

# SELF-REGULATION, MARKETING COMMUNICATIONS AND CHILDHOOD OBESITY: A CRITICAL REVIEW FROM NEW ZEALAND

*Janet Hoek\**

*Ninya Maubach\*\**

## I. INTRODUCTION

The debate over children's exposure to food advertising and its effects on their behavior has raised many important questions about how marketing communications are regulated and whether these regulations are adequate. Advertisers argue strongly for self-regulation, where advertisers themselves develop and promulgate codes of practice and deal with any alleged breaches.<sup>1</sup>

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\* Janet Hoek, Professor of Marketing, Massey University, New Zealand. Professor Hoek has a particular interest in marketing regulation and has written extensively on the regulation of tobacco promotions and the ethics and effects of food advertising. She has also published several papers on the measurement of consumer deception and has served as an expert witness in several intellectual property cases. Her work has been published in the *Journal of Public Policy & Marketing*; *Public Opinion Quarterly*; *Journal of Business Research* and the *International Journal of Market Research*.

\*\* Ninya Maubach, Ph.D. Candidate in Marketing, Massey University, New Zealand; Bachelor of Science, with a major in Psychology, and Bachelor of Business Studies, Massey University, New Zealand. Ninya was awarded a post-graduate Massey Scholarship and a Massey Doctoral Scholarship in recognition of her outstanding record in both marketing and health psychology. She is interested in marketing regulation and public policy, and her Ph.D. research examines consumers' understanding and use of nutrition information. Her research has been published in the *European Journal of Marketing* and the *New Zealand Medical Journal*.

1. See Debra Harker & Glen Wiggs, *Three Generations of Advertising Self-Regulation: Learning from Our Forefathers*, 11 *MARKETING BULL.* 1, 1 (2000), <http://marketing-bulletin.massey.ac.nz/author.asp?aid=78>.

Some academic researchers have supported this approach, suggesting it helps advertisers “internalize” accepted social values while promoting “moral adhesion” to these values.<sup>2</sup> Even strong proponents of self-regulation, however, acknowledge that self-regulation may not be an appropriate model where the consequences of regulatory failure are serious.<sup>3</sup>

Concern about the consequences of regulatory failure has led others, particularly those associated with health groups, to claim that the self-interest of participants undermines self-regulation.<sup>4</sup> These researchers argue that only robust government intervention can provide dispassionate and effective oversight of advertising.<sup>5</sup>

The debate over self-regulation has appeared in many contexts, but is most profound when vulnerable audiences, such as children, and adverse health consequences, such as obesity, are at stake.<sup>6</sup> To explore the effect of food advertising on children further, this Article critically reviews the self-regulation of marketing communications and examines the extent to which industry oversight of advertising affords adequate protection to vulnerable consumer groups. This Article also explores how marketing communications shape young people’s behavior and explains why government intervention is necessary to control the adverse health consequences linked to marketing activities.

## II. SELF-REGULATION OF MARKETING COMMUNICATIONS

In many Western democracies, legislation promotes advertisers’ rights to communicate with the public. For example, the First Amendment of the U.S. Constitution protects commercial speech,<sup>7</sup> as

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2. Jean Boddewyn, *Advertising Self-Regulation: True Purpose and Limits*, 18 J. ADVERTISING 19, 20 (1989).

3. *Id.* at 21.

4. See Sandra Jones & Robert Donovan, *Self-Regulation of Alcohol Advertising: Is It Working for Australia?*, 2 J. PUB. AFF. 153, 163 (2002).

5. See David Garvin, *Can Industry Self-Regulation Work?*, 25 CAL. MGMT. REV. 37, 46–48 (1983); see also Jones & Donovan, *supra* note 4, at 164 (arguing that, for decisions regarding complaints about alcohol advertisements, case reports should include why the advertisements were or were not forwarded to the formal complaints panel or management committee).

6. Janet Hoek & Philip Gendall, *Advertising and Obesity: A Behavioral Perspective*, 2006, J. HEALTH COMM. (forthcoming).

7. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (establishing that the First Amendment protects commercial

does the New Zealand Bill of Rights Act 1990.<sup>8</sup> Accordingly, governments have been wary of limiting commercial rights via legislation.<sup>9</sup> To fill what would otherwise be a regulatory void, advertisers have developed industry-funded regulatory procedures that have preempted or forestalled government regulation.<sup>10</sup> As researchers have noted, self-regulation averts or, at least, ameliorates the threat of government intervention and typically results in more benign oversight.<sup>11</sup>

Self-regulatory systems recognize the pervasiveness of marketing communications and the need to ensure that the overall content, tone, and presentation of these communications meet general standards of acceptability.<sup>12</sup> Furthermore, architects of self-regulatory models also accept that because some advertisements are either intentionally or inadvertently misleading, offensive, or irresponsible, the industry needs a fair and robust process to address consumers' concerns about specific advertisements.<sup>13</sup>

#### A. Asserted Benefits of Self-Regulation

Despite general agreement on the desirability of regulation, the precise form of oversight that advertising should take remains in dispute. Irrespective of the approach taken, those responsible for setting and maintaining advertising standards face difficulties when defining nebulous concepts such as "good taste" and "social decency." The problems arise because views on certain moral topics

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speech if it is not misleading; if the government interest is substantial; if the regulation directly advances the government interest; and if it is not more extensive than necessary to serve that interest).

8. See Simon Kellett, *Privacy Special Issue: Legislative Definition of Spam for New Zealand*, 36 VICTORIA U. WELLINGTON L. REV. (N.Z.) 607, 625 (2005) (stating that the New Zealand Bill of Rights Act 1990 protects anything written or said, regardless of the nature of the particular communication or the context in which it occurs).

9. See Debra Harker, *Towards Effective Advertising Self-Regulation in Australia: The Seven Components*, 9 J. MARKETING COMM. 93, 94 (2003).

10. See Garvin, *supra* note 5, at 41–42.

11. See *id.* at 42; *cf.* Debra Harker & Michael Harker, *Establishing New Advertising Self-Regulatory Schemes: A Comparison of the UK and Australian Approaches*, 59 AUST. J. PUB. ADMIN. 56, 59 (2000) (noting that advertisers in the U.K. and Australia are enthusiastic self-regulators because of the threat of government regulation).

12. See Harker & Wiggs, *supra* note 1, at 2.

13. *Id.* at 1.

evolve over time and existing values are inherently diverse within a community.<sup>14</sup>

In addition, researchers remain divided over whether self-regulation is sufficiently robust to ensure that advertising meets the standards designed to protect vulnerable groups from harm. Professor David Garvin noted, “[S]elf-regulation does not have to be perfect; it need only ‘elevate the performance of the industry to the point where it does not represent a relatively attractive target to the resource-constrained regulatory agency’.”<sup>15</sup> To critics of self-regulation, however, comments such as these appear to reinforce their concerns that industry monitoring of its own activities is little more than an attempt to set standards so liberal that they afford minimal protection to consumers.

Despite concerns over whether self-regulation is an appropriate approach to maintaining advertising standards, proponents argue that it has the potential to deliver several benefits. First, self-regulation is more efficient and results in higher levels of compliance than government regulation.<sup>16</sup> In addition, self-regulation is funded by the industry to which it applies, thus avoiding the need for government expenditure on regulation.<sup>17</sup> Moreover, because self-regulation draws on the knowledge of industry members to assess complaints, it is said to bring a higher level of expertise to decision making.<sup>18</sup> Finally, effective self-regulation is said to work alongside, and not instead of, government regulation.<sup>19</sup> Thus, while government regulation may establish broad social objectives or constraints, the manner in which these regulations are realized or applied is determined by the affected industry.<sup>20</sup>

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14. See Boddewyn, *supra* note 2, at 25.

15. Garvin, *supra* note 5, at 42–43.

16. See Thomas R. Wotruba, *Industry Self-Regulation: A Review and Extension to a Global Setting*, 16 J. PUB. POL’Y & MARKETING 38, 40 (1997).

17. See *id.* at 42.

18. See *id.* at 42.

19. See *id.* at 40.

20. See Jean J. Boddewyn, *Advertising Self-Regulation: Private Government and Agent of Public Policy*, 4 J. PUB. POL’Y & MARKETING 129, 130–31 (1985).

*B. Proposed Characteristics of the Ideal Self-Regulation Model*

Researchers examining the efficacy of self-regulatory systems have documented the characteristics they believe these systems should possess.<sup>21</sup> First, the systems themselves should be well funded, which would allow wide dissemination of decisions to both practitioners and the public.<sup>22</sup> Complaints boards must clearly communicate the results of their deliberations to stakeholders if they are to help establish precedents that can guide future advertising and promotional developments.<sup>23</sup> Furthermore, ensuring that the public is aware of complaint outcomes maintains awareness of the complaints service and highlights the range of issues addressed.<sup>24</sup>

Second, a series of clearly written codes must exist. These are often developed in conjunction with interested parties, including regulators, interest groups, industry representatives and the public, and are subject to regular review and revision, to reflect changing social norms.<sup>25</sup> However, the responsibility for developing the codes lies with the advertising industry, thereby rendering the extent to which these codes reflect wider community interests and concerns moot.

Third, effective self-regulation depends on interested parties, including consumers, traders and industry representatives, and other regulators, being aware of the codes' existence and encouraged to submit complaints.<sup>26</sup> Thus, people representing a broad range of interests are both aware of and able to participate in the complaints process. Wide distribution of the codes assists potential complainants with framing their concerns and helps ensure that complaints are clearly heard and considered.<sup>27</sup> Arguably, dissemination of the codes and solicitation of complaints is not in self-regulators' interests, as it would increase their workload and the expense of

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21. See Harker, *supra* note 9, at 97; Debra Harker, *Educating to Improve the Effectiveness of Advertising Self-Regulatory Schemes: The Case of Australia*, 26 J. CURRENT ISSUES & RES. ADVERTISING 69, 71 (2004) [hereinafter Harker, *Educating to Improve*].

22. See Harker, *supra* note 9, at 99.

23. See *id.* at 104.

24. See *id.*

25. See *id.* at 100–01.

26. See Boddewyn, *supra* note 2, at 24–25.

27. See Harker, *supra* note 9, at 104–05.

maintaining the system itself.<sup>28</sup> Moreover, even if the complaints procedures are “user-friendly”, the need to provide personal details, and the fact that these details will be published in decisions, may deter some complainants.

To broaden the range of complaints received and considered, Dr. Debra Harker suggests that screening procedures ought not to be employed since they would reduce the complaints body’s exposure to the full range of concerns that exist in the wider community.<sup>29</sup> Nevertheless, screening procedures appear to be widely used and the adjudicating body does not hear many of the submitted complaints.<sup>30</sup>

Once complaints have been received and registered, best practice guidelines suggest the complaints body should be comprised of equal representation from industry and the public.<sup>31</sup> This body should follow the principles of natural justice in its deliberations and allow the advertiser, agency, and other interested parties an opportunity to respond to the complaint.<sup>32</sup> However, researchers have questioned whether, in practice, complaints boards adequately represent the lay public, whose views should form the reference point against which all decisions should be tested.<sup>33</sup>

The guidelines also suggest that if a complaint is upheld a penalty should be imposed. The nature of the penalty, however, has attracted increasing attention; critics have argued that requiring advertisers to withdraw an advertisement when it has already concluded its media schedule can hardly be considered a penalty.<sup>34</sup> Furthermore, critics suggest “penalties” that have no material effect provide no incentive to comply with principles outlined in the self-regulatory codes.<sup>35</sup>

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28. See Boddewyn, *supra* note 2, at 25.

29. See Harker, *Educating to Improve*, *supra* note 21, at 71.

30. See Harker, *supra* note 9, at 101.

31. See *id.* at 102.

32. See *id.* at 97.

33. See Harker, *Educating to Improve*, *supra* note 21, at 72–73 (noting that the Australian Competition and Consumer Commission, a public watchdog group concerned with implementing Australia’s Trade Practices Act, found the Media Council of Australia exhibited a lack of responsiveness to changes in community needs).

34. See Gayle Kerr & Cheryl Moran, *Any Complaints? A Review of the Framework of Self-Regulation in the Australian Advertising Industry*, 8 J. MARKETING COMM. 189, 192, 201 (2002).

35. *Id.* at 201.

Harker's compilation of self-regulatory traits also includes the need to undertake periodic and independent audits of the systems put in place to govern advertising conduct.<sup>36</sup> These reviews should test awareness of the complaints system, as well as satisfaction with the complaints resolution process. Ideally, these reviews would be made public so all interested stakeholders could evaluate for themselves the merits of the self-regulatory system used to adjudicate complaints.

The final two features Harker argues should be part of self-regulatory systems are creation of public awareness and education, particularly the need to ensure that industry representatives are aware of the required standards and precedent setting decisions.<sup>37</sup> As noted earlier, public awareness is achieved via publicizing the complaints body's decisions and through informing the public about the codes, usually through mass media advertising.<sup>38</sup> Publicizing decisions, however, provides no guarantee that the media will feature the decisions prominently, nor does it ensure that the industry will heed any cautions issued.

*C. Compliance with Proposed Characteristics:  
Analysis of the Australian and New Zealand Models*

Few would disagree that there is a need for self-regulatory systems to include the attributes advocated by Harker. However, the extent to which advertising self-regulation models comply with Harker's recommended framework remains debatable. In a review of the self-regulatory system in place in Australia prior to 1997, Harker concluded that it fell far short of the standards academic researchers have suggested should be mandatory.<sup>39</sup> For example, Harker noted that the regulatory body's chairperson excluded around fifty percent of the complaints received from full review<sup>40</sup> on the grounds that they did not establish a *prima facie* case, or because they were deemed frivolous or trivial.<sup>41</sup>

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36. See Harker, *supra* note 9, at 97–98, 103–04.

37. *Id.* at 98, 104.

38. *Id.* at 98, 104–05.

39. See Harker, *Educating to Improve*, *supra* note 21, at 78–79.

40. Harker, *supra* note 9, at 101.

41. Harker, *Educating to Improve*, *supra* note 21, at 72.

Examination of data from New Zealand's advertising self-regulatory body reveals a similar trend. Table 1 shows that over the last five years the percentage of complaints not accepted have risen from just under a quarter (24%) of those considered to nearly 40%.<sup>42</sup> By contrast, the percentage upheld reflects the opposite trend: while 40% of complaints considered were upheld in 2000, this figure had declined to just over a quarter (27%) in 2004.<sup>43</sup> The percentage of complaints not upheld remained steady over this period at around 30%.<sup>44</sup>

TABLE 1: NEW ZEALAND ADVERTISING STANDARDS COMPLAINTS BOARD COMPLAINT OUTCOMES 2000–2004<sup>1</sup>

COMPLAINT OUTCOMES	YEAR				
	2000	2001	2002	2003	2004
TOTAL DECISIONS RELEASED <sup>2</sup>	315	336	419	326	459
Percentage not accepted	24	26	31	38	39
Percentage withdrawn, resolved or adjourned	6	7	4	6	5
Percentage upheld/settled	40	34	32	26	27
Percentage not upheld	30	34	32	29	29
Percentage not classified	0	0	*	*	*
TOTAL	100	100	100	100	100

<sup>1</sup> Information sourced from Advertising Standards Complaints Board Decision database.<sup>45</sup>

<sup>2</sup> Some decisions may relate to multiple complaints.

One interpretation of the data is that, since the percentage of complaints upheld has tracked steadily downwards, the standards of advertising must have improved. However, the fact that the number

42. Advertising Standards Authority Inc., Complaints Board Decision Database, (Aug. 23, 2005), <http://www.asa.co.nz/php/refdat.htm> (illustrating that of the 459 complaints decisions released in 2004, 180 were not accepted for various reasons, most often due to a 'previous decision,' 'no jurisdiction' or 'no prima facie case'; 21 were withdrawn, resolved, no adjudication or adjourned).

43. *Id.*

44. *Id.*

45. *Id.*



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of complaints considered has shown a slight increase, suggests this explanation may not be correct.

Alternatively, the pattern in Table 1 may reflect the increase in the percentage of complaints not accepted by the Chairperson of the Complaints Board. This interpretation suggests that members of the public have not been well informed about the various Codes of Practice since many of the complaints were deemed to have failed to establish a *prima facie* case.<sup>46</sup> Further investigation is necessary to ascertain whether the criteria used to screen complaints can accommodate the range of concerns consumers wish to raise.

More seriously, the declining percentage of complaints upheld may indicate a difference between what members of the Complaints Board view as offensive and what members of the public find unacceptable. Several researchers have noted the need for Complaints Board members to reflect the values and mores of the community they represent.<sup>47</sup> As noted earlier, the integrity of any self-regulatory system depends on Complaints Board members' knowledge of social values and their ability to use these values to inform the decisions they make.<sup>48</sup> Yet, as Harker noted, the lay representatives typically include people who have retired from professional careers and, thus, whether their views and experiences represent the concerns held by members of the general public remains debatable.<sup>49</sup>

If differences between consumers' concerns and the views held by Complaints Board members exist, changes to the composition of the Complaints Board may be necessary. This would ensure that the board's decisions reflect fairly the social values of the general public. In addition, there is a need for ongoing research to evaluate knowledge of, and satisfaction with, the complaints procedure, and to provide benchmarks of New Zealanders' values and perceptions of "social decency" that can be used to inform decisions. Although attention to these issues would address information gaps and improve

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46. Debra Harker & Michael Harker, *Dealing With Complaints About Advertising in Australia: The Importance of Regulatory Self-Discipline*, 21 INT'L J. ADVERTISING 23, 38 (2002).

47. See Debra Harker, *Achieving Acceptable Advertising: An Analysis of Advertising Regulation in Five Countries*, 15 INT'L MARKETING REV. 101, 104-105 (1997).

48. See *id.* at 104.

49. *Id.*

the Complaints Board's ability to interpret the letter of the advertising codes the success of self-regulatory systems depends on industry members' respect for the codes. Thus, attempts to refine the content of codes, or the Complaints Board's interpretation of the content of codes, will be seriously undermined if advertisers do not embrace the spirit of the codes.<sup>50</sup>

Given the need for industry acceptance of the codes' provisions, the strategies identified by Harker and used by advertisers to circumvent the codes are cause for concern.<sup>51</sup> These strategies include, testing the validity of complaints as a precursor to litigation, requiring rivals to reveal sensitive market information as part of their defense, and damaging rivals by forcing them to amend advertisements, which disrupts the original media schedule and increases production costs.<sup>52</sup>

Perhaps most seriously, however, Harker noted evidence that advertisers would schedule controversial advertisements to coincide with council meetings since this allowed "4 weeks of freedom and free publicity."<sup>53</sup> Harker's comments suggest some advertisers have deliberately manipulated the media schedules developed for advertisements thought likely to be controversial. The schedules have maximized the exposure of these advertisements by timing the start of the campaign immediately after the last Complaints Board meeting.<sup>54</sup> This cynical approach to self-regulation highlights a key reason why critics have questioned the ability of self-regulation to maintain appropriate standards.<sup>55</sup>

#### D. Outlook

In summary, although self-regulation enables an industry to communicate standards to its members, its ability to ensure members adhere to both the letter and the spirit of those standards is often weak. Moreover, self-regulatory systems rarely act in a proactive manner to restrain errant advertisers. Instead, self-regulation models are predicated on the education of advertisers, rather than pun-

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50. *See id.*

51. *See* Harker & Harker, *supra* note 46, at 39–40.

52. Harker, *supra* note 9, at 108.

53. *Id.*

54. *Id.*

55. *See* Kerr & Moran, *supra* note 34, at 191–92.

ishment, as, at least in New Zealand, no direct financial penalties are imposed on advertisers who breach the codes.<sup>56</sup>

Internationally, researchers concerned about the efficacy of self-regulation point to the tobacco industry to illustrate that self-regulation is not robust.<sup>57</sup> Self-regulation highlights the uneasy tension between an organization's need to deliver profit to its shareholders and its wider social responsibilities. The evidence to date suggests the former typically outweighs the latter to such an extent that additional measures are necessary to ensure that vulnerable groups, such as children, receive adequate protection.<sup>58</sup>

However, proponents of self-regulation suggest that the reliance on positive reinforcement rather than punishment is not necessarily a weakness.<sup>59</sup> They argue that self-regulation depends on a strong legal framework and government agencies can intervene to prosecute recidivist offenders.<sup>60</sup> In practice, however, such action is rare, leading critics to question whether self-regulation provides sufficient incentive to ensure high levels of industry compliance.<sup>61</sup>

Despite their objections to restrictions on food promotions, advertisers and food manufacturers recognize that obesity levels have increased, and have indicated a willingness to contribute to solutions.<sup>62</sup> The codes that exist appear well intentioned and comprehensive, and there are instances where self-regulatory bodies have intervened to restrain advertisers.<sup>63</sup>

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56. See Harker & Wiggs, *supra* note 1, at 5.

57. BEN KELLEY, PUB. HEALTH ADVOCACY INST., INDUSTRY CONTROLS OVER FOOD MARKETING TO CHILDREN: ARE THEY EFFECTIVE? 4 (2005), [http://www.phaionline.org/downloads/car\\_u.analysis.pdf](http://www.phaionline.org/downloads/car_u.analysis.pdf).

58. See *id.*

59. See Harker & Harker, *supra* note 46, at 26; Harker & Harker, *supra* note 11, at 57.

60. See Harker & Harker, *supra* note 11, at 57.

61. See Kerr & Moran, *supra* note 34, at 191.

62. See generally Jeremy Irwin, Executive Dir., Ass'n of N.Z. Advertisers, Inc., Food Industry Accord Briefing (Sept. 8, 2004), *available at* <http://updates.caanz.co.nz/attachments/food-accord-briefing-8-sept-04.pdf> (stating that the key objectives of the Association of New Zealand Advertisers, Inc. are reducing obesity, improving nutrition, increasing physical activity, and working towards a cross-Tasman industry approach to obesity).

63. See NAT'L ADVER. REVIEW COUNCIL, WHITE PAPER: GUIDANCE FOR FOOD ADVERTISING SELF-REGULATION 34 (2004), *available at* <http://www.narcpartners.org/reports/whitepaper.asp>.

Even in the United States, however, the percentage of advertisements that have attracted self-regulators' attention remains low.<sup>64</sup> Thus, while it is difficult to argue that self-regulators have done nothing, the question of whether their interventions have been sufficient to protect children remains debatable. One observer commenting on U.S. regulation of children's advertising noted that the "[Children's Advertising Review Unit] says it is a watchdog, but it is empowered to do things so small you need a scanning electron microscope to see it."<sup>65</sup>

On-going concerns over the extent to which the codes circumscribe corporate behavior have become more serious, especially where the groups likely to be adversely affected by lower than desirable industry compliance are themselves vulnerable.<sup>66</sup> Similarly, where the outcome of promotional activities contributes to social or health problems, critics have questioned whether self-regulation can provide a sufficiently disinterested level of supervision.<sup>67</sup>

These concerns have coalesced as health researchers, child advocates, and doctors have documented the growing incidence of obesity-related disorders among young children.<sup>68</sup> In the past, few children were regarded as clinically obese; today around thirty percent of children are deemed severely overweight.<sup>69</sup> Indeed, some

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64. *Id.* at 33–38 (stating that some seventy-nine decisions, eighteen involving food, were published between 1975 and 1979; 159 decisions, sixteen of which involved food, were published in the 1980s; 48 formal cases, 4 involving food, were published in the 1990s, although 434 informal cases, 50 involving food, were also published in this decade).

65. Caroline E. Mayer, *Minding Nemo; Pitches to Kids Feed Debate About a Watchdog*, WASH. POST, Feb. 27, 2005, at F01, available at [http://www.commercialalert.org/issues-article.php?article\\_id=338&subcategory\\_id=69&category=1](http://www.commercialalert.org/issues-article.php?article_id=338&subcategory_id=69&category=1) (quoting Gary Ruskin, Executive Director of Commercial Alert).

66. See SUSTAIN, ALLIANCE FOR BETTER FOOD & FARMING, THE CHILDREN'S FOOD BILL: WHY WE NEED A NEW LAW, NOT MORE VOLUNTARY APPROACHES 3, 8–9 (2005), available at [http://www.sustainweb.org/CFB\\_MpReport.pdf](http://www.sustainweb.org/CFB_MpReport.pdf) (stating that children are particularly vulnerable to food advertising).

67. See *id.* at 13.

68. See CTR. FOR SCI. & THE PUB. INTEREST, PESTERING PARENTS: HOW FOOD COMPANIES MARKET OBESITY TO CHILDREN (2003), available at [http://cspinet.org/new/pdf/pages\\_from\\_pestering\\_parents\\_final\\_pt\\_1.pdf](http://cspinet.org/new/pdf/pages_from_pestering_parents_final_pt_1.pdf).

69. Anthony Maher, Nick Wilson & Louise Signal, *Advertising and*

estimates are that obesity among children could exceed fifty percent in 2020 if current trends continue.<sup>70</sup> Both the short and long-term consequences of obesity have focused researchers' attention on factors that are likely to contribute to obesity, including marketing communications.<sup>71</sup> The following Part examines how marketing communications work, and the particular effects they may have on children's eating behaviors.

### III. MARKETING COMMUNICATIONS AND OBESITY

Although researchers continue to debate how marketing communications affect consumers' behavior, the effects of promotional activity are more easily observed.<sup>72</sup> Advertising, sales promotions and the range of other communication tools available to marketers reinforce existing behaviors and provide stimuli that assist the introduction of new behavior patterns.<sup>73</sup> In the following section, the analysis draws upon behavior modification theory and Professor Andrew Ehrenberg's "weak" theory of advertising, which was informed by behavior modification theory. The "weak" theory of advertising is a well documented and empirically supported model of marketing communications.<sup>74</sup>

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*Availability of 'Obesogenic' Foods Around NZ Secondary Schools: A Pilot Study*, 118 N.Z. MED. J. 1556, 1556 (2005), available at <http://www.nzma.org.nz/journal/118-1218>; see also MINISTRY OF HEALTH, NZ FOOD NZ CHILDREN: KEY RESULTS OF THE 2002 NATIONAL CHILDREN'S NUTRITION SURVEY, at xxii (2003), available at [http://www.moh.govt.nz/moh.nsf/0/064234A7283A0478CC256DD6000AB4C/\\$File/nzfoodnzchildren.pdf](http://www.moh.govt.nz/moh.nsf/0/064234A7283A0478CC256DD6000AB4C/$File/nzfoodnzchildren.pdf) (indicating results of survey evincing an increase in obese children in New Zealand); Am. Acad. of Pediatrics, *Policy Statement: Prevention of Pediatric Overweight and Obesity*, 112 PEDIATRICS 424, 424 (2003) (specifying that over fifteen percent of U.S. children are obese).

70. ROYAL COLL. OF PHYSICIANS, RCP RESPONSE TO CHOOSING HEALTH: OVERWEIGHT AND OBESITY (2004), [http://www.rcplondon.ac.uk/college/statements/response\\_choosehealth\\_obesity.aspx](http://www.rcplondon.ac.uk/college/statements/response_choosehealth_obesity.aspx).

71. See K.A. Coon & K.L. Tucker, *Television and Children's Consumption Patterns*, 54 MINERVA PEDIATRICA (Italy) 423, 423 (2002); Jason Halford et al., *Effect of Television Advertisements for Foods on Food Consumption in Children*, 42 APPETITE 221, 221-22 (2004).

72. ROBERT EAST, THE EFFECT OF ADVERTISING AND DISPLAY: ASSESSING THE EVIDENCE 52-54 (2003).

73. *Id.*

74. See Andrew Ehrenberg, *Repetitive Advertising and the Consumer*, 14 J. ADVERTISING RES. 25, 31-32 (1974).

### A. Behavior Modification Theory

Behavior modification theory views marketing activities as environmental interventions that may cue new behaviors or maintain existing behaviors in the face of competitors' promotions.<sup>75</sup> Activities that stimulate new behaviors include value-added promotions that increase the overall appeal of a particular item.<sup>76</sup> As well as enhancing the value delivered by a product, interventions also include signage that increases the visibility of particular products, making them easier to recognize among a product array.<sup>77</sup>

### B. Common Marketing Tactics

#### 1. Price Discounts

Common examples of marketing tactics that stimulate purchase behavior include sales promotions such as price discounts.<sup>78</sup> These promotions prompt trial of new menu items by providing better value than that offered by other menu items or by competitors' products. Stimulating trial of new items is a form of cross-selling that attempts to broaden the range of products consumers purchase from a particular supplier. Other things being equal, the more products consumers purchase from a single supplier, the less likely they are to defect to another supplier. Thus, the continuous refinement of menu offerings and the release of limited-period special items help maintain variety from a consumer's perspective and provide incentives to revisit the outlet.

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75. See Walter R. Nord & J. Paul Peter, *A Behavior Modification Perspective on Marketing*, 44 J. MARKETING 36, 36-37 (1980).

76. See *id.* at 39.

77. See *id.* at 40.

78. See, e.g., Roy Beth Kelley, Case Note, *Wal-Mart Stores, Inc. v. American Drugs, Inc.: Drawing the Line Between Predatory and Competitive Pricing*, 50 ARK. L. REV. 103, 103 (1997) (stating that a court has found Wal-Mart's below-cost pricing legally enhanced competition).

## 2. Bundling

Promotions may also increase usage of complementary menu items by “bundling” these into enhanced value offerings.<sup>79</sup> “Bundling” occurs when a range of menu items are offered at a price that is lower than the sum of the individual unit prices of the bundled items. For consumers, bundling promotions foster the purchase of multiple items since the “bundle” represents better unit value than the purchase of one item alone.

If bundling promotions are routinely available to consumers, they may foster the development of a habit; that is, consumers may regularly purchase “bundled” items because these are known to provide better value. Although sales promotions are not inherently unhealthy, the fact that larger serving sizes are frequently associated with the best value discounts seems likely to skew purchases towards these items. This, in turn, stimulates and supports the consumption of larger serving sizes which, if not matched by increased energy expenditure, will contribute to obesity.

## 3. Competitions

Competitions also maintain and increase consumption rates by setting entry criteria that must be met by a certain date.<sup>80</sup> Many competitions require multiple purchases before the entry qualifies.

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79. See, e.g., Suzanne Kapner, *Shopping Spree-Stores Hoping Black Friday Sales Mean Green*, N.Y. POST, Nov. 24, 2005, at 043 (providing an example of bundling where retailers lure customers after Thanksgiving with special “door-buster” deals, where products are sold at a lower price for a limited time with the hope the customers will stay and shop for other items at full price); Pizza Marketing Quarterly, *How Appetizing is Your Menu?*, <http://www.pmq.com/mag/2002spring/appetizer.shtml> (last visited Feb. 6, 2006) (providing an example of bundling where Domino’s has offered to customers that they can add a soda and a side to build an entire meal for the family at a lower cost than buying each item individually).

80. See, e.g., Press Release, PR Newswire Ass’n LLC, *A Millionaire, Movie Store, and Complete Home Makeover to Emerge From New Monopoly Best Chance Game 3.0 at McDonald’s: McDonald’s and Best Buy Team Up to Offer McDonald’s Customers \$200 Million in Prizes* (Oct. 4, 2005) (stating the criteria for entry as purchase of Large Fries, Medium and Large Soft Drinks, Hash Browns, three and five piece Chicken Selects, and new Premium Chicken Sandwiches); McDonald’s, <http://monopoly.promotions.com/monopoly/front.do> (last visited Dec. 1, 2005) (stating that the monopoly Best Chance Game 3.0 ended Nov. 15, 2005).

Where the competition entry period extends over only a short period of time, potential entrants have a clear incentive to ensure their consumption levels are such that they meet the entry criterion. Therefore, these promotions are likely to support an increase in consumption levels (consumers will buy multiple qualifying items) or an increase in the frequency of consumption (consumers will eat at the outlet sponsoring the competition more frequently). These changes in behavior are likely to occur for a sustained period of time (until the competition closes), thus, consumers may develop new habits that are maintained even after the competition ends. Where the changed behavior involves increased consumption, the potential for it to contribute to obesity is clear.

#### 4. Loyalty Programs

The same reasoning applies to loyalty programs that provide incentives to purchase in order to complete a particular collection of items.<sup>81</sup> These programs appeal to children's desire for collectible items and have the potential to stimulate increased sales for the duration of the promotion (normally at least four weeks).<sup>82</sup>

Many loyalty programs are directed explicitly at young children and are linked with merchandise featuring characters from recently released movies. The use of characters such as Sponge Bob Squarepants, Harry Potter, and Batman are clearly designed to appeal to children and will prompt them to ask their parents to buy the merchandise-linked items.<sup>83</sup>

Loyalty promotions associate premiums with specific menu items and run for a period of weeks. During this time, the premium on an offer is changed, normally on a weekly basis; this frequent updating of the free item provides an incentive for children to revisit the outlet and repurchase the menu item so they acquire the entire collection offered. One commentator noted that "McDonald's, the world's biggest food service retailer, with a turnover of \$40 billion,

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81. Amy Johannes, *Burger King Rolls Out Star Wars Themed Gift Cards, Toy Premiums*, PROMO, Nov. 23, 2005, [http://promomagazine.com/premiums/bk\\_starwars\\_112305/index.html](http://promomagazine.com/premiums/bk_starwars_112305/index.html) (stating Burger King launched the gift-card program to build brand loyalty among customers and drive trial with gift card recipients and to drive purchases with kids by offering premiums of six watches and seventeen toys with kids' meals).

82. See CTR. FOR SCI. & THE PUB. INTEREST, *supra* note 68, at 26.

83. See *id.* at 25–26.



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has harnessed the pulling-power of icon characters from films, television, computer games, cartoon strips and the toy trade and turned buying hamburgers into a fetish.”<sup>84</sup>

The types of promotions outlined above hold wide appeal to young people, as they offer added value and make the unit price of particular menu items more attractive when purchased in conjunction with other items. Children’s increasing spending power has been well documented.<sup>85</sup> Yet, because children have limited incomes, promotions that offer high unit value are likely to prove very attractive.

### *C. The Effect of Food Advertising on Child Obesity*

The prior section has highlighted the wide range of marketing communications now directed at children. Sales promotions offer added value, either by increasing the size of the menu item or by adding a free gift, and provide an incentive to purchase, and to continue purchasing. However, in addition to stimulating purchase behavior, marketing communications also reinforce and maintain existing behavior patterns through operant conditioning.

According to Professor Ehrenberg, repetitive advertising’s main role is to reinforce already developed, repeat-buying habits.<sup>86</sup> This, in turn, preserves that brand’s salience and, thus, the likelihood that consumers will buy it again when next making a purchase in that product category. Therefore, children’s exposure to advertisements for food products is likely to both stimulate their requests for particular items (where these are associated with premiums) and ensure that they continue to purchase and request items with which they are already familiar.

Because advertising can play a key role in supporting and maintaining behavior patterns, researchers have undertaken detailed analyses of children’s exposure to food advertising. Researchers have found that as the range of promotions directed at children has

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84. John Windsor, *No Accounting for Taste*, OBSERVER U.K., Mar. 25, 2001, <http://www.mcspotlight.org/media/press/mcde/observer250301.html>.

85. Allison Stein Wellner, *Tiny Hands on Big Purse Strings*, FORECAST, Dec. 2002, [http://www.findarticles.com/p/articles/mi\\_mOGDE/is\\_12\\_22/ai\\_94982883/print](http://www.findarticles.com/p/articles/mi_mOGDE/is_12_22/ai_94982883/print).

86. Ehrenberg, *supra* note 74, at 32.

increased, so has their exposure to food marketing.<sup>87</sup>

Recent research by Krista Kotz and Mary Story suggests that around half of the advertisements screened during children's television hours feature food products.<sup>88</sup> Furthermore, primetime programs that children watch also contain a high proportion of food advertisements.<sup>89</sup> Researchers have also identified an increase in the number of food advertisements screened; recent estimates suggest that American children are exposed to more than 40,000 food advertisements a year.<sup>90</sup>

The foods promoted during programs regularly viewed by children are typically high in fat, salt or sugar, and are regarded by nutritionists as low in nutritional value to children.<sup>91</sup> Kotz and Story concluded that "[t]he diet presented on Saturday morning television is the antithesis of what is recommended for healthful eating for children."<sup>92</sup>

More recently, an analysis by the Australian Divisions of General Practice found that over ninety-nine percent of food advertisements screened during children's programs featured these types of food products.<sup>93</sup> By contrast, promotions designed to foster healthy eating behaviors were conspicuously absent.<sup>94</sup> A recent study conducted in the United States concluded that food advertising during children's television programs could strongly influence their snacking behavior since these programs screen after school and

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87. See Leonie Neville et al., *Food Advertising on Australian Television: The Extent of Children's Exposure*, 20 HEALTH PROMOTION INT'L. 105, 108 (2005); see also Kay Hammond et al., *The Extent and Nature of Televised Food Advertising to New Zealand Children and Adolescents*, 23 AUSTL. & N.Z. J. PUB. HEALTH. 49, 51 (1999) (finding a high percentage of food advertising during primetime television hours in Australia and New Zealand).

88. Krista Kotz & Mary Story, *Food Advertisements During Children's Saturday Morning Television Programming: Are They Consistent with Dietary Recommendations?*, 94 J. AM. DIETETIC ASS'N 1296, 1297 (1994).

89. See *id.*

90. Dale Kunkel, *Children and Television Advertising*, in HANDBOOK OF CHILDREN AND THE MEDIA 375, 376 (Dorothy Singer & Jerome Singer eds., 2001).

91. See Kotz & Story, *supra* note 88, at 1297.

92. See *id.* at 1296.

93. AUSTRALIAN DIV. OF GEN. PRACTICE, WHAT ARE WE FEEDING OUR CHILDREN? A JUNK FOOD ADVERTISING AUDIT (Feb. 2003), [http://www.adgp.com.au/client\\_images/1245.pdf](http://www.adgp.com.au/client_images/1245.pdf).

94. See *id.*

before the evening meal.<sup>95</sup>

The number of high fat, salt and sugar food advertisements children are exposed to is a cause for concern, as are the techniques used in these promotions. Advertisements directed at children often use animation and fantasy and draw heavily on emotional, rather than factual, appeals.<sup>96</sup> By engaging children at an emotional rather than cognitive level, this type of advertising seems unlikely to prompt any consideration of the nutritional value of the food promoted, the rate at which it should be consumed, or the consequences of excessive consumption.

#### *D. The Effect of Promotional Techniques on Child Obesity*

However, it is not simply children's exposure to food advertising that has concerned health researchers. The range of promotional techniques used by food marketers engages children in a way that is very likely to make them less receptive to messages about healthy eating.<sup>97</sup> Promotions that feature characters from children's television programs or movies are clearly targeted at children. Recent studies have noted a strong growth in licensing arrangements between snack food manufacturers and owners of character trademarks.<sup>98</sup> The range of food items now associated with children's characters has also diversified. Whereas these characters were once found primarily on children's cereals, they now appear on snack food bars, ice cream, fast food items, and confections. Indeed, one recent study reported that as many as one in six food promotions included a free toy offer.<sup>99</sup>

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95. Katherine Coon et al., *Relationships Between Use of Television During Meals and Children's Food Consumption Patterns*, 107 PEDIATRICS 1, 5 (2001), <http://www.pediatrics.org/cgi/content/full/107/1/ef>.

96. See MK Lewis & AJ Hill, *Food Advertising on British Children's Television: A Content Analysis and Experimental Study with Nine-Year Olds*, 22 INT'L J. OBESITY 206, 207 (1998).

97. See *supra* notes 86–87 and accompanying text.

98. See Kaiser Family Foundation, *The Role of Media in Childhood Obesity*, ISSUE BRIEF (Kaiser Family Found., Menlo Park, Cal.), Feb. 2004, at 6, available at <http://www.kff.org/entmedia/entmedia022404pkg.cfm>.

99. See *id.*

### 1. Web Sites

As new forms of media have developed and new techniques for utilizing existing media have evolved, marketing communications to children have become both more sophisticated and more engaging. Many food companies host Web sites designed specifically for children.<sup>100</sup> These sites involve clubs and games, together with promotions for specific meal items and details of the premiums available with these promotions.<sup>101</sup> Other links include coloring-in pages featuring characters and trademarks associated with the brand, recipes involving the manufacturer's products, screensavers, and competitions.<sup>102</sup> A recent research paper identified more than fifty links to pages designed to appeal to children on one company's Web site; each page was associated with one of the company's brands.<sup>103</sup>

In many cases, the promotions featured on these pages are no less blatant than the sales promotions outlined above. However, even the more subtle associations clearly reinforce and maintain the salience of specific brand names, menu items, and premiums. Marketers' association of high fat, salt and sugar foods with fun experiences is not balanced by information about appropriate and healthy consumption levels.<sup>104</sup> As a result, children receive sophisticated messages promoting brands and linking these to positive experiences and outcomes, but little or no information about the frequency with which these foods should be consumed, or the need to eat a wider range of foods to ensure a healthy diet.

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100. McDonald's New Zealand, [http://www.mcdonalds.co.nz/fun\\_games.htm](http://www.mcdonalds.co.nz/fun_games.htm) (containing a link to the United States "www.Ronald.com" page that featured details of "Happy Meal" items together with a disclaimer in size 7.5 Arial font: "HEY KIDS, THIS IS ADVERTISING."); *see also* Sustain, Snagged in the Web: Advertising Junk Food to Children on the Internet, [http://www.sustainweb.org/child\\_add\\_intro.asp](http://www.sustainweb.org/child_add_intro.asp) (last visited Feb. 24, 2004) (displaying a number of food marketing techniques directed at children).

101. McDonald's New Zealand, *supra* note 100.

102. *Id.*

103. *See* CTR. FOR SCI. & THE PUB. INTEREST, *supra* note 68, at 20.

104. *See* AUSTRALIAN DIVS. OF GEN. PRACTICE, *Junk Food Audit*, *supra* note 93.

## 2. Product Placement

While Web sites are sometimes clearly linked to a particular manufacturer or brand, other promotions are more subtle and less easily avoided. Numerous researchers have documented the growth in product placement, a marketing strategy that the paid inclusion of brands in television shows or movies.<sup>105</sup> Initially utilized by the tobacco industry, product placement is now a multi-million dollar business that offers advantages not associated with advertising.

Brands featured as an integral part of a movie or television program, rather than something featured in a discrete promotion, are considerably more difficult to avoid. Viewers are normally unwilling to fast-forward through program material, assuming they are aware that it contains brand promotions. Researchers have questioned the extent to which viewers are even aware of brand placements, and thus, whether they are fully aware of the commercial stimuli they are receiving.<sup>106</sup> Given that children are typically less aware of advertising's commercial focus and have greater difficulty in separating program content from advertisements, the use of product placements further blurs this distinction and capitalizes on children's less developed cognitive skills.<sup>107</sup> Even older, more discerning, children are less likely to reason against product placement, particularly when the brands are carefully integrated with the characters' lifestyles and behaviors.<sup>108</sup>

Furthermore, use of brands by actors young people admire can also enhance that brand's appeal. The resulting increase in popularity of that brand is likely to provide additional reinforcement to users and may even induce trial among non-users.<sup>109</sup> Dr. Wootan notes that "[p]roduct placements create and reinforce social norms regarding the product. They also undermine parental responsibility and control because they cannot be skipped over and avoided."<sup>110</sup>

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105. Alain d'Astous & Francis Chartier, *A Study of Factors Affecting Consumer Evaluations and Memory of Product Placements in Movies*, 22 J. CURRENT ISSUES & RES. ADVERTISING 31, 31 (2000).

106. *See id.* at 39.

107. CTR. FOR SCI. & THE PUB. INTEREST, *supra* note 68, at 21, 35.

108. *See d'Astous & Chartier, supra* note 105, at 39.

109. *See* CTR. FOR SCI. & THE PUB. INTEREST, *supra* note 68, at 22, 36.

110. *Id.* at 22.

Recent examples of product placement include McDonald's offer to pay rappers if they incorporate the words "Big Mac" into their songs.<sup>111</sup> Additionally, young people playing the popular computer game "The Sims" can shop at McDonald's with their characters.<sup>112</sup> Also, Coca-Cola has invested heavily in teenage television promotions:

In one of television's broadest and most blatant advertising gambits in recent years, Coca-Cola Co. has committed millions of dollars to saturate the fledgling drama ['Young Americans'] with commercials and product placement. When 'Young Americans', an hour-long weekly series about teens at an elite small-town prep school, starts its eight-week run tonight, viewers may be hard-pressed to figure out where the drama ends and the product-pitching begins.<sup>113</sup>

Recent research suggests that these promotions reinforce current purchasing behavior.<sup>114</sup> An experiment that exposed children to different versions of a movie, one of which included a scene showing Pepsi-Cola, found children who saw the product placement were significantly more likely to select Pepsi-Cola when invited to choose between Pepsi-Cola or Coca-Cola.<sup>115</sup>

Promotions such as these incorporate brands into young people's everyday experiences, thereby entrenching those brands as a normal part of those experiences. Their influence is more pervasive, and arguably more difficult to counter, because such promotions are covert and virtually impossible to avoid. Moreover, the widespread reinforcement of these brands in "normal" environments suggests the brands are part of a regular diet, even though nutritionists argue these

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111. See Jonathan Duffy, *Well Placed*, BBC NEWS MAG. (U.K.), Mar. 30, 2005, <http://news.bbc.co.uk/1/hi/magazine/4391955.stm>.

112. See Tor Thorsen, *Advertising in Games*, GAMESPOT, Dec. 9, 2002, [http://www.gamespot.com/ps2/adventure/truecrimestreetsofla/printable\\_6081917.html](http://www.gamespot.com/ps2/adventure/truecrimestreetsofla/printable_6081917.html).

113. Joe Flint, *TV's New Teen Drama Gives Starring Role to Coke—What \$6 Million Can Buy: Soft Drink Is Everywhere In WB's Prep-School Saga*, WALL ST. J., July 12, 2000, at B1, available at <http://www.commercialalert.org/wb-cola2.htm>.

114. See Susan Auty & Charlie Lewis, *Exploring Children's Choice: The Reminder Effect of Product Placement*, 21 PSYCHOL. & MARKETING 697, 706 (2004).

115. See *id.*

foods have limited value and that regular consumption at the expense of more nutritious foods is damaging.<sup>116</sup>

For at least a decade, researchers have questioned the ethics of promotions that transpose commercial messages into program content.<sup>117</sup> Professor Siva Balasubramanian highlights these issues, explaining that “[b]ecause they are paid for, hybrid messages provide a basis for the sponsor to control key message aspects such as its content and format; because they covertly or overtly disguise their commercial origins, hybrid messages may appear believable.”<sup>118</sup>

Balasubramanian also notes that unlike advertisements, which typically screen for only thirty or sixty seconds, product placements may appear throughout a show, thus increasing brand reinforcement.<sup>119</sup> In addition, associating celebrities with featured brands enhances the potential for vicarious learning or modeling by children, and encourages them to acquire consumption behaviors that will benefit the promoted brand.<sup>120</sup> Where the behaviors may contribute to health problems, they become of particular concern because product placements rarely feature any information that might balance the implied sales message.

Although this section has drawn on only a small number of the many marketing strategies employed by food manufacturers who advertise to children, it is clear that children’s media contains numerous food promotions. Today’s food promotions are diverse in format and have evolved into subtle, less obtrusive communications

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116. See Waitemata Dist. Health Bd., *Drink Guidelines a First in Child Obesity Battle*, May 25, 2005, <http://www.scoop.co.nz/stories/GE0505/S00189.htm> (noting that “one in three New Zealand children are overweight or obese and more than a quarter of an average child’s daily sugar intake comes directly from what they drink.”); DIABETES N.Z. & FIGHT THE OBESITY EPIDEMIC, INC., *CUTTING THE FAT: HOW A FAT TAX CAN HELP FIGHT OBESITY 10* (2004), available at <http://diabetes.org.nz/resources/files/CutFatAug04.doc> (noting that thirty percent of deaths in New Zealand are attributable to dietary factors, and that illnesses related to diet include type 2 diabetes, heart disease, stroke, and cancer).

117. See Siva K. Balasubramanian, *Beyond Advertising and Publicity: Hybrid Messages and Public Policy Issues*, 23 J. ADVERTISING 29, 30–31 (1994).

118. *Id.* at 30.

119. *See id.* at 38.

120. *See id.* at 38; Barbara Baerns, *Separating Advertising Content from Programme Content: The Principle and Its Relevance in Communications Practice*, 8 J. OF COMM. MGMT. 101, 102 (2003).

that policy researchers suggest children may be less likely to recognize as commercials.<sup>121</sup>

### *E. Outlook*

In summary, marketing promotions stimulate purchase behavior, foster consumption of larger-sized menu items, and provide immediate rewards, such as giveaways, that reinforce purchase behavior. Over time, cueing and maintaining behavior in this way will support the development of long-term habits.

In some cases, those habits may not be associated with any adverse health consequences; however, where they support the view that frequent consumption of high fat, salt and sugar foods are consistent with a healthy diet, the potential for them to contribute to obesity is clear. Moreover, the wide array of media used to promote value for money offerings may encourage beliefs that these foods are not unhealthy, irrespective of the frequency with which they are consumed or the size of the portions consumed.

These promotions have evolved under the current self-regulatory regimes. This Article now considers whether this form of advertising regulation sufficiently protects children. Like many countries, New Zealand is currently considering how best to manage the health problems associated with an increasingly obese population. The following Part examines and reviews New Zealand's approach to self-regulation.

## IV. SELF REGULATION OF FOOD MARKETING AND MARKETING TO CHILDREN: AN EXPERIENCE FROM NEW ZEALAND

Like their overseas counterparts, New Zealand food and advertising industry representatives are determined to ensure that the self-regulatory codes remain as liberal as possible.<sup>122</sup> The Advertising Standards Authority draws on the United Nation's Convention on the Rights of the Child to construct an argument that suggests restrictions on advertising would encroach upon children's rights: "Article 13 recognizes the child's right to freedom of expression. 'This right shall include the freedom to seek, receive and impart information and ideas of all kinds.' Children therefore have the right

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121. See Auty & Lewis, *supra* note 114, at 710.

122. Harker, *Educating to Improve*, *supra* note 21, at 70.



to receive advertisements along with other information.”<sup>123</sup>

The view that advertisements directed at children ensure their right to access information may surprise health researchers who more typically view advertising as a tool designed to achieve commercial objectives. Other arguments in defense of advertising to children have much in common with the arguments used to oppose restrictions on tobacco promotions. For example, the Communication Agencies' Association of New Zealand (CAANZ) outlined its role as providing “leadership in the defense of the right to promote.”<sup>124</sup>

Opponents of restrictions on advertising and promotion rely heavily upon a “legal to sell, legal to promote” argument. For example, Professor Tim Ambler argues that advertising restrictions will serve no useful purpose, having, he claims, previously been unsuccessful in reducing alcohol misuse.<sup>125</sup> He suggests that environmental factors, such as the behavior of parents and peers, which themselves reflect deeper social and cultural norms, will more powerfully influence young people's food consumption.<sup>126</sup>

In New Zealand, the advertising industry has been quick to frame the debate as an issue of freedom concerning the extent to which governments should adopt a paternalistic approach to regulation.<sup>127</sup> The food industry's public relations consultant declared that the key issue in the debate was “the extent to which the state should intervene in peoples [sic] lives by determining what they can and can't—or should and shouldn't eat.”<sup>128</sup>

These claims evoke concerns that the government plans to erode fundamental democratic freedoms and deflects attention away from

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123. Adver. Standards Auth., CODE FOR ADVERTISING TO CHILDREN, (Feb. 1, 2005), <http://www.asa.co.nz/codes/codes.htm>.

124. MARK CHAMPION, COMM'C'N AGENCIES' ASS'N, SUBMISSION ON THE ADVERTISING STANDARDS AUTHORITY'S REVIEW OF ITS CHILDREN AND FOOD CODES 1 (2005), available at <http://updates.caanz.co.nz/attachments/asacodes/subfinal.pdf>.

125. See Tim Ambler, *Do We Really Want to Be Ruled by Fatheads?*, 5 INT'L. J. ADVERTISING & MARKETING TO CHILDREN 25, 26 (2004).

126. See *id.* at 28 (noting that the sedentary nature of television watching, together with family lifestyles, may account for obesity).

127. KEVIN RAMSHAW, WELLINGTON PERSPECTIVE: PRESENTATION TO CAANZ 49, 51 (2004), available at <http://updates.caanz.co.nz/attachments/food-accord-briefing-8-sept-04.pdf>.

128. See *id.*

the real debate over the ethics and effects of food promotions aimed at children. To support arguments that government intervention is unwarranted, opponents of restrictions argue there is little or no evidence that they are necessary. For example, CAANZ interprets the low number of complaints relating to the Codes for Food Advertising and the Code for Advertising to Children as evidence that “there is a high level of . . . compliance with the codes [and] . . . a level of comfort among consumers of advertising that the promotion of products to children is being handled responsibly by advertisers, media and agencies.”<sup>129</sup>

This argument is illogical for several reasons. It assumes that the public fully understands the complaints process and believes that complaints made will be processed fairly. Yet, there is no evidence on the ASA Web site of research that has tested public awareness and knowledge of the complaints system or that has explored complainants’ satisfaction with the complaints system.<sup>130</sup> Without empirical support, it is difficult to rely upon industry claims that consumers are satisfied with the type and level of advertising currently featured in the media. Furthermore, the extent to which adult audiences overlap with children’s programming is unknown. If the level of overlap is low and few parents watch children’s television, their alleged satisfaction with the advertising content cannot be assumed.

Another argument supporting self-regulation of food advertising directed at children is that the advertising will soon be balanced by greater latitude in the claims that advertisers may make about food products. Once advertisers may make health claims about foods, the argument asserts, the availability of this new information will ensure consumers are better equipped to make healthy choices.<sup>131</sup> This argument assumes, however, that the health claims themselves will be based on sound science and presented in a format accessible to consumers. The U.S. experience suggests this may be a wishful assumption.<sup>132</sup>

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129. CHAMPION, *supra* note 124, at 3.

130. Adver. Standards Auth., <http://www.asa.co.nz/> (last visited Oct. 18, 2005).

131. CHAMPION, *supra* note 124, at 5.

132. *Government Role in Combating Obesity: Hearing on H.R. 3444 and H.R. 2987 Before the H. Comm. on Government Reform*, 108th Cong. 2-3

Further, the health food argument explicitly assumes that advertisements of fresh fruits and vegetables will increase once suppliers of these products are able to make health claims about them. This assumption overlooks the fact that, as unprocessed products, fresh fruits and vegetables are not value-added items. As a result, their marketing budgets are small to nonexistent.

More generally, advertisers argue that obesity is a complex problem that requires a multi-faceted approach.<sup>133</sup> They describe proposals to restrict or ban promotional activities as “simple, silver-bullet solution[s]” that are unlikely to achieve any benefits.<sup>134</sup> However, this reasoning implies that until health researchers have identified the precise role played by each factor known to be correlated with obesity, no interventions should occur. Dr. Wootan highlights the flaw in this reasoning, explaining that “[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>135</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>136</sup> While the evidence connecting marketing with obesity is not unequivocal, WHO experts are satisfied that the causal link is probable, therefore, marketing communications are an appropriate target for intervention.<sup>137</sup>

To counter these arguments, proponents of self-regulation in New Zealand and elsewhere create doubt about their opponents’ claims. Where advertisers can create sufficient doubt about the size or scope of problems, or the efficacy of proposed solutions, they often avoid government regulation. Professors David Michaels and

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(2004) [hereinafter *Hearing*] (testimony of Bruce Silverglade, Dir. of Legal Affairs Ctr. for Sci. in the Pub. Interest), available at <http://www.cspinet.org/new/pdf/GovReftsy.pdf>.

133. See NAT’L ADVER. REVIEW COUNCIL, *supra* note 63, at 27.

134. Jenny Robertson, *Food Giants Worry Over Charges Their Products Damage Children’s Health*, MEDILL NEWS SERVICE, Jan. 28, 2005, <http://www.organicconsumers.org/school/giantsworry013105.cfm>.

135. *Id.*

136. See WORLD HEALTH ORG., DIET, NUTRITION AND THE PREVENTION OF CHRONIC DISEASES: TECHNICAL REPORT 916, at 65 (2003).

137. *Id.*

Celeste Monforton refer to this phenomenon as the “manufacture of uncertainty,” a process designed to reduce the pressure for regulators to act.<sup>138</sup> Although Michaels and Monforton examine the tobacco industry’s use of this strategy, the parallels with food manufacturers and advertisers are striking. Food manufacturers and advertisers dispute the influence of marketing activities on behavior, particularly posited causal relationships, and argue that more research is required before policy interventions can be supported.<sup>139</sup>

Food manufacturers and advertisers dismiss empirical evidence and reasoned argument as “junk science” or mere “personal opinion,” which, as Professors Gary Edmond and David Mercer noted, means little more than “I don’t like your study.”<sup>140</sup> Moreover, the term “junk science” implies that real science will be able to arrive at an objective and indisputable truth. By contrast, scientists themselves recognize that “absolute scientific certainty is both counter-productive and futile.”<sup>141</sup>

The arguments presented by the New Zealand advertising industry have, thus far, been very successful in avoiding government regulation. The New Zealand Minister of Health has publicly endorsed an industry document known as the “Food Industry Accord” (FIA), which commits industry signatories to work to address obesity while allowing them to protect all the marketing freedoms that contribute to obesity.<sup>142</sup> One critic summed up health researchers’ attitudes about the accord: “The food industry accord has as much chance of turning the tide of childhood obesity as King Canute.”<sup>143</sup>

In the year that has elapsed since the launch of the FIA, the food industry has run a television campaign featuring Willie Munchright

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138. See David Michaels & Celeste Monforton, *Manufacturing Uncertainty: Contested Science and the Protection of the Public’s Health and Environment*, 95 AM. J. PUB. HEALTH, at s39 (2005).

139. See *id.* at s40.

140. See generally Gary Edmond & David Mercer, *Trashing Junk Science*, 1998 STAN. TECH. L. REV. 3 (explaining how the term “junk science” reduces very complex issues to mere technicalities).

141. Michaels & Monforton, *supra* note 138, at s45.

142. See N.Z. FOOD INDUS. ACCORD, THE HEALTH OF OUR NATION (2004), [http://www.nzftbc.co.nz/images/food\\_ind\\_accord.pdf](http://www.nzftbc.co.nz/images/food_ind_accord.pdf).

143. See Press Release, Sue Kedgley, N.Z. Green Party, Burger Barons Hijack Obesity Campaign (Sept. 3, 2004), available at <http://www.greens.org.nz/searchdocs/PR7830.html>.

(an unbranded McDonald's character promoting healthy eating), and undertaken an ongoing review of the Codes for Advertising to Children and the Code for Food Advertising.<sup>144</sup> Other initiatives are said to be underway, though no tangible outputs are yet apparent. During this same year, Coca-Cola has launched a teen music Web site, and McDonald's has sponsored school dental vans via the brand's Ronald McDonald House.<sup>145</sup> These recent marketing initiatives have not allayed concerns that the food industry is unable to place health concerns above corporate self-interest.

## V. CONCLUSION

The evidence from New Zealand and elsewhere suggests governments can no longer afford to experiment with self-regulatory schemes that have overseen a rapid growth in promotions directed at children. These promotions have taken a myriad of forms. Some are more blatant and intrusive while others are more subtle and difficult to detect. Overall, the prevalence of these promotions suggests that self-regulatory codes have failed to adequately balance the commercial drive for profit against the need to meet high standards of social responsibility.<sup>146</sup>

The need for government intervention is urgent, and the lack of legal authority on food promotions directed at children must be addressed.<sup>147</sup> Only the government can regulate trade practices described as creating a "hostile food environment" and intervene to "remedy the gross information imbalance that leads many consumers, especially children, to adopt a less healthful diet."<sup>148</sup>

The current range of food promotions reveals the inherent weakness of self-regulation, particularly the lack of clarity in the

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144. Geoff Cumming, *The Fight Against Junk Food*, N.Z. HERALD, Jan. 10, 2005, [http://www.nzherald.co.nz/section/story.cfm?c\\_id=2&objectid=10348103](http://www.nzherald.co.nz/section/story.cfm?c_id=2&objectid=10348103).

145. See Coketunes Music Download Store, <http://www.cokefridge.co.nz/index.sm> (last visited Sept. 6, 2005); Ronald McDonald House Charities, <http://www.rmhc.tx.co.nz/programmes/index.html> (last visited Sept. 6, 2005).

146. See Letter from Ben Kelley, Bd. Member, Pub. Health Advocacy Inst., to Donald S. Clark, Sec'y, Fed. Trade Comm'n (May 31, 2005), *available at* <http://www.phaionline.org/downloads/blog/phai.ftc.comments.pdf>.

147. See BEN KELLEY, PUB. HEALTH ADVOCACY INST., *INDUSTRY CONTROLS OVER FOOD MARKETING TO CHILDREN: ARE THEY EFFECTIVE?* 3 (2005), *available at* <http://www.phaionline.org/downloads/caru.analysis.pdf>.

148. See *Hearing*, *supra* note 132.

code provisions, which creates ambiguity and loopholes that manufacturers and advertisers are quick to exploit.<sup>149</sup>

Industry arguments that consumers are satisfied with food advertising and the promotions directed at children are illogical and lack empirical support. Claims that parents need to take more responsibility for their children's diets and exercise habits also deflect attention away from the role the food and advertising industries play in shaping and reinforcing children's dietary habits.

Nor can the argument that there is no such thing as "healthy" and "unhealthy" foods be accepted, as "[t]his is tantamount to saying that all foods, however bad their nutritional quality, can fit into a balanced diet, provided that you hardly ever eat them. Unfortunately, children eat large amounts of junk food and all too frequently food promotions to children are dominated by these products."<sup>150</sup>

Food marketing to children is only logical if it maintains or reinforces behavior, or increases the rate at which this is exhibited. Recent evidence also challenges claims that food marketing has little effect on behavior and suggests promotions directed at children do influence their behavior.<sup>151</sup> Given the marketing activities, and the evidence of their effects on young people, governments can no longer rely on the food and advertising industries to control the food promotions they direct to children.

While interventions such as education to improve children's knowledge of healthy food choices may be proposed as alternatives to regulation, these are unlikely to have a meaningful effect in a media environment dominated by messages promoting foods high in fat, salt and sugar. Only regulatory interventions that restrict food promotions can create an environment in which education and social marketing messages are effective, and where young people's ability to make healthy choices is enhanced.

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149. See SUSTAIN, FOOD & FARMING, *supra* note 66, at 13.

150. *Id.* at 14.

151. See FOOD STANDARDS AGENCY, REVIEW OF RESEARCH ON THE EFFECTS OF FOOD PROMOTION TO CHILDREN 137 (2003), available at <http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1.pdf>.