutritional choices." Childhood Obesity Reduction Act, S. 1324, 109th Cong. (2005).

10. Sugarman & Sandman, *supra* note 7, at 1408.

11. *Id.* (noting that the call for more regulation "is compelling, given mounting evidence that our food choices are not truly our own and are likely to remain that way as long as we live in a world of food advertising, promotion, and increased portion size").

12. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 28 (2001), available at <http://www.surgeongeneral.gov/topics/obesity/>.

13. See, e.g., Mason, *supra* note 4, at 96 (explaining that "children have less knowledge about nutrition, less exposure to sources of information about foods and nutrition, [and] less exposure to and ability to buy alternative food products . . . than do adults").

14. See *id.* at 96-97.

This section will critique the current self-regulatory system for food marketing to children. In light of new research demonstrating the link between food advertising of unhealthy products and obesity discussed in Part II, this section will discuss a critical issue in the regulation debate: the role of parental responsibility. Finally, Part IV briefly discusses regulatory efforts undertaken in other countries to support the conclusion that government regulation could be a workable solution to address the obesity epidemic in the United States.<sup>15</sup>

## II. EXAMINING THE FOOD INDUSTRY'S ROLE IN THE CHILDHOOD OBESITY CRISIS

### A. Types of Advertising to Children

According to the Institute of Medicine,<sup>16</sup> “the prevailing pattern of food and beverage marketing to children in America represents, at best, a missed opportunity, and, at worst, a direct threat to the health of the next generation.”<sup>17</sup> Children have become increasingly involved in media, celebrity, shopping, brand names, and other consumer practices.<sup>18</sup> They have become primary influencers of parental purchases while also gaining their own independence as consumers.<sup>19</sup> It is estimated that children aged four to twelve spent approximately \$6.1 billion of their own money in 1989, \$23.4 billion in 1997, and \$30 billion in 2002, demonstrating a 400% in-

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15. This note focuses on the effectiveness of regulation by examining the relationship between marketing and childhood obesity. However, whether such regulation is constitutional is a critical issue in the regulation debate. The food and beverage industries have a constitutionally protected right to provide truthful information about products that meet consumer demand. Eileen Salinsky, *Effects of Food Marketing to Kids: I'm Lovin' It?*, Issue Brief No. 814 (Nat'l Health Policy Forum), Aug. 15, 2006, at 2, available at [http://www.nhpf.org/library/issue-briefs/IB814\\_FoodMarketing\\_08-15-06.pdf](http://www.nhpf.org/library/issue-briefs/IB814_FoodMarketing_08-15-06.pdf). However, advertising can be regulated, particularly if it is misleading. Because children are often too young to be regarded as fully autonomous decision-makers, advertising to children raises special concerns. J. MICHAEL MCGINNIS ET AL., FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY? 341 (2006), available at [http://www.nap.edu/catalog.php?record\\_id=11514#toc](http://www.nap.edu/catalog.php?record_id=11514#toc).

16. Through the fiscal year 2004 Health, Labor, and Education Committee appropriation, Congress directed the Centers for Disease Control and Prevention (CDC) to undertake a study of the role of food and beverage marketing to children. MCGINNIS ET AL., *supra* note 15, at xiii. The CDC commissioned the Institute of Medicine (IOM) of the National Academies to conduct this study. *Id.*

17. *Id.* at 1.

18. Juliet B. Schor & Margaret Ford, *From Tastes Great to Cool: Children's Food Marketing and the Rise of the Symbolic*, 35 J.L. MED. & ETHICS 10, 10 (2006).

19. *Id.* at 11.

crease in spending.<sup>20</sup> Children's marketer James McNeal estimates that the "influence" market "continues to grow 20% per year."<sup>21</sup>

Marketers have taken full advantage of children's purchasing power and have recognized that children represent "an important demographic market because they are potential customers, they influence purchases made by parents and households, and they constitute the future adult market."<sup>22</sup> Food companies bypass parents and market directly to children using traditional commercials, product placement, brand licensing, and product tie-ins.<sup>23</sup> Children's exposure is between twenty thousand and forty thousand advertisements per year and expenditures on marketing to children rose from about two billion dollars in 1999 to approximately fifteen billion dollars in 2004.<sup>24</sup> Sweets, snacks, and beverages—which account for a third of children's total spending—constitute the largest product category.<sup>25</sup> Because food is the largest product category for both spending and advertising, food is at the core of the larger trend of the commercialization of childhood.<sup>26</sup>

Although the Internet and computer games have been growing in popularity with children, television continues to be their primary electronic medium.<sup>27</sup> Research indicates that in general, Americans receive information regarding nutrition primarily from television.<sup>28</sup> For young people throughout the industrialized world, watching television is a "dominant pastime."<sup>29</sup> Children are often unsupervised when they watch television; therefore, no adult is present to help them decipher the marketing messages.<sup>30</sup> It is estimated that 65% of American children have a television in their bedroom.<sup>31</sup> Even the youngest children are left alone when they are

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20. *Id.* at 10.

21. *Id.* at 11 (citing M. Norris, *Buy, Buy, Baby: Companies Taking the Fight for Consumer Loyalty to Kids*, ABC EVENING NEWS, May 11, 2002).

22. MCGINNIS ET AL., *supra* note 15, at 138.

23. Susan Linn & Josh Golin, *Beyond Commercials: How Food Marketers Target Children*, 39 LOY. L.A. L. REV. 13, 16 (2006).

24. Schor & Ford, *supra* note 18, at 11.

25. *Id.* at 10.

26. *Id.* at 11.

27. Linn & Golin, *supra* note 23, at 15.

28. FED. TRADE COMM'N & DEP'T OF HEALTH & HUMAN SERVS., PERSPECTIVES ON MARKETING, SELF-REGULATION, AND CHILDHOOD OBESITY 29 (2005) [hereinafter PERSPECTIVES ON MKTG.].

29. David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 521 (2006) (quoting David S. Ludwig & Steven L. Gortmaker, *Programming Obesity in Children*, 364 LANCET 226 (2004)).

30. *Id.*

31. PERSPECTIVES ON MKTG, *supra* note 28, at 29.

exposed to television—research indicates that 36% of all children aged six and under have their own televisions in their rooms.<sup>32</sup>

Children are bombarded with ads not only when watching television at home, but “[i]n virtually every aspect of the education day—from classrooms and hallways to the lunch room and athletic field—children are targets for the marketing of high-fat, highly sugared junk food and beverage products.”<sup>33</sup> Corporate-sponsored newscasts, exclusive beverage contracts, corporate-sponsored teaching materials, reward programs,<sup>34</sup> and book covers with advertisements are ways in which food marketers reach children in schools.<sup>35</sup> Some company and school officials have acknowledged that the true purpose of exclusive vending contracts is to develop brand loyalty in students at an early age.<sup>36</sup>

Another marketing strategy blends commercial content with programming or editorial content to add brand exposure.<sup>37</sup> Product or brand placement is a marketing technique that embeds a corporate or brand name, product package, signage, or other trademarks, either visually or verbally, in television programs, films, video games, magazines, books, and music, or across a range of these media simultaneously.<sup>38</sup> Food and beverages are

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32. VICTORIA J. RIDEOUT ET AL., ZERO TO SIX: ELECTRONIC MEDIA IN THE LIVES OF INFANTS, TODDLERS AND PRESCHOOLERS 7 (Fall 2003), available at <http://www.kff.org/entmedia/upload/Zero-to-Six-Electronic-Media-in-the-Lives-of-Infants-Toddlers-and-Preschoolers-PDF.pdf>.

33. Edward L. Palmer & Lisa Sofio, *Food and Beverage Marketing to Children in School*, 39 LOY. L.A. L. REV. 33, 35 (2006); see generally Karen E. Peterson & Mary Kay Fox, *Addressing the Epidemic of Childhood Obesity Through School-Based Interventions: What Has Been Done and Where Do We Go From Here?*, 35 J. L. MED. & ETHICS 113 (2007) (reviewing school-based initiatives to combat obesity).

34. CTR. FOR SCI. IN THE PUB. INTEREST, PESTERING PARENTS: HOW FOOD COMPANIES MARKET OBESITY TO CHILDREN 18 (2003) [hereinafter PESTERING PARENTS], available at <http://www.cspinet.org/reports/index.html> (follow link to Parts I–III). For example, the Pepsi Notes contest provided musical instruments to schools in exchange for note symbols collected from Pepsi and Frito-Lay packages; Pizza Hut has a school-based program that rewards elementary school students for reading a required number of books by giving them a coupon for a free Personal Pan Pizza; The Krispy Kreme Good Grades program offers elementary school children one doughnut for each “A” they earn on their report cards and up to six doughnuts per grading. *Id.*

35. See Linn & Golin, *supra* note 23, at 25–30; U.S. GEN. ACCOUNTING OFFICE, PUBLIC EDUCATION: COMMERCIAL ACTIVITIES IN SCHOOLS 8 tbl.1 (2000), available at <http://www.gao.gov/new.items/00156.pdf>. A report by the U.S. General Accounting Office sets forth a four-category framework for reviewing in-school commercialism practices: (1) product sales; (2) direct advertising; (3) indirect advertising; and (4) market research. U.S. GEN. ACCOUNTING OFFICE, *supra*, at 8 tbl. 1.

36. Michele Simon, *Can Food Companies Be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children’s Health*, 39 LOY. L.A. L. REV. 169, 195 (2006).

37. MCGINNIS ET AL., *supra* note 15, at 141.

38. *Id.*; see Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, Fed. Trade Comm’n, to Gary Ruskin, Executive Dir., Commercial Alert (Feb. 10, 2005), available at <http://www.ftc.gov/os/closings/staff/050210productplacemen.pdf>. Product placement can be: “(1) visual, i.e., where a product, logo, or sign is shown; (2) auditory, i.e., where the product is mentioned; or (3) where the product is used or plays a role in the program.” Angela J. Campbell, *Restricting the*

often among the top-selling product placements.<sup>39</sup> Marketers have increasingly employed product placement across different forms of media, such as television, to advertise food and beverages to children and youth.<sup>40</sup> A substantial number of the products placed in children's media are foods of low nutritional value.<sup>41</sup> For example, on the show *American Idol*, judges sip Coca-Cola in clearly labeled containers.<sup>42</sup>

Product placement is not limited to movies and television.<sup>43</sup> Some Web pages targeting children and teens also carry product placements. Approximately 98% of websites designed for children allow advertising, and more than two-thirds of these websites earn their revenue primarily from advertising.<sup>44</sup> This strategy has been successful. Estimates show that approximately 13.1 million children ages 2 to 11 access the Internet, and this number has been rapidly increasing.<sup>45</sup> Approximately 64% of children, ages five to fourteen, who use the Internet, do so to play games.<sup>46</sup> Statistics show that even very young children actively participate.<sup>47</sup> For example, 66% of four- to six-year-olds have Internet access in their homes, 56% use the computer on their own, and 30% have visited children's websites.<sup>48</sup>

One example of Internet advertising is the Neopets Web page, which claims to have twenty-five million mostly "tween-aged" visitors.<sup>49</sup> This website encourages children to obtain "Neopoints" by playing games and completing surveys.<sup>50</sup> On the site, a child can create and care for a pet by purchasing toys, medicines, and food at McDonald's using the Neo-

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*Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 LOY. L.A. L. REV. 447, 448 (2006).

39. *Id.* at 455.

40. *Id.* at 452-54; MCGINNIS ET AL., *supra* note 15, at 164.

41. Campbell, *supra* note 38, at 455. For example, in the movie *Spider-Man*, Spider-Man uses his web-spinning power to retrieve a Dr. Pepper. *Id.* at 452. Other examples of children's movies with paid product placement include "*Madagascar* (Coca-Cola, Denny's), *Scooby-Doo 2* (Burger King, Gatorade), *Fantastic Four* (Burger King, Pepsi, Kool-Aid, Mountain Dew, Oscar Meyer), and *Spider-Man 2* (Dr. Pepper, Fritos, Pop-Tarts)." *Id.*

42. *Id.*

43. "Product placement is also turning up in other, less-expected places. In recent years, a number of counting and activity books for very young children have featured branded snack foods and cereals. McDonalds recently hired a marketing firm to encourage hip-hop artists to integrate the Big Mac into their songs." *Id.* at 454.

44. ELIZABETH S. MOORE, KAISER FAMILY FOUNDATION, IT'S CHILD'S PLAY: ADVERTISING AND THE ONLINE MARKETING OF FOOD TO CHILDREN 1 (2006), available at <http://www.kff.org/entmedia/upload/7536.pdf>.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Campbell, *supra* note 38, at 453.

50. *Id.*

points.<sup>51</sup> This marketing strategy is referred to as an “advergame,” a type of “branded entertainment” in which a brand is inserted within an entertainment property.<sup>52</sup> Many of these Web pages encourage children to talk to one another about a brand.<sup>53</sup> Approximately 64% of the sites give children an opportunity to send an e-greeting or e-mail invitation to their friends encouraging them to visit the site.<sup>54</sup> These messages are another strategy for advertising because they contain a brand name, logo, or brand character.<sup>55</sup>

Internet marketing is successful primarily because of its capacity to engage an audience at a high level.<sup>56</sup> Unlike a passive medium like television that captures a child’s attention for thirty seconds, surfing through a Web page is an interactive process that requires the audience to participate in a continuing series of decisions and actions for at least several minutes.<sup>57</sup> Internet marketing is also effective because the boundaries between advertising and other content may be more difficult for a child to distinguish.<sup>58</sup> For example, there are no natural breaks between commercial and non-commercial content as in television.<sup>59</sup> Although some advertisers remind children of the marketing intent of the site by posting a message such as “Hey Kids, This is Advertising,” these advertisers are in the minority.<sup>60</sup> The Kaiser Family Foundation’s advergame study reported that only 18% of advertisers provide such “ad break” reminders.<sup>61</sup>

Video games are another medium which will increasingly be used for children’s product placement.<sup>62</sup> One advertising agency, Massive, is placing products in computer and video games for advertisers such as Dunkin’ Donuts and Coca-Cola.<sup>63</sup> Massive’s CEO has explained that “[a]dvertising is seamlessly integrated into games [and] takes many forms: billboards, posters, branded messages on delivery trucks and computer and TV screens.”<sup>64</sup> Massive’s technology allows different advertisements to be

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51. *Id.*

52. MOORE, *supra* note 44, at 1.

53. *Id.* at 28.

54. *Id.*

55. *Id.*

56. *Id.* at 1.

57. *Id.*

58. *Id.* at 27.

59. *Id.*

60. *Id.* at 27, 47.

61. *Id.* at 27.

62. Campbell, *supra* note 38, at 454.

63. *Id.*

64. *Id.*

inserted depending on a variety of factors such as time of day or geography.<sup>65</sup>

Advertisers also use character marketing to promote their products. According to the Institute of Medicine, “[t]he use of child-oriented licensed cartoon and other fictional or real-life spokes-characters has been a prevalent practice used to promote low-nutrient and high-calorie food and beverage products.”<sup>66</sup> Some advertisers have created characters, such as Chester Cheetah, Tony the Tiger, and Ronald McDonald, specifically to promote their products.<sup>67</sup> Other “celebrity spokes-characters” appear in children’s books, movies, television shows, and video games to market other unrelated products.<sup>68</sup> For example, SpongeBob Square Pants, a Nickelodeon character, appears on packaging for food products such as Kellogg’s cereal, Cheez-It snack crackers, and Pop-Tarts.<sup>69</sup> Fast food restaurants also use this marketing technique by putting toy characters from popular children’s movies into their children’s meals.<sup>70</sup> The Federal Trade Commission (FTC) Chairman has acknowledged the influence of this marketing technique, stating that “[f]or better or worse, beloved characters like Sesame Street’s Elmo, capture the attention of young children in ways that parents and teachers cannot.”<sup>71</sup>

Although character marketing has become increasingly popular in movies, Web pages, and video games, this technique also remains popular in television commercials.<sup>72</sup>

Most of the movies and many of the TV programs children watch are marketed with off-screen food promotions. Once a program is associated with a particular brand, the program itself becomes an ad for that food. Visit any supermarket and you’ll find shelves filled with examples of these links between the media and food manufacturers. . . . Tie-ins like these are designed to lure children into selecting foods associated with favorite movie or TV characters. Even characters from children’s programs shown on public broadcasting stations, such as Sesame Street and Arthur, which are

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65. *Id.*

66. MCGINNIS ET AL., *supra* note 15, at 175.

67. Campbell, *supra* note 38, at 460.

68. *Id.*

69. *Id.* at 460–61.

70. *Id.* at 461.

71. Deborah Platt Majoras, *Food For Thought: The FTC and Market Influences on Consumer Health*, 62 FOOD & DRUG L.J. 433, 435 (2007).

72. Campbell, *supra* note 38, at 463.

supposed to provide a non-commercial alternative for children, are frequently used to promote food products to children.<sup>73</sup>

### B. Cause and Effect: Marketing and Childhood Obesity

The food industry exerts enormous influence over consumers' food preferences and choices.<sup>74</sup> Companies clearly believe that advertising and other marketing techniques are effective ways to influence children's food choices.<sup>75</sup> Kraft and fellow members General Mills and the Kellogg Company, which comprise the top three advertisers of packaged food to children, spend approximately \$380 million annually in the U.S. alone.<sup>76</sup> The evidence also shows that "[m]arketing works."<sup>77</sup> Decades of studies show that food marketing to children, particularly through television, is effective.<sup>78</sup> In the late 1970s, Marvin Goldberg studied differences between children who saw and did not see television advertising, and found that sugared cereals were more likely to be present in the homes of the former.<sup>79</sup> Another study in the 1980s showed that weekly television viewing time is correlated significantly with requests for specified advertised products as well as overall caloric intake for children aged three to eight.<sup>80</sup> In the 1990s, a "study of fourth and fifth graders found that increased television viewing is related to poor nutritional habits . . . ."<sup>81</sup> One more recent study found that even brief exposure to advertisements influenced low-income preschoolers to choose the advertised food products more often.<sup>82</sup>

The Institute of Medicine's report reviewed evidence of marketing influence on children's food preferences and on the preponderance of televi-

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73. *Id.* at 464 (quoting SUSAN LINN, CONSUMING KIDS: THE HOSTILE TAKEOVER OF CHILDHOOD 97 (2004)).

74. Alderman et al., *supra* note 8, at 101.

75. For example, on its website, McDonald's notes that, "Thanks to television commercials, his participation in fundraising events, and daily visits with children in hospitals, schools and McDonald's restaurants, Ronald McDonald has become a national institution—recognized by 96 percent of American children." PESTERING PARENTS, *supra* note 34, at 35.

76. Simon, *supra* note 36, at 210.

77. MCGINNIS ET AL., *supra* note 15, at xiii.

78. Schor & Ford, *supra* note 18, at 13.

79. *Id.* (citing Marvin E. Goldberg, *A Quasi-Experiment Assessing the Effectiveness of TV Advertising Directed to Children*, XXVII J. MARKETING RES. 445 (1999); Gerald J. Gorn & Marvin E. Goldberg, *Behavioral Evidence of the Effects of Televised Food Messages on Children*, 9 J. OF CONSUMER RES. 200 (1982)).

80. *Id.* (citing Howard L. Taras et al., *Television's Influence on Children's Diet and Physical Activity*, 10 DEVELOPMENTAL & BEHAV. PEDIATRICS 176 (1989)).

81. *Id.* (citing Nancy Signorielli & Margaret Lears, *Television and Children's Conceptions of Nutrition: Unhealthy Messages*, 4 HEALTH COMM. 245 (1992)).

82. *Id.* (citing Dina L. G. Borzekowski & Thomas N. Robinson, *The 30-Second Effect: An Experiment Revealing the Impact of Television Commercials on Food Preferences of Preschoolers*, 101 J. AM. DIETETIC ASS'N 42 (2001)).

sion food and beverage advertising promoting high-calorie and low-nutrient products.<sup>83</sup> The report found that television advertising influences children to prefer and request high-calorie and low-nutrient foods and beverages.<sup>84</sup> The Institute of Medicine concluded: “Statistically, there is strong evidence that exposure to television advertising is associated with adiposity in children ages 2–11 years and teens ages 12–18 years.”<sup>85</sup>

Studies of food marketing effects on children have not been limited to the United States. For example, an extensive literature review in the United Kingdom also found sufficient evidence to conclude that food marketing impacts children’s preferences, purchase behavior, and consumption of food products.<sup>86</sup> “These studies found that advertising affected the food preschoolers said they liked, vending machine displays influenced what teenagers purchased, and advertisements for soft drinks and sugar cereal reduced children’s ability to determine which products contained real fruit and which were artificial.”<sup>87</sup>

### III. REGULATION: EXAMINING THE GOVERNMENT’S ROLE IN THE OBESITY CRISIS

Despite the strong evidence establishing a connection between food marketing to children and obesity, past efforts to regulate such advertising have been unsuccessful. Furthermore, the current self-regulatory system has failed to implement or enforce consistent marketing standards.

#### A. *The Renewed Regulation Debate*

Commentators note that the revived campaign for governmental oversight sounds much like history repeating. In the 1970s, advocacy groups petitioned the Federal Communications Commission (FCC) and the FTC to regulate advertising to children. Three decades later, the battle over appropriate responsibility for children’s advertising continues. The Children’s Advertising Review Unit (CARU), the self-regulatory body that evaluates child-directed advertising for truthfulness, accuracy, and consistency

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83. MCGINNIS ET AL., *supra* note 15, at 8.

84. *Id.*

85. *Id.* at 279.

86. Amanda Shaffer et al., *Changing the Food Environment: Community Engagement Strategies and Place-Based Policy Tools that Address the Influence of Marketing*, 39 LOY. L.A. L. REV. 647, 652 (2006) (citing GERARD HASTINGS ET AL., REVIEW OF RESEARCH ON THE EFFECTS OF FOOD PROMOTION TO CHILDREN: FINAL REPORT 180 (2003)).

87. *Id.* (citing HASTINGS ET AL., *supra* note 86, at 2, 118–19, 132–36).

cy,<sup>88</sup> serves as an important deterrent to child-directed advertising that promotes excessive consumption or misleading nutritional information.<sup>89</sup> When the attempt to regulate advertising to children in 1981 failed, the FTC Staff observed, “voluntary initiatives may well be the most effective mechanism for addressing the concerns expressed in the proceeding.”<sup>90</sup> According to former FTC Assistant Director for Advertising Practices Wallace Snyder, who was responsible for approving the 1981 Staff Report:

[c]hildren are far more sophisticated in understanding what they see and hear today than they were in the 1970s. The combination of children’s sophistication, industry’s recognition of its responsibility to children, and CARU’s voluntary guidelines benefiting children and industry have resulted in children that are well protected in the world of advertising.<sup>91</sup>

However, “[h]eightedened awareness of the childhood obesity epidemic—eighty-four percent of Americans consider childhood obesity a major problem—has renewed the call for regulatory and legislative action that has been relatively dormant for more than three decades.”<sup>92</sup> For example, a bill proposed in the House of Representatives calls for an overhaul of the present self-regulation system for children’s advertising. The Children’s Health Federal Trade Commission Authority Restoration Act would restore the authority of the FTC to issue regulations that restrict marketing or advertising of foods to children under age eighteen if the FTC determines that certain foods and beverages are detrimental to the health of children.<sup>93</sup> Many advocates are now arguing that the “world of advertising”<sup>94</sup> is not protecting children, but is endangering their health.<sup>95</sup> According to the Center for Science in the Public Interest, a leading public advocacy group, “[g]iven the rising obesity and diabetes rates and children’s poor eating habits, it is time to revisit current practices and strengthen laws and regula-

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88. Children’s Advertising Review Unit, About the Children’s Advertising Review Unit (CARU), <http://www.caru.org/about/> (last visited Mar. 9, 2009).

89. William C. MacLeod & Judith L. Oldham, *Kid-Vid Revisited: Important Lessons for the Childhood Obesity Debate*, 18 ANTITRUST 31, 34 (2004).

90. *Id.* (citing FED. TRADE COMM’N, FTC FINAL STAFF REPORT AND RECOMMENDATION 13 (Mar. 1981) [hereinafter 1981 STAFF REPORT]).

91. *Id.*

92. Alderman et al., *supra* note 8, at 93.

93. Children’s Health Federal Trade Commission Authority Restoration Act, H.R. 5737, 109th Cong. (2006).

94. MacLeod & Oldham, *supra* note 89, at 34 (citing 1981 STAFF REPORT).

95. See PESTERING PARENTS, *supra* note 34, at 51 (noting that overall, little progress has been made in protecting children from food marketers).

tions to better protect children's health and support parents' efforts to feed their children healthy diets."<sup>96</sup>

Since the 1970s, marketing to children via television has catalyzed advocacy movements and government regulation.<sup>97</sup> Many of the same concerns at issue during the 1970s are being raised again by public interest groups. The debate over regulation led the FTC to initiate a rulemaking regulation which was "the most exhaustive examination ever undertaken of the practical realities that would have to be addressed in any effort to restrict advertising to children."<sup>98</sup> It is therefore instructive to examine past efforts to regulate advertising to children and to consider lessons learned from those failed attempts.<sup>99</sup>

### B. Revisiting "Kid Vid"

In the early 1970s, public interest groups such as Action for Children's Television (ACT) and the Center for Science in the Public Interest (CSPI) petitioned the FCC and FTC<sup>100</sup> to review and limit the unregulated advertising of highly sugared foods with low nutritional value, such as candy and cereals, to children.<sup>101</sup> These advocates were concerned about adverse effects of "host selling" on the physical and psychological health of children.<sup>102</sup>

In response to the petitions for government oversight and mounting research showing that advertising to young children is inherently unfair because they are incapable of understanding the persuasive selling intent of

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96. *Id.* at 2.

97. Alderman et al., *supra* note 8, at 97.

98. FED. TRADE COMM'N, ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT 9 (2004) [hereinafter ADVERTISING TO KIDS AND THE FTC], available at <http://www.ftc.gov/speeches/beales/040802adstokids.pdf>.

99. See Mary Engle, Assoc. Dir., FTC Div. of Adver. Practices, Presentation at the IOM Meeting on Food Marketing and the Diets of Children and Youth: Regulating Food Advertising to Children: An Historical Perspective (Oct. 14, 2004), available at <http://www.iom.edu/File.aspx?ID=23031> (providing an outline of FTC history); NAT'L ADVER. REVIEW COUNCIL, GUIDANCE FOR FOOD ADVERTISING SELF-REGULATION 25 (2004), available at [http://www.narcpartners.org/reports/NARC\\_White\\_Paper\\_6-1-04.pdf](http://www.narcpartners.org/reports/NARC_White_Paper_6-1-04.pdf) (examining the history of regulation from the National Advertising Review Council's perspective).

100. Both the FTC and FCC derive their authority to regulate advertising from the Commerce Clause of the federal Constitution, which grants jurisdiction to the federal government over commerce among states. U.S. CONST. art I, §8. The FTC's basic authority to regulate advertising and marketing practices derives from Federal Trade Commission Act (FTC Act), 15 U.S.C. § 45(a)(2) (2006), which prohibits unfair or deceptive acts or practices in commerce.

101. Alderman et al., *supra* note 8, at 97.

102. Ellen J. Fried, *Assessing Effectiveness of Self-Regulation: A Case Study of the Children's Advertising Review Unit*, 39 LOY. L.A. L. REV. 93, 94 (2006). "Host selling is the appearance by program characters in television commercials and sales promotions within the context of that same character's program." *Id.* at 94 n.7.

advertisements,<sup>103</sup> the advertising industry created the self-regulatory Children's Advertising Review Unit (CARU) in 1974.<sup>104</sup> CARU, the "children's arm of the advertising industry's self-regulation program," was founded as part of an alliance between the major advertising trade associations through the National Advertising Review Council (NARC).<sup>105</sup> CARU's policy and direction are set by NARC, a group made up of the Council of Better Business Bureaus (CBBB), which administers CARU's day-to-day operations, and the three major advertising associations: the Association of National Advertisers (ANA), the American Association of Advertising Agencies (AAAA), and the American Advertising Federation (AAF).<sup>106</sup> It is directly funded by annual fees paid by companies who advertise to children.<sup>107</sup>

This self-regulatory agency did not diminish concerns about advertising sugared foods to children.<sup>108</sup> Rather, advocacy groups sought greater government oversight.<sup>109</sup> In 1977 and 1978, advocacy groups filed several petitions with both the FCC and FTC.<sup>110</sup> The Action for Children's Television (ACT) and Center for Science in the Public Interest (CSPI) requested rulemaking to regulate television advertising for candy and sugared food products directed to children in 1977.<sup>111</sup> Consumers Union of the United States, Inc. (CU) and Committee on Children's Television, Inc. (CCT) filed a petition in 1978, which sought rulemaking to regulate all television advertising oriented to young children.<sup>112</sup> In response to petitions filed by ACT and CSPI, the FTC conducted extensive fact-finding and compiled a staff report stating that "televised advertising of sugared products to children . . . too young to understand the selling purpose . . . violate[s] the FTC Act."<sup>113</sup> The staff proposed either: (1) a complete ban on advertising directed at children eight and under, (2) a ban of all ads for foods linked to poor dental health directed at children twelve and under, or (3) a requirement that ads for sugared foods contain disclosures of the health effects of

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103. Alderman et al., *supra* note 8, at 97 (citing D. Kunkel, *Children and Television Advertising*, in HANDBOOK OF CHILDREN AND THE MEDIA 375–93 (D.G. Singer & J.L. Singer eds., 2001)).

104. Children's Advertising Review Unit, *supra* note 87.

105. *Id.*

106. PERSPECTIVES ON MKTG., *supra* note 28, at 40.

107. *Id.*

108. Fried, *supra* note 102, at 95.

109. *Id.*

110. Children's Advertising, 46 Fed. Reg. 48,710 (Oct. 2, 1981) (codified at 16 C.F.R. 461).

111. *Id.*

112. *Id.*

113. Alderman et al., *supra* note 8, at 97 (citing FED. TRADE COMM'N, FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN 10–11 (Feb. 1978)).

the foods.<sup>114</sup> With this staff approval, the FTC embarked on a rulemaking that came to be known as “Kid Vid.”<sup>115</sup> The FTC issued a *Notice of Proposed Rulemaking* (NPR) in 1978 that proposed major regulation of advertisements aired during children’s television.<sup>116</sup> In response to the NPR, consumer organizations, academics, scientists, government officials, broadcasters, product manufacturers, advertising agencies, associations, and individual consumers submitted hundreds of written comments, comprising more than 60,000 pages.<sup>117</sup> More than 6,000 pages of hearing transcripts were generated at the legislative hearings, held in San Francisco and Washington, DC.<sup>118</sup> The FTC received harsh political and public response to this proposed rulemaking.<sup>119</sup> Congress also reacted negatively to “Kid Vid.” Not only did Congress pass legislation limiting the FTC’s power to enforce any rule relating to children’s advertising, but it also failed to renew the FTC’s funding, which shut down the agency temporarily.<sup>120</sup> According to FTC’s 2004 report on advertising to children, “[t]he children’s advertising proceeding was toxic to the Commission as an institution.”<sup>121</sup> The congressional response was not merely the result of “skilled lobbying by politically well connected industries,” but was also a reaction to public perception of the proposal as “grossly overreaching.”<sup>122</sup>

Congress effectively put an end to the rulemaking when it enacted the FTC Improvements Act of 1980, which revoked the Commission’s authority “to promulgate any rule in the children’s advertising proceeding . . . or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice

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114. ADVERTISING TO KIDS AND THE FTC, *supra* note 99, at 6 (citing Children’s Advertising, 43 Fed. Reg. at 17,967). The Commission also sought comment on remedial approaches, such as affirmative disclosures placed in advertisements directed to children, affirmative disclosures and nutritional information contained in separate advertisements directed to children, limitations placed on particular advertising messages and/or techniques used to advertise to very young children, and limitations upon the number and frequency of advertisements directed to very young children. *Id.* at 6 n.27. The Notice of Proposed Rulemaking also raised issues such as whether it is unfair or deceptive to direct advertising to children too young to understand it, the impact of the proposed remedies on children’s television programming, the causal relationship, if any, between advertising sugared products and tooth decay, and the constitutionality of the proposed advertising bans under the First Amendment. *Id.* at 7.

115. *Id.* at 6.

116. *Id.*

117. *Id.* at 7 (citing 1981 STAFF REPORT, *supra* note 90, at 13).

118. *Id.*

119. William A. Ramsey, *Rethinking Regulation of Advertising Aimed at Children*, 58 FED. COMM. L.J. 361, 362–63 (2006) (citing Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22 (calling the rulemaking proposal “a preposterous intervention that would turn the FTC into a great national nanny”)).

120. *Id.* at 363.

121. ADVERTISING TO KIDS AND THE FTC, *supra* note 97, at 7.

122. *Id.* at 8.

in or affecting commerce.”<sup>123</sup> Without its unfairness jurisdiction as a basis for rulemaking, the FTC could only restrict advertising based on deception.<sup>124</sup> Deception requires a showing that “there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”<sup>125</sup> However, there were no such facts.<sup>126</sup> Particularly, FTC found that there was no basis for concluding that food advertising had any adverse effect on children between eight and twelve years old.<sup>127</sup>

Following six weeks of legislative hearings, after an unsuccessful attempt to develop advertising standards under the new law, the FTC staff announced, “while the rulemaking record establishes that child-oriented television advertising is a legitimate cause for public concern, there do not appear to be, at the present time, workable solutions which the Commission can implement through rulemaking in response to the problems articulated during the course of the proceeding.”<sup>128</sup>

The FTC terminated the rulemaking because proof was lacking to show either that advertising of sugared products to children under twelve years old adversely affected their attitudes about nutrition, or that it was responsible for the ill effects of sugared products on teeth.<sup>129</sup> Therefore, the Commission was unable to conclude that advertising sugared foods to children was either unfair or deceptive.<sup>130</sup> The Commission adopted the recommendation of its staff and brought the “Kid Vid”<sup>131</sup> rulemaking to a close,<sup>132</sup> stating that the Commission was unwilling to commit more resources to fund further studies “at the expense of more pressing enforcement priorities.”<sup>133</sup> Because the Improvements Act stripped the agency of its unfairness jurisdiction in child-related advertising issues, oversight of children’s advertising essentially defaulted to CARU.<sup>134</sup>

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123. FTC Improvements Act of 1980, Pub. L. No. 96-252, §§ 11(a)(1), 11(a)(3), 94 Stat. 374 (codified in part at 15 U.S.C. § 57a).

124. 46 Fed. Reg. 48,711 (Oct. 2, 1981).

125. ADVERTISING TO KIDS AND THE FTC, *supra* note 97, at 5 (quoting the Deception Policy Statement, appended to *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 176 (1984)). Elements of a finding of deception include: (1) the representation, omission, or practice must be likely to mislead the consumer; (2) the act or practice must be considered from the perspective of the reasonable consumer; and (3) the representation, omission, or practice must be material, that is, likely to affect a consumer’s choice or conduct, thereby leading to injury. *Id.* at 176–83.

126. MacLeod & Oldham, *supra* note 89, at 33.

127. *Id.*

128. ADVERTISING TO KIDS AND THE FTC, *supra* note 98, at 7 (citing 1981 FINAL STAFF REPORT, *supra* note 90, at 2).

129. 46 Fed. Reg. 48,713 (Oct. 2, 1981).

130. *Id.*

131. ADVERTISING TO KIDS AND THE FTC, *supra* note 98, at 6.

132. 46 Fed. Reg. 48,710 (Oct. 2, 1981).

133. 46 Fed. Reg. 48,714 (Oct. 2, 1981).

134. Fried, *supra* note 102, at 98.

### C. Advertising to Kids: The Current Self-Regulatory System

After the FTC's unsuccessful attempt to regulate advertising aimed at children, there was not much governmental involvement in that area until 1990, when Congress passed the Children's Television Act (CTA).<sup>135</sup> This act instructed the FCC to enforce certain requirements for television broadcasters.<sup>136</sup> However, the government has left the substantive content of commercials unfettered. That essentially leaves CARU as the watchdog over advertising to children.<sup>137</sup> CARU has had a total staff of six<sup>138</sup> and an advisory board comprised of academics.<sup>139</sup> A bilingual staff member was added in late 2004 to assist in monitoring Spanish language advertisements.<sup>140</sup> CARU's guidelines

provide, for example, that child-directed advertising should not exploit a child's imagination, should not depict products used in unsafe ways, should not convey the impression that possession of the product will result in more acceptance of a child by his or her peers and, when feasible, should promote pro-social behavior. The Guidelines apply to advertising targeted at children under twelve years of age in all media, including print, broadcast and cable television, radio, video, point-of-sale, packaging, and online advertising.<sup>141</sup>

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135. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996.

136. The CTA applies to both over-the-air commercial television broadcasters, as well as cable and digital providers, and requires that (1) the FCC establish standards for broadcasters regarding the amount of children's television programming aired and the FCC require broadcasters to air three hours of "core" children's programming per week, Policies and Rules Concerning Children's Television Programming, *Report and Order*, 11 F.C.C.R. 10660, para. 4 (1996), and (2) broadcasters must limit the amount of commercial time aired during children's television programs to 10.5 minutes per hour or less on weekends and 12 minutes per hour or less on weekdays, 47 U.S.C. § 303a(b).

137. See Children's Advertising Review Unit, <http://www.caru.org> (last visited Mar. 9, 2009).

138. Children's Advertising Review Unit, Staff Listing, <http://www.caru.org/about/staff.aspx> (last visited Mar. 9, 2009).

139. Children's Advertising Review Unit, Academic Advisory Board, <http://www.caru.org/about/advisory.aspx> (last visited Mar. 9, 2009).

140. See Press Release, Children's Advertising Review Unit, CARU Launches New Program to Monitor Advertising to Children in Spanish-Language Media (Sept. 9, 2004), available at <http://www.caru.org/news/2004/spanishlang.asp>.

141. NAT'L ADVER. REVIEW COUNCIL, *supra* note 99, at 26; see also THE CHILDREN'S ADVERTISING REVIEW UNIT (CARU), SELF-REGULATORY PROGRAM FOR CHILDREN'S ADVERTISING 5 (2006), available at <http://www.caru.org/guidelines/guidelines.pdf>. The following "Core Principles" apply to all practices covered by the self-regulatory program:

1. Advertisers have special responsibilities when advertising to children or collecting data from children online. They should take into account the limited knowledge, experience, sophistication and maturity of the audience to which the message is directed. They should recognize that younger children have a limited capacity to evaluate the credibility of information, may not un-

Since 1975, CARU has reviewed advertising practices, completing more than 1,100 formal and informal (expedited) inquiries.<sup>142</sup> To conduct an inquiry, the CARU attorney or advertising review specialist monitors advertisements and requests substantiation from an advertiser for claims and/or information and materials establishing compliance with CARU's Guidelines.<sup>143</sup> After reviewing the submissions of the advertiser, CARU offers the advertiser an opportunity to meet with the CARU staff member conducting the investigation.<sup>144</sup> For formal inquiries, the CARU staff member, together with CARU's director, reviews all the evidence and any applicable laws and regulations and issues a decision, which outlines CARU's and the advertiser's positions, summarizes the evidence, and determines whether the advertising complies with CARU's Guidelines.<sup>145</sup> If a child-directed advertisement does not comply with the Guidelines, CARU recommends the advertiser modify or withdraw its advertising.<sup>146</sup>

CARU announces all formal decisions through press releases.<sup>147</sup> Advertisers may appeal a formal decision to the National Advertising Review Board, although to date, no formal CARU decision has been appealed.<sup>148</sup> CARU reports violations of its recommendations to the FTC, which re-

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derstand the persuasive intent of advertising, and may not even understand that they are being subject to advertising.

2. Advertising should be neither deceptive nor unfair, as these terms are applied under the Federal Trade Commission Act, to the children to whom it is directed.

3. Advertisers should have adequate substantiation for objective advertising claims, as those claims are reasonably interpreted by the children to whom they are directed.

4. Advertising should not stimulate children's unreasonable expectations about product quality or performance.

5. Products and content inappropriate for children should not be advertised directly to them.

6. Advertisers should avoid social stereotyping and appeals to prejudice, and are encouraged to incorporate minority and other groups in advertisements and to present positive role models whenever possible.

7. Advertisers are encouraged to capitalize on the potential of advertising to serve an educational role and influence positive personal qualities and behaviors in children, e.g., being honest, and respectful of others, taking safety precautions, engaging in physical activity.

8. Although there are many influences that affect a child's personal and social development, it remains the prime responsibility of the parents to provide guidance for children. Advertisers should contribute to this parent-child relationship in a constructive manner.

*Id.*

142. NAT'L ADVER. REVIEW COUNCIL, *supra* note 99, at 33.

143. *Id.* at 31.

144. *Id.*

145. *Id.*

146. *Id.* at 32.

147. *Id.*

148. *Id.*

quires the advertisers to pay fines to the government.<sup>149</sup> In 1991 CARU also began conducting expedited procedures for advertising that is substantiated or changed within ten business days of the commencement of a CARU inquiry.<sup>150</sup>

#### D. Analyzing Self-Regulation

In July 2005, the FTC and the Department of Health and Human Services (HHS) held a public workshop to consider what the private sector can and should do to help lower childhood obesity rates.<sup>151</sup> The workshop reviewed current food marketing practices and examined current self-regulatory efforts governing food marketing to children.<sup>152</sup> In the panel discussions and in the comments received for the workshop, views on the value of the CARU Guidelines varied widely. The discussion at the FTC Conference on Childhood Obesity reveals the divergence of opinion on the effectiveness of the self-regulatory system.<sup>153</sup>

Overall, industry members felt the guides have “worked well” and have done an adequate job in protecting children from false, misleading, or inappropriate food ads. Consumer group participants were far less enthusiastic about the guides, indicating that self-regulation was “not working,” was a “failure,” or should be “abandoned.” Senator Harkin, who offered opening remarks at the workshop, expressed the view that self-regulation to date has not been effective. Some participants pointed to recent ad campaigns that they say violated the CARU Guides, arguing that CARU, whose budget is funded by those it regulates, cannot be relied on to independently police food industry advertising.<sup>154</sup>

According to the FTC, effective self-regulation requires the system to adjust its enforcement strategies and standards in light of the food industry’s new developments.<sup>155</sup> Effective self-regulation measures must be accepted and enforced by the industry member and transparent to the public.<sup>156</sup> In addition, self-regulation must be conducted independently from its members to objectively evaluate compliance with guidelines.<sup>157</sup>

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149. *Id.*

150. *Id.*

151. PERSPECTIVES ON MKTG., *supra* note 28, at 1.

152. *Id.* at 23.

153. *Id.* at 43.

154. *Id.*

155. *Id.*

156. *Id.* at 39.

157. *Id.*

According to the Center for Science in the Public Interest, “the CARU Guidelines look good on paper.”<sup>158</sup> However, the Guidelines are only enforceable to the extent the companies voluntarily respond to CARU’s limited complaint procedures.<sup>159</sup> Because CARU’s guidelines are effectively unenforceable, they do not address the core problem: the manipulation of children’s food preferences and choices through advertising.<sup>160</sup> Couching the sales pitch in different terms does not change the fact that children are induced through advertising to buy foods with low nutritional value.<sup>161</sup>

Because CARU lacks the power to prevent specific ads from running, and has no ability to sanction advertisers that break the rules, it cannot effectively regulate the industry.<sup>162</sup> According to CARU’s director, “[s]ome of our guidelines have no backup in law, so somebody can actually blow us off and all we do is publish the results and give them bad publicity.”<sup>163</sup>

For example, on July 18, 2007, in response to escalated pressure by advocacy groups on food companies to curtail child-targeted marketing, “eleven major food companies voluntarily pledged their commitment to restrict marketing to children and, for the first time, to make their marketing plans available to the Better Business Bureau and CARU.”<sup>164</sup> Kellogg’s pledged to stop marketing to children younger than twelve and curtail marketing using media-licensed characters by 2008.<sup>165</sup> The Kellogg Company’s unprecedented voluntary agreement would result in marketing strategies that no longer target children, with or without media characters.<sup>166</sup> Other companies, such as Kraft Co., General Mills, and Walt Disney Co., have recently undertaken other self-regulation efforts and voluntary restrictions.<sup>167</sup> However, these efforts vary on a company-by-company basis, resulting in inconsistent standards.<sup>168</sup> For example, General Mills announced it will limit advertising of Trix cereal to children under age twelve, but will not limit marketing of Cocoa Puffs.<sup>169</sup> Although PepsiCo—which owns Frito-Lay, Quaker Foods, Pepsi, and Gatorade—has agreed to limit its marketing to children, it will continue advertising Baked Cheetos Cheese Flavored

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158. PESTERING PARENTS, *supra* note 34, at 43.

159. *Id.*

160. *Id.* at 44.

161. *Id.*

162. Fried, *supra* note 102, at 136–37.

163. Elizabeth L. Lascoux, *Children’s Advertising Review Unit*, 16 ST. JOHN’S J. LEGAL COMMENT. 649, 650 (2002).

164. Susan Linn & Courtney Novosat, *Calories for Sale: Food Marketing to Children in the Twenty-First Century*, 615 ANNALS AM. ACAD. POL. & SOC. SCI. 133, 149 (2008).

165. *Id.* at 148.

166. *Id.*

167. TRUST FOR AMERICA’S HEALTH, *supra* note 2, at 43.

168. Linn & Novosat, *supra* note 164, at 149.

169. TRUST FOR AMERICA’S HEALTH, *supra* note 2, at 43.

Snacks and Gatorade drinks to children under twelve.<sup>170</sup> In addition to these inconsistent standards for marketing reform, no universal commitment by the food industry to restrict marketing to children has been achieved. Although some manufacturers have made commitments to reduce food marketing to children, many of the most prominent marketers—such as Burger King, Nestle, ConAgra, and Chuck E. Cheese—have publicly refused to voluntarily restrict advertising to children.<sup>171</sup> The lack of any uniform standard for company commitments regarding marketing to children represents an inherent flaw in self-regulation and highlights the impossibility of monitoring compliance.<sup>172</sup>

Even the FTC Chairman, who asserts that industry-generated approaches can address problems more quickly, creatively, and flexibly than government regulation, has acknowledged that self-regulation works only if it has real substance, if industry members participate, and if there are consequences for noncompliance.<sup>173</sup> The recent example of limited participation in marketing reform demonstrates that the current self-regulatory system fails to meet these elements for success.

Another problem is that CARU's process is heavily dominated by those whom it purports to control.<sup>174</sup> For example, marketers or their advertising agencies comprise eighteen of the twenty-two positions on CARU's advisory board.<sup>175</sup> Large corporations benefit most from this situation, but these are the same entities that lead the campaign supporting deregulation.<sup>176</sup> Perhaps this is a reason for CARU's inefficiency.<sup>177</sup> As former Director of Commercial Clearances for MTV Networks Lisa Slythe said, "By the time they take action, the commercial has usual[ly] finished running as scheduled and been viewed by millions of children."<sup>178</sup>

In September 2005, Kraft announced that by the end of 2006, only products that meet Kraft's Sensible Solution nutrition standards would appear on Kraft websites that primarily reach children ages six through

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170. *Id.*

171. Linn & Novosat, *supra* note 164, at 149.

172. *Id.*

173. Deborah Platt Majoras, FTC Chairman, Remarks at the Obesity Liability Conference: The FTC: Fostering Positive Market Initiatives to Combat Obesity 9 (May 11, 2005), available at <http://www.ftc.gov/speeches/majoras/050511obesityliability.pdf>.

174. Stephen Gardner, *Litigation as a Tool in Food Advertising: A Consumer Advocacy Viewpoint*, 39 LOY. L.A. L. REV. 291, 309 (2006).

175. LISA FLYTHE, COMMERCIAL-FREE CHILDHOOD, PROBLEMS WITH SELF-REGULATION, available at <http://www.commercialfreechildhood.org/articles/3rdsummit/flythe.htm>.

176. Alderman et al., *supra* note 8, at 102.

177. Gardner, *supra* note 174, at 309.

178. *Id.*

eleven.<sup>179</sup> However, less than two weeks after this announcement of improved marketing practices aimed at children, Kraft joined with other major food companies and ad agencies to create a new lobbying group called the Alliance for American Advertising.<sup>180</sup> The purpose of the Alliance is to defend the industry's First Amendment advertising rights and to promote themselves in lieu of government restrictions.<sup>181</sup> Michele Simon, professor and Director of the Center for Informed Food Choices, has criticized Kraft by posing the following questions: "What better evidence do we need that 'industry leaders' such as Kraft cannot be trusted to self-regulate than their forming such a lobbying coalition? If Kraft was serious about 'being part of the solution,' why would this be necessary?"<sup>182</sup>

The inconsistent standards and compliance rates clearly demonstrate that the food industry has been a powerful lobby and food marketing to children is a profitable endeavor; therefore, it is naïve to believe that companies will reform their marketing strategies without external regulations.<sup>183</sup>

#### IV. CHALLENGES OF REGULATION

In light of the failed attempt at regulation and the backlash from Congress, it is not surprising that the FTC has been reluctant to entertain the concept of increased government regulation of children's advertising. At the 2005 Obesity Liability Conference, the current FTC Chairman, Deborah Platt Majoras, commented: "I want to be clear that, from the FTC's perspective, this is not the first step toward new government regulations to ban or restrict children's food advertising and marketing. The FTC tried that approach in the 1970s, and it failed for good reasons."<sup>184</sup> However, new research on the effects of food marketing warrants revisiting the issue of parental responsibility, which continues to be a focus of the regulation debate.

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179. Simon, *supra* note 36, at 208 (citing Press Release, Kraft Foods, Kraft Announces Healthy Lifestyle Initiatives at California Summit on Health, Nutrition and Obesity (Sept. 15, 2005)).

180. Simon, *supra* note 36, at 210.

181. *Id.*

182. *Id.*

183. Linn & Novosat, *supra* note 164, at 148.

184. Majoras, *supra* note 173, at 9.

### A. Parental Responsibility During “Kid Vid”

Although the reasons for the recommendation to close the rulemaking proceedings were complex,<sup>185</sup> parental responsibility over food choices and consumption has been a recurring theme in the regulation debate.<sup>186</sup> During “Kid Vid,” critics argued that there was no legal basis for regulation to interfere with the influence of parents regarding child-oriented advertising and food consumption because most children under twelve did not have the means or the opportunity to purchase food without the help of their parents.<sup>187</sup> The FTC rejected government regulation in favor of alternative remedies, such as putting the impetus on parents to limit exposure to television or help their children understand the role and purpose of commercials.<sup>188</sup> According to FTC Bureau of Consumer Protection Director J. Howard Beales, in the “Kid-Vid” proceeding “the Commission learned that protecting parents from their children’s requests that the parent purchase particular food products simply is not a sufficient basis for government action.”<sup>189</sup>

### B. Revisiting the Parental Responsibility Debate

Some argue that although companies market their products directly to children, parents have the responsibility of deciding whether to purchase products.<sup>190</sup> For example, supporters of the Cheeseburger Bill, which grants immunity to fast food manufacturers in obesity lawsuits, argue that preventing obesity is the responsibility of parents, local schools, and the health-care system, not of fast-food companies.<sup>191</sup> According to one Congressman, “Isn’t making sure that children limit their consumption of fast foods the responsibility of parents, not trial lawyers?”<sup>192</sup> Another legislator, a former psychologist, said “parents need to teach their children at early ages to eat healthy meals and to establish exercise routines for their families.”<sup>193</sup>

However, food marketing aimed at children makes a parent’s job more difficult and undermines parental authority. It forces parents to choose

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185. See MacLeod & Oldham, *supra* note 89, at 33.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* (citing J. Howard Beales, Remarks before George Mason Law Review 2004 Symposium on Antitrust and Consumer Protection: Competition, Advertising, and Health Claims: Legal and Practical Limits on Advertising Regulation 7 (Mar. 2, 2004)).

190. PESTERING PARENTS, *supra* note 34, at 1.

191. Burnett, *supra* note 1, at 400.

192. *Id.* (quoting 151 Cong. Rec. H8929 (daily ed. Oct. 19, 2005) (statement of Rep. Paul)).

193. *Id.* (statement of Rep. Murphy).

between saying “no” in order to protect their children’s health or surrendering to junk-food demands to keep the peace.<sup>194</sup> This situation is stressful for families. Several studies have linked children’s purchase requests to parent-child conflicts, and other studies have found a direct correlation between children’s exposure to advertising and family conflicts.<sup>195</sup>

As most parents struggle to set limits, corporations often undermine parental authority by encouraging children to nag.<sup>196</sup> A poll of young people aged twelve to seventeen demonstrates the power of the “nag factor” and how marketing can lead to family conflict and stress.<sup>197</sup> Forty percent of respondents said they had asked their parents for an advertised product they thought their parents would not approve of.<sup>198</sup> Encouraging children to use “the nag factor” to get their parents to buy things is an effective marketing technique. Fifty-five percent of young people surveyed said they are usually successful in getting their parents to give in.<sup>199</sup> On average, the young people surveyed said they have to ask nine times before their parents give in and let them have what they want.<sup>200</sup> Eleven percent of twelve- to thirteen-year-olds admitted to asking their parents more than fifty times for products they have seen advertised.<sup>201</sup> For example, a 1998 study conducted to help retailers exploit children’s nagging to boost sales found that nagging was responsible for 40% of trips to “entertainment establishments like the Discovery Zone and Chuck E. Cheese,” one of every three trips to a fast-food restaurant, and three out of every ten home video sales.<sup>202</sup>

Food marketers also portray adults as incompetent or mean and encourage children to rebel against their parents.<sup>203</sup> For example, although mothers are known for teaching their children not to play with their food, marketers are encouraging them to do so.<sup>204</sup> The food marketing industry often sees parental disapproval as a strong selling point with kids.<sup>205</sup> A marketing expert described the strategy for selling Kraft Lunchables: “Parents do not fully approve—they would rather their child ate a more tradi-

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194. PESTERING PARENTS, *supra* note 34, at 2.

195. CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD, MARKETING, MATERIALISM, AND FAMILY STRESS, <http://www.commercialexploitation.org/factsheets/materialism.pdf> (last visited Mar. 9, 2009).

196. Linn & Novosat, *supra* note 163, at 147.

197. CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD, *supra* note 195.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Linn & Novosat, *supra* note 164, at 147.

204. *Id.*

205. *Id.*

tional lunch—but this adds to the brand’s appeal among children because it reinforces their need to feel in control.”<sup>206</sup>

The Institute of Medicine’s report describes the effect of food marketing on children’s purchase requests.<sup>207</sup> For example, in one experimental study cited by the report, young children watched a twenty-minute television cartoon with or without advertisements for candy bars, a chocolate drink mix, grape jelly, and salty snack chips.<sup>208</sup> Mothers watched the cartoon separately without the advertisements and did not know whether their children had viewed the commercials.<sup>209</sup> A “separate study” of family shopping was conducted the following week in a grocery store.<sup>210</sup> A clerk, who was unaware of the nature of the study, observed the families.<sup>211</sup> “Children who had seen the commercials more often asked for [the advertised] products, . . . pointed to them, grabbed them off the shel[ves], or put them into the grocery cart.”<sup>212</sup> Mothers often said no, put the items back on the shelves and offered alternatives.<sup>213</sup> Based on forty-five results from forty-two different published research reports, the Institute of Medicine concluded that “the evidence clearly supports the finding that television advertising influenced [younger and older children’s] food and beverage preferences.”<sup>214</sup>

The food industry has continued to defend its marketing practices by arguing that parents are personally responsible for themselves and their children. Although the food industry portrays governmental involvement as intrusion rather than protection and argues that the free market is the proper force to create change, this ignores the illusory nature of choices consumers supposedly make.<sup>215</sup> Arguing for personal responsibility assumes that everyone is a “fully-informed and rational consumer,” a fact that is not always true.<sup>216</sup> As Professor Banzhaf notes, “You can’t have personal responsibility if you aren’t informed.”<sup>217</sup> For example, most poor Americans, who do not have convenient access to healthy foods, are una-

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206. *Id.*

207. MCGINNIS ET AL., *supra* note 15, at 253.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 253–54.

214. *Id.* at 257. Included in these studies were parents’ and children’s observations from real and simulated grocery stores, and reports and questionnaires of product requests from parents and children. *Id.* at 258.

215. Alderman et al., *supra* note 8, at 102.

216. Burnett, *supra* note 1, at 401.

217. *Id.* at 401 n.210 (citing Jenny Deam, *Hooked on Fast Food? While Law Prof Wants Warnings by Chains, Experts Say Burgers, Fries Aren’t Addictive*, DENV. POST, June 25, 2003, at F1).

ble to effectively act on good intentions regarding their diet.<sup>218</sup> Children are vulnerable to food advertising and as a result of peer pressure are likely to choose junk foods.<sup>219</sup> Adults cannot be fully-informed and responsible food consumers without adequate education about nutrition, fitness, and the health effects of obesity.<sup>220</sup> Furthermore, consumers may think they are eating healthily and thus acting responsibly, based on their limited knowledge of nutrition or the often misleading marketing of supposedly “healthy” food products, when in fact they are still eating poorly.<sup>221</sup> The food industry “convince[s] consumers that the environment is a result of their choices rather than a reflection of corporate desires; industry encourages consumers to be wary of government regulation of their private lives to draw attention away from their own power in creating and defining existing social conditions.”<sup>222</sup>

In sum, the industry exerts powerful control over children and parents’ food preferences and choices, rendering “parental control” illusory.

#### V. THE FUTURE FOR REGULATION

Although debate over regulation of food marketing to children in the United States has continued for the past three decades, a number of other countries have already established regulations for advertising to children. A survey conducted by the World Health Organization (WHO) found that sixty-two of seventy-three countries reviewed had some form of regulation of television advertising targeted at children.<sup>223</sup> For example, Sweden banned advertising to children under age twelve more than a decade ago.<sup>224</sup> Norway and Finland have also banned companies from sponsoring children’s television shows.<sup>225</sup> Finland prohibits advertisements endorsed by familiar cartoon characters or children.<sup>226</sup> Belgium has banned commercials from appearing five minutes before, during, and after children’s programs.<sup>227</sup> Norway banned television advertising ten minutes before and

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218. Alderman et al., *supra* note 8, at 102.

219. *Id.*

220. Burnett, *supra* note 1, at 401.

221. *Id.* at 401–02.

222. Alderman et al., *supra* note 8, at 102.

223. CORINNA HAWKES, *MARKETING FOOD TO CHILDREN: THE GLOBAL REGULATORY ENVIRONMENT* 14 (2004), available at <http://whqlibdoc.who.int/publications/2004/9241591579.pdf>.

224. *Id.* at 19.

225. HENRY J. KAISER FAMILY FOUND., *THE ROLE OF MEDIA IN CHILDHOOD OBESITY* 8 (2004), available at <http://www.kff.org/entmedia/upload/The-Role-Of-Media-in-Childhood-Obesity.pdf>.

226. HAWKES, *supra* note 223, at 19.

227. HENRY J. KAISER FAMILY FOUND., *supra* note 225, at 8.

after children's programs.<sup>228</sup> Italy does not allow advertising of children's products during programs aimed at children.<sup>229</sup> In England, a major broadcaster, the British Broadcasting Corporation, has banned the use of cartoon characters in fast food ads.<sup>230</sup> In the Canadian province of Quebec, advertising is not allowed during programming for which 15% or more of the audience is under thirteen years old.<sup>231</sup> The fact that so many countries restrict marketing strategies aimed at children indicates that similar legislation could be achieved in the United States.<sup>232</sup>

Several organizations are now calling upon the government to take measures similar to those described above to protect children from marketing strategies they deem deceptive. For example, the American Psychological Association has recommended that the government restrict advertising directed at children under age eight because "children under the age of eight lack the cognitive development to understand the persuasive intent of television advertising and are uniquely susceptible to advertising's influence."<sup>233</sup> Because children do not understand the intent of marketing or have the ability to evaluate such advertising, some authors assert that the "intense marketing of high fat, high sugar foods to young children can be viewed as exploitation."<sup>234</sup> Those advocating for government regulation argue that "children are a vulnerable group that should be protected from commercial influences that may adversely impact their health, and that as a society that values children, there should be greater social responsibility for their present and future health."<sup>235</sup>

Some commentators argue that there is no evidence demonstrating how a ban on advertising could reduce obesity.<sup>236</sup> Advertisers claim that obesity is a complex problem that requires a multi-faceted approach.<sup>237</sup> They describe proposals to restrict or ban promotional activities as "simple, silver-bullet solution[s]" that are unlikely to achieve any benefits.<sup>238</sup> Howev-

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228. Shaffer et al., *supra* note 86, at 660.

229. *Id.*

230. HENRY J. KAISER FAMILY FOUND., *supra* note 225, at 8.

231. PESTERING PARENTS, *supra* note 34, at 46.

232. Campbell, *supra* note 38, at 504.

233. Shaffer et al., *supra* note 86, at 653; *see also* MCGINNIS ET AL., *supra* note 15, at 297 (explaining that young children under the age of seven-to-eight years old have "great difficulty recognizing the persuasive intent that necessarily underlies all television advertising").

234. Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the US*, 1 INT'L J. BEHAV. NUTR. & PHYSICAL ACTIVITY 3 (2004), available at <http://www.ijbnpa.org/content/1/1/3>.

235. *Id.*

236. MacLeod & Oldham, *supra* note 89, at 34 (commenting that "as was the case in 1977, [there is no] evidence that any relationship between commercials for specific foods and obesity is measurable").

237. *See* NAT'L ADVER. REVIEW COUNCIL, *supra* note 99, at 27.

238. Janet Hoek & Ninya Maubach, *Self-Regulation, Marketing Communications and Childhood Obesity: A Critical Review from New Zealand*, 39 LOY. L.A. L. REV. 139, 165 (2006) (quoting Jenny

er, this reasoning suggests that no interventions should occur until researchers precisely identify the role played by each obesity-causing factor.<sup>239</sup> According to Dr. Margo Wootan, Nutrition Policy Director at the Center for Science in the Public Interest, “[j]ust because there are other contributors doesn’t mean we shouldn’t address the most important of those contributors . . . . I think marketing is at the top of the list.”<sup>240</sup>

The World Health Organization (WHO) also argues that there is enough evidence to suggest that heavy marketing of energy-dense foods and fast food outlets contributes to increased risk of weight gain and obesity.<sup>241</sup> Although evidence connecting marketing with obesity is not unequivocal, the probable causal link, the proliferation of marketing strategies aimed at children, the inherent flaws of self-regulation, and the life-threatening effects of childhood obesity makes marketing an appropriate target for government intervention.<sup>242</sup>

In light of the evidence proving the cause-and-effect relationship of food marketing and childhood obesity, limiting advertising of nutrient-deficient foods to children could have an important impact on the obesity epidemic. Because food marketing to children is very profitable and the food industry has become such a powerful lobby, external regulations are needed to effect a change in marketing practices.<sup>243</sup> The role of the food industry in the obesity epidemic demonstrates that it is not in children’s best interest to depend on the industry to be “the guardians of public health. Only an across-the-board set of policies—designed and enforced by a body from outside the food and marketing industries—can both protect children’s health and maintain a level playing field between companies.”<sup>244</sup> CARU’s inability to implement and enforce consistent and effective standards governing food marketing to children should prompt Congress should revisit the benefits of restoring the FTC’s authority to regulate marketing to children.

Research has shown the effect of marketing strategies such as product placement and character marketing on children’s food preferences.<sup>245</sup> Since children have a limited ability to understand the purpose of advertising and distinguish advertising from programming content on television

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Robertson, *Food Giants Worry Over Charges Their Products Damage Children’s Health*, MEDILL NEWS SERVICE, Jan. 28, 2005).

239. *Id.*

240. *Id.*

241. *Id.* (citing WORLD HEALTH ORG., DIET, NUTRITION AND THE PREVENTION OF CHRONIC DISEASES: TECHNICAL REPORT 916 65 (2003)).

242. *Id.*

243. Linn & Novosat, *supra* note 164, at 148.

244. *Id.* at 150.

245. *See supra* Part II.A–B.

and in movies,<sup>246</sup> the use of licensed media characters and products integrated into programming can be misleading. The influence such marketing has on children's selection of food high in sugar and fat and the resulting detrimental health affects warrants a prohibition of product placement in children's movies, video and computer games, and television programs that do not identify such embedded advertising when it occurs.<sup>247</sup> A commercial-free public broadcasting system that would provide programming for children free of any marketing, including brand licensing, should also be available for families.<sup>248</sup>

Food companies should be prohibited from using advertising techniques that exploit children's developmental vulnerabilities, such as commercials that encourage kids to turn to food for empowerment, or to be popular, or for fun.<sup>249</sup> To protect children against exploitation, food-branded toys, toy giveaways by fast-food companies and child-targeted sweepstakes and contests to market food products should be limited.<sup>250</sup> As public health advocates Susan Linn and Courtney Novosat have asked, "Do we want to encourage our children to make food requests or purchases based on commercials whose marketing implicitly or explicitly suggests a product will enhance their social life, make them happier, or increase their power?"<sup>251</sup>

Other countries have demonstrated that regulations are possible solutions to the obesity epidemic and that government has a prominent role to play in the regulation of food marketing to children. The childhood obesity epidemic should encourage Congress to openly revisit the food marketing regulation debate in the United States.

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246. *See supra* Part II.B.

247. Linn & Novosat, *supra* note 164, at 150.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*