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The Real Toy Story: The San Francisco Board of Supervisors Healthy Food Incentives Ordinance

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THE REAL TOY STORY:
THE SAN FRANCISCO BOARD OF SUPERVISORS HEALTHY
FOOD INCENTIVES ORDINANCE

*Cortney Price**

I. INTRODUCTION.....	347
II. HISTORY OF MARKETING TO KIDS.....	349
III. SAN FRANCISCO BOARD OF SUPERVISORS HEALTHY FOOD INCENTIVES ORDINANCE.....	354
IV. WILL THE ORDINANCE BE EFFECTIVE?.....	356
A. <i>The Loophole</i>	356
B. <i>The Controversy Surrounding the Ordinance</i>	357
C. <i>Potential Nation-wide Influence</i>	359
V. CONCLUSION.....	361

I. INTRODUCTION

Obesity among children in the United States has tripled over the last thirty years.¹ Incidentally, the world’s largest fast food restaurant, McDonald’s, first introduced its children’s Happy Meal thirty-two years ago.² Shortly thereafter, the first Disney inspired toy found its way into Happy Meals and the hearts of the “billions and billions served.”³

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1. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Childhood Obesity Facts: Obesity rates among all children in the United States*, available at <http://www.cdc.gov/obesity/data/childhood.html> [hereinafter CDC] (last visited Sep. 20, 2013); Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 32 EMORY L. J. 1645, 1648 n.3 (2004); Carla Fried, *McDonald's Hit by Happy Meal Toy Ban*, CBS NEWS.COM (Nov. 4, 2010), available at http://www.cbsnews.com/8301-505123_162-41141510/mcdonalds-hit-by-happy-meal-toy-ban/.

2. Kayla Webley, *The Happy Meal*, TIME (Apr. 30, 2010), available at <http://www.time.com/time/nation/article/0.8599.1986073.00.html>. McDonald's introduced the Happy Meal in 1979. *Id.*

3. *Id.*

Although the iconic Happy Meal and accompanying toy have become “a staple of Americana akin to baseball and apple pie,” the continued existence of the practice is being threatened in light of the powerful influence toys have on children’s food choices, thus contributing to the current obesity epidemic.⁴ The San Francisco Board of Supervisors has become the leader of the Happy Meal insurgency by enacting the Healthy Food Incentives Ordinance, effective December 2011, outlawing the accompaniment of free toys in children’s fast food meals (“kids’ meals”) unless those meals meet certain health standards.⁵

The San Francisco Board of Supervisors is holding kids’ meals responsible for today’s increasingly unhealthy adolescent population through a predatory practice of exploiting young children’s developmental immaturity and susceptibility to marketing.⁶ In response, the Healthy Food Incentives Ordinance (“Ordinance”) aims to raise awareness of the obesity epidemic and force fast food giants to recognize their significant role in combating childhood obesity.⁷ While the Ordinance is applicable in too small of a test area to make a meaningful difference in the obesity rates nationwide, “sometimes symbolic gestures are the start of more substantive change.”⁸

This article intends to dissect the intention and scope of the recent San Francisco Board of Supervisors Healthy Food Incentives Ordinance, commonly referred to as the “toy ban,” in an effort to determine the success and national consequence of such an ordinance. Part II considers the history of the “Happy Meal,” particularly the development of the now billion-dollar industry focusing on marketing to kids and leading to the current childhood obesity epidemic. Part III focuses on the composition of the toy ban ordinance, including the requirements to include incentive items in children’s fast food meals, the purpose and goals the ban aims to achieve, and the detrimental loophole the San Francisco Board of Supervisors overlooked. Part IV will examine the anticipated effectiveness of the Ordinance in San Francisco, including fast food giants’ responses to the Ordinance, and the potential nationwide implications. This article is not suggesting that the San Francisco “toy ban” will solve the obesity problem or even make a sizeable dent on a nationwide scale. However, Part V concludes by finding that the Ordinance is a positive addition of government regulation implemented to raise awareness of the childhood

4. Roseann B. Termini et al., *Food Advertising and Childhood Obesity: A Call to Action for Proactive Solutions*, 12 MINN. J. L. SCI. & TECH. 619, 630 (2011).

5. San Francisco Health Code art. 8, §§ 471.1-471.9 (2010).

6. Fried, *supra* note 1.

7. San Francisco Health Code art. 8, § 471.2.

8. Fried, *supra* note 1.

obesity epidemic in this country, challenging the restaurant industry to put children's health before profits since research confirms a direct link between fast food consumption and childhood obesity.

II. HISTORY OF MARKETING TO KIDS

Today, one in every three children is overweight or obese, which is approximately twenty-four million children in the United States.⁹ Such statistics suggest that childhood obesity is not simply an individual, incidental problem defying Hollywood's representation of iconic beauty, but rather, is a "national health crisis" that creates a "compelling and critical call for action that cannot be ignored."¹⁰ According to the White House, the current generation may be on track to have a shorter lifespan than their parents due to the physical implications of childhood obesity, including an increased risk of heart disease and asthma.¹¹ Consequently, the corresponding economic costs of providing inpatient treatment to children diagnosed with obesity increased from \$125.9 million in 2001 to \$237.6 million in 2005, with an additional \$14.1 billion spent on prescription drugs, emergency room visits, and outpatient treatment.¹² The psychological effects of childhood obesity are even more alarming with reports indicating that obese children enjoy a quality of life equal to that of a child diagnosed with cancer.¹³

"As a matter of public health, law and policy makers have an obligation to examine the reasons for obesity in America."¹⁴ Affirmative action is beginning to develop in response to this obesity epidemic at the state and national level, but everyone has a role to play, including parents and caregivers, schools, health care professionals, and elected officials

9. CDC, *supra* note 1; Fed. Trade Comm'n, *Food for Thought: Interagency Working Group Proposal on Food Marketing to Children*, available at <http://www.ftc.gov/os/2011/04/110428foodmarketfactsheet.pdf>; ChildStats.gov, *Forum on Child and Family Statistics*, <http://www.childstats.gov/americaschildren/tables/pop1.asp> (last visited Sept. 20, 2012). In 2011, there were approximately 73.9 million children, age 0-17, in the United States. *Id.* One third of this population equals approximately twenty-four million overweight or obese children in the United States. *Id.*

10. White House Task Force, *Solving the Problem of Childhood Obesity Within a Generation: White House Task Force on Childhood Obesity Report to the President, The Challenge We Face*, at 3 (May 2010) [hereinafter Task Force], available at <http://www.letsmove.gov/white-house-task-force-childhood-obesity-report-president>.

11. *Id.* at 3, 6.

12. San Francisco Health Code art. 8, § 471.1(6).

13. Task Force, *supra* note 10, at 6; San Francisco Health Code art. 8, § 471.1(5).

14. Margaret Sova McCabe, *The Battle of the Bulge: Evaluating Law as a Weapon Against Obesity*, 3 J. FOOD L. & POL'Y 135, 137 (2007).

from all levels of government.¹⁵ The Ordinance compels participation in combating the obesity epidemic through individual consumer's food choices, forcing the restaurant industry to acknowledge its role in childhood obesity.¹⁶

McDonald's "Happy Meal" is recognized as the most iconic children's meal and contains food that is ranked among the worst for children; however, McDonald's is not the only fast food restaurant under the Ordinance's radar.¹⁷ Burger King introduced its own permanent children's meal, called the Kids' Meal Pack.¹⁸ The success of the Kids' Meal Pack was evidenced in 1999 when Burger Kings across the country were swarmed with desperate parents looking to buy children's meals accompanied by Pokémon promotional toys after the film's debut.¹⁹ Today, all major fast food chains have recognizable kids' meals such as Wendy's, Taco Bell, and Dairy Queen.²⁰

One of the amorphous contributing factors of childhood obesity, on which the Ordinance focuses, is the practice of unregulated food marketing

15. Let's Move!, <http://www.letsmove.gov/about> (last visited Sept. 30, 2011). One such response is the Obama Administration's implementation of the Healthy, Hunger-Free Kids Act. The Healthy, Hunger Free Kids Act was signed into law in December 2010, largely in response to First Lady Michelle Obama's Let's Move! initiative. Healthy, Hunger-Free Kids Act of 2010, PL 111-296, December 13, 2010, 124 Stat 3183. Let's Move! is dedicated to solving the problem of obesity within a generation by reducing the obesity rate to just five percent by 2030, the same rate before childhood obesity first began to rise in the late 1970s. Task Force, *supra* note 10, at 9. Currently, the childhood obesity rate is 19.6 percent. *Id.*

16. Ryan Jaslow, CBS News, *San Francisco toy giveaway ban spotlights childhood obesity*, Dec. 1, 2011, available at http://www.cbsnews.com/8301-504763_162-57334621-10391704/san-francisco-toy-giveaway-ban-spotlights-childhood-obesity/.

17. McDonald's Corporation, 2011 WL 190607 at 6 (S.E.C. No-Action Letter) (Feb. 10, 2011). In an internal evaluation regarding the childhood obesity issue, McDonald's Corporation stated, "the contribution of the fast food industry to the global epidemic of childhood obesity has become a major public issue." *Id.* The internal evaluation also includes data from a recently released, comprehensive study by the Yale Rudd Center on Food Policy and Obesity, which ranks the nutrition quality of McDonald's food among the worst for children. *Id.*

18. Burger King, *Company Info*, available at <http://www.bk.com/en/us/company-info/index.html> (last visited Sept. 30, 2012).

19. Jason Kandel, *Kids Swarm Burger King as Pokemon-Mania Strikes*, DAILY NEWS, Nov. 12, 1999, available at [http://www.thefreelibrary.com/KIDS+SWARM+BURGER+KING+AS+POKEMONMANIA+STRIKES.\(News\)\(Statistical...-a083629023](http://www.thefreelibrary.com/KIDS+SWARM+BURGER+KING+AS+POKEMONMANIA+STRIKES.(News)(Statistical...-a083629023).

20. Angela Haupt, *Best and Worst Fast Food Kids' Meals*, US NEWS HEALTH, Nov. 9, 2010, available at <http://health.usnews.com/health-news/diet-fitness/diet/articles/2010/11/09/best-and-worst-fast-food-kids-meals>.

to children.²¹ Research proves that the rising obesity rate in America's youth is linked to the rising amount of money allocated to marketing that targets children.²² Food and beverage advertisers alone, such as McDonald's, Coca-Cola Company, and Kraft Foods Global, Inc., spend between \$10 billion and \$15 billion annually targeting their best advocates: children.²³ With children younger than eight lacking the ability to differentiate between program content and advertising, and those same children having a substantial influence on parental judgment, it seems as though these marketing giants have tapped into an inextinguishable well of consumer influence and subsequent wealth.²⁴ Moreover, a study conducted by Yale University's Rudd Center for Food Policy & Obesity concluded that children think foods taste better when packaging displays their favorite television or movie character.²⁵ In response, Quaker Oats allocates over \$15 million solely on advertising for Cap'n Crunch cereal, and it is not alone.²⁶ These mega-bucks are paying off as a solid investment because, of the \$200 billion spent by children and youth consumers in 2006, the four categories leading in sales were candy and snack foods, soft drinks, cereal, and fast food.²⁷

The government appears to adequately regulate marketing standards, at least on its face. For example, regulations have been issued governing everything from consumer endorsements in advertisements to requiring precisely 660 feet between the edge of the pavement and a billboard erected on the side of the road.²⁸ However, things are not always as they

21. Task Force, *supra* note 10, at 28. Childhood obesity is more common among certain race and ethnic groups. *Id.* at 5. Obesity rates are highest among non-Hispanic black girls and Hispanic boys. *Id.* Among adults, obesity rates are typically associated with lower incomes, particularly among women, but the relationship between income and obesity in children is less consistent and sometimes even points in the opposite direction. *Id.*

22. Susan Linn & Courtney L. Novosat, *Calories For Sale: Food Marketing to Children in the Twenty-First Century*, 615 ANNALS AM. ACAD. POL. & SOC. SCI. 133, 134 (2008).

23. *Id.* at 134.

24. *Id.* at 135.

25. Termini, *supra* note 4, at 630. In this study, forty children ranging from ages four to six were each given three pairs of identical snack foods: graham crackers, fruit snacks, and carrots. *Id.* One package of each food had a cartoon character, Scooby Doo, Dora the Explorer, or Shrek on the front, while the others did not. *Id.* Over two-thirds of the children involved in the study stated that they preferred the snack with the character on the package, while approximately one-half of the children thought the foods from packages with the cartoon characters tasted better. *Id.*

26. Linn & Novosat, *supra* note 22, at 134.

27. *Id.*

28. 16 C.F.R. § 255.2 (2009); Tenn. Comp. R. & Regs. 1680-02-03.03 (2008).

appear. As of 1984, the Federal Communications Commission (“FCC”) “rescinded all restrictions on the amount of commercial content,” finding that the advertising industry is better suited for self-regulation, which provided a “watershed moment for advertisers.”²⁹ Prior to 1984, regulations were imposed on advertising practices deemed “unfair” or “deceptive.”³⁰ Although the Children’s Television Act of 1990 reinstated advertising time limits to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays, the content of the advertising remained unregulated.³¹ As applied today, the FCC’s rescission of marketing regulation has created a self-imposed, voluntarily regulated industry that habitually markets high-calorie and low-nutrient foods to children.³²

This voluntarily regulated marketing-to-children industry has resulted in chips and french fries currently comprising half of all the vegetables kids eat, causing parents to become more concerned about childhood obesity than smoking and drug abuse.³³ While still allowing voluntary adoption by individual food and beverage advertisers, there are currently two leading preliminary propositions to standardize regulation of food marketing to children.³⁴

First, Congress directed the Federal Trade Commission, along with experts in nutrition, health, and marketing from the Food and Drug Administration, the Centers for Disease Control and Prevention, and the United States Department of Agriculture to establish the Interagency Working Group on Food Marketed to Children (“Working Group”).³⁵ The Working Group seeks to establish recommendations for the nutritional quality of food marketed to children and adolescents under 17 years old and seeks to implement two basic nutritional principles to all food marketed to children by 2016.³⁶ The first principle includes providing a meaningful contribution to a healthful diet from food groups including fruit, vegetables, whole grains, fat-free or low-fat milk products, fish, extra

29. Linn & Novosat, *supra* note 22, at 135.

30. *Id.*

31. *Id.* at 136.

32. *Id.* at 134; Fed. Trade Comm’n, *supra* note 9 (indicating that “[t]he food industry spent more than \$1.6 billion in 2006 alone to market messages to kids promoting foods that often are high in calories and low in nutrition.”).

33. Fed. Trade Comm’n, *supra* note 9.

34. Karlene Lukovitz, *Industry Unveils New Marketing-to-Kids Standards*, MEDIAPOST NEWS (Jul. 15, 2011), available at http://www.mediapost.com/publications/?fa=Articles.printFriendly&art_aid=154139.

35. Fed. Trade Comm’n, *Interagency Working Group Seeks Input on Proposed Voluntary Principles for Marketing Food to Children* (Apr. 28, 2011), available at <http://www.ftc.gov/opa/2011/04/foodmarket.shtm>.

36. *Id.*

lean meat or poultry, eggs, nuts and seeds, and beans.³⁷ The second principle provides that foods marketed to children should be formulated to minimize the content of nutrients that could have a negative impact on health or weight.³⁸ This second principle prevents foods containing more than the allocated allowances of saturated fat, trans fat, added sugars, and sodium from being marketed to children.³⁹

Second, as an alternative to standards presented by the Working Group, the Council of Better Business Bureau proposed the Children's Food and Beverage Advertising Initiative ("CFBAI").⁴⁰ This initiative creates separate nutritional standards for each of ten product categories and provides consistent definitions for "healthy" or "better-for-you" foods advertised to children under 12.⁴¹ CFBAI's seventeen members, including McDonald's USA, Burger King Corp., Cadbury Adams USA, Campbell Soup Company, and thirteen of the "largest food/beverage companies", are encouraged to implement the new standards by December 31, 2013.⁴²

Thus far, self-regulated initiatives have proven ineffective.⁴³ With advances in technology allowing marketers to find more direct, personalized gateways to reach young audiences that sidestep parental authority, the question becomes: Can parents actually control what their kids eat?⁴⁴ When public health campaigns to buckle up and quit smoking were unsuccessful, government regulations like "Click it or Ticket" and public smoking restrictions were used to reduce the number of health related injuries caused by these behaviors.⁴⁵ Some city officials in California believe that such government regulation is needed to combat childhood obesity by "break[ing] the link between unhealthy food and prizes."⁴⁶

37. *Id.*

38. *Id.*

39. *Id.*

40. Lukovitz, *supra* note 34.

41. *Id.*

42. *Id.*

43. McDonald's Corporation, *supra* note 17, at 15 (providing that more preschoolers saw McDonald's ads in 2009 than in 2007).

44. *See generally* Linn & Novosat, *supra* note 22.

45. *See generally* Lynn Parker et al., *Legal Strategies in Childhood Obesity Prevention – Workshop Summary*, INSTITUTE OF MEDICINE (August 10, 2011); Nat'l Highway Traffic Safety Admin., *Click It or Ticket: America's Seat Belt Campaign*, available at <http://www.nhtsa.gov/C1OT> (last visited October 19, 2012); *See e.g.*, Ark. Code Ann. § 20-27-1804 (West 2006); *see also* McCabe, *supra* note 14, at 137.

46. Sara Bonisteel, CNN LIVING, *Toys banned in some California fast food restaurants*, Apr. 28, 2010, available at http://articles.cnn.com/2010-04-28/living/fast.food.california_1_kids-meals-toys-ordinance?_s=PM:LIVING.

III. SAN FRANCISCO BOARD OF SUPERVISORS HEALTHY FOOD INCENTIVES ORDINANCE

On November 23, 2010, the San Francisco Board of Supervisors approved the Healthy Food Incentives Ordinance by overruling Mayor Gavin Newsom's veto with an eight to three vote, the minimum needed to override a veto.⁴⁷ Mayor Newsom vetoed the Ordinance, taking the position that "these types of toy bans [are] inappropriate [and not] particularly effective."⁴⁸ However, the Mayor's position was not influential enough to sway the Board of Supervisors' vote after hearing from numerous speakers, both advocates and opponents, some of whom included representatives from the Department of Public Health, the California Center for Public Health Advocacy, the University of California at San Francisco Department of Pediatrics, the California Restaurant Association, and the McDonald's Corporation.⁴⁹ Once approved, the Ordinance effectively amended Article 8 of the San Francisco Health Code by adding seven sections, which operate to set nutritional standards for restaurant food sold accompanied by toys or other youth focused incentive items.⁵⁰

The broad intent of the Ordinance is to "support families seeking healthy eating choices for their children by permitting restaurants to give away free toys and other incentive items in combination with foods only if those foods meet specified nutritional criteria."⁵¹ The Ordinance prevents restaurants from using toys to make unhealthy food items appealing to children by offering restaurants many different options for compliance, including introducing healthier menu options, reformulating current menu items, or changing marketing and toy distribution practices.⁵² Therefore, the Ordinance is not a complete ban on toys in kids' meals, as commonly coined by the media and opponents, but rather an incentive program.⁵³ Incentives are the "added element without which the desired action probably would not occur" because incentives act to "intentionally. . .[motivate] a person to choose differently than he or she

47. Angela Calvillo, Board of Supervisors City and County of San Francisco Meeting Minutes, Vol. 105 No. 39, at 1043 (Nov. 23, 2010).

48. Rachel Gordon, SFGATE.COM, *Mayor Gavin Newsom vetoes fast-food toy ban*, Nov. 13, 2010, http://articles.sfgate.com/2010-11-13/bay-area/24830064_1_toy-ban-toys-in-kids-meals-vetoes.

49. Calvillo, *supra* note 47, at 1043.

50. San Francisco Health Code art. 8, §§ 471.1-471.9.

51. *Id.* § 471.2.

52. *Id.* § 471.4 (where the Ordinance refrains from specifying how affected restaurants are to comply).

53. *See generally* Fried, *supra* note 1; *see also* Gordon, *supra* note 48.

would be likely to choose in its absence.”⁵⁴ With the long-standing popularity of toys in kids’ meals, it appears the Board of Supervisors is expecting such incentives to affirmatively entice children to alter the status quo and start eating healthier meals.

Kids’ meal toys are defined in the Ordinance as “incentive items” and generally include all items, both physical and digital, with “particular appeal to children and teens.”⁵⁵ To keep the “happy” in Happy Meals, children’s fast-food meals in San Francisco must now meet specified nutritional guidelines, which vary based on whether the food sold is a full meal (e.g., a hamburger and fries), a single food item (e.g., a single slice of pizza), or a beverage.⁵⁶ Pursuant to the Ordinance, a toy may accompany the sale of a meal if that item does not exceed: 600 calories, 640 milligrams of sodium, 35% of total calories from fat, 10% of total calories from saturated fat, or 0.5 grams of trans fat.⁵⁷ In addition, a restaurant may only include an incentive item for a meal if the meal includes at least 0.5 cups of fruits and at least 0.75 cups of vegetables.⁵⁸ Finally, an incentive item may only be linked to the purchase of a single food item or beverage if it does not include more than 35% of total calories from fat, or more than 10% of calories from added caloric sweeteners.⁵⁹ As of the date the Ordinance was passed, none of the two-dozen Happy Meals on McDonald’s menu met the criteria dictated by San Francisco lawmakers.⁶⁰

The Ordinance became effective December 1, 2011.⁶¹ Any restaurant establishments that do not comply with the terms of the Ordinance are subject to administrative citations issued by the Director of the Health Department and enforced by the Department of Public Health.⁶² Any establishment that “stores, prepares, packages, serves, vends or otherwise prepares food for human consumption at the retail level for consumption on or off the premises” is required to comply with the Ordinance.⁶³ With San

54. Ruth W. Grant & Jeremy Sugarman, *Ethics in Human Subjects Research: Do Incentives Matter?*, 29(6) J. MED. & PHIL. 717, 721 (2004), available at <http://www.waisman.wisc.edu/events/ethics/sprin06-sem2-incentives-compensation.pdf>.

55. San Francisco Health Code art. 8, § 471.3(d).

56. *Id.* § 471.4.

57. *Id.* § 471.4(a)(1)-(5).

58. *Id.* § 471.4(a)(7).

59. *Id.* § 471.4(b).

60. Gordon, *supra* note 48.

61. San Francisco Health Code art. 8, §§ 471.1-471.9.

62. *Id.* § 471.5.

63. *Id.* § 471.3(f).

Francisco containing the highest number of restaurants per capita in the country, the Ordinance has a potentially sweeping and influential reach.⁶⁴

IV. WILL THE ORDINANCE BE EFFECTIVE?

A. *The Loophole*

A loophole overlooked by the San Francisco Board of Supervisors, perhaps due to underestimating the dexterity of the fast food industry, may have rendered the Ordinance futile before it could even be implemented.⁶⁵ The loophole derived from the term “incentive items” being freely interchanged with “free toy” throughout the amendments to Article 8.⁶⁶ As such, McDonald’s restaurants in San Francisco have found a way to fully comply with the Ordinance: charge ten cents for the toy.⁶⁷ The money from the toy sales will be allocated to help build a new Ronald McDonald House, McDonald’s charity that provides a “home-away-from-home” for families so they can stay close to their hospitalized children at little or no cost.⁶⁸ According to McDonald’s USA Director of Media Relations, the ten-cent price was an idea developed from surveying customers who thought ten cents for a toy was “fair and reasonable,” especially after being told the money would go to charity.⁶⁹ While McDonald’s is responsible for the ingenuity of circumventing the Ordinance, other fast food giants are planning to follow suit.⁷⁰ Burger Kings in San Francisco have begun charging ten cents for toys, effective the day the Ordinance was implemented, but have not yet decided what to do with the proceeds.⁷¹ The fact that consumers are willing to pay for a Happy Meal toy is “[p]roof positive, and completely admitted by McDonald’s, that no customer will buy a Happy Meal unless it comes with a toy.”⁷² At the least, this

64. Square Feet Commercial Real Estate Blog, *San Francisco’s Bong Su Latest Victim: Restaurants Hit Hard*, Mar. 10, 2009, available at <http://www.squarefeetblog.com/commercial-real-estate-blog/2009/03/10/san-franciscos-bong-su-latest-victim-restaurants-hit-hard/>.

65. CBS NEWS, *San Francisco McDonald’s find way around toy ban*, November 30, 2011, available at http://www.cbsnews.com/8301-201_162-57333985/san-francisco-mcdonalds-find-way-around-toy-ban/.

66. See San Francisco Health Code art. 8, §§ 471.1-471.8.

67. CBS NEWS, *supra* note 65.

68. McDonald’s Corporation, Ronald McDonald House Charities, *What We Do*, available at <http://rmhc.org/what-we-do/ronald-mcdonald-house/>, (last visited Sept. 22, 2012).

69. CBS NEWS, *supra* note 65.

70. Jaslow, *supra* note 16.

71. *Id.*

72. *Id.*

revelation goes to prove that the Ordinance is properly focused on an influential product with the power to affect consumer food choices.

McDonald's views its tactical diversion to compliance with the Ordinance as a business decision, still failing to support any efforts implemented to combat childhood obesity.⁷³ According to McDonald's, its responsibility lies with giving its "customers what they want," which is the option of purchasing a toy.⁷⁴

Interestingly, even in hindsight, the San Francisco Board of Supervisors does not plan to make any changes to the Ordinance to address the paralyzing loophole.⁷⁵ Eric Mar, the San Francisco supervisor who sponsored the Ordinance, has deemed the law a success regardless of the loophole.⁷⁶ The stated purpose of the Ordinance was to raise awareness about the nutritional content of the food served at fast food restaurants, and Supervisor Mar feels the Ordinance has done just that since McDonald's has revamped its Happy Meal with smaller portions of fries, or apple and milk options, effective nationwide by March 2012.⁷⁷

B. The Controversy Surrounding the Ordinance

Besides the now obvious defect in the Ordinance, opponents voiced critical opinions questioning the Ordinance's effectiveness long before its implementation.⁷⁸ Prior to approval of the Ordinance, the San Francisco Board of Supervisors welcomed public petitions and communications in November 2010.⁷⁹ An influx of responses were received from concerned citizens not only in San Francisco, but from throughout the United States.⁸⁰

73. CBS SAN FRANCISCO, *McDonald's Outsmarts San Francisco On Happy Meal Toy Ban*, Nov. 30, 2011, available at <http://sanfrancisco.cbslocal.com/2011/11/30/mcdonalds-outsmarts-san-francisco-on-happy-meal-toy-ban/>.

74. Jaslow, *supra* note 16.

75. *Id.*

76. *Id.*; see also HUFF POST SAN FRANCISCO, *San Francisco Happy Meal Toy Ban Takes Effect, Sidestepped by McDonald's*, December 1, 2011, available at http://www.huffingtonpost.com/2011/11/30/san-francisco-happy-meal-ban_n_1121186.html.

77. Jaslow, *supra* note 16.

78. See City and County of San Francisco Board of Supervisors, *Petitions and Communications*, available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/communications/2010/101392.pdf> (last visited Sept. 21, 2012).

79. *Id.* The San Francisco Board of Supervisors accepted public communication regarding the Ordinance from November 2-8, 2010. *Id.*

80. *Id.* The majority of out-of-state comments were composed of threats to not visit San Francisco as a tourist because of the writers' disgust at the "toy ban" ordinance. *Id.*

The collective consensus of opponents to the Ordinance claim the government's health police have run amok and are invading people's private choices, but interestingly, there was very little criticism about the effectiveness of such an ordinance.⁸¹ Cries of "nanny state" and accusations that the Board of Supervisors is "parenting others' children" dominate the petitions and communications received by the Board.⁸² In addition, the United States Constitution was patriotically quoted, essentially claiming Americans' right to choose obesity.⁸³ Many opponents feel that the Ordinance represents the overuse and misuse of government power.⁸⁴ Comments were ripe with resentment claiming, "[t]his is the type of government control that our forefathers were trying to avoid."⁸⁵ This Ordinance has been scrutinized as an individual breach of freedom, and a delicate matter spawning passionate debate.

However, the Ordinance is not a breach of consumer freedom to make food-purchasing decisions. Negative externalities follow such individual decisions on a national basis. For example, unhealthy eating habits pose a serious economic strain on the national Medicare costs and ever-rising health insurance costs.⁸⁶ Nationally, between 2001 and 2005, the annual costs of providing inpatient treatment to children diagnosed with obesity increased from \$125.9 million to \$237.6 million.⁸⁷ Outpatient treatment, including money spent on prescription drugs and emergency room visits, total a staggering \$14.1 billion annually.⁸⁸ A new study out of Cornell estimates the aggregate annual cost of treating obesity in the United States, both inpatient and outpatient, is \$168 billion, which correlates to 16.5% of our national medical care costs.⁸⁹ According to findings for the Ordinance, as overweight and obese children become adults, their unhealthy lifestyles are likely to contribute to the already high economic costs of healthcare and loss of productivity associated with adult obesity.⁹⁰ Moreover, statistics released by Thomson Medstat indicate that children covered by Medicaid are six times more likely to be treated for morbid obesity than children with

81. Jaslow, *supra* note 16.

82. Petitions and Communications, *supra* note 78.

83. *Id.* at letter from Brenda Brinks (Nov. 4, 2010).

84. *Id.* at letter from Danny Johns (Nov. 3, 2010).

85. *Id.* at Clerk of the Board Satisfaction Form (Nov. 4, 2010).

86. San Francisco Health Code art. 8, § 471.1(6).

87. *Id.*

88. *Id.*

89. Fried, *supra* note 1.

90. San Francisco Health Code art. 8, § 471.1.

private insurance.⁹¹ The Ordinance is supported by the Institute of Medicine, the World Health Organization, pediatricians, educators, parents and community health advocates who all realize, among other concerns, that “reducing the consumption of junk food by kids could spare the health of millions and save billions of dollars to our overstrapped public health system.”⁹² In fact, registered dietitians agree that “[w]hatever it takes to get restaurants to help fight childhood obesity is a great thing.”⁹³

The Ordinance is aimed at encouraging children to make healthful food decisions based on the food’s nutritional content, free from unregulated marketing of incentive items.⁹⁴ Adult opponents claim their rights are being infringed, but the Ordinance is not focused on adult’s food decisions; it is focused on children’s health.⁹⁵ Regulatory efforts to protect children reflect their unique legal status and the fragility of their liberties.⁹⁶ This Ordinance is a further example of protective governmental regulation, comparable to laws requiring car seats and the prohibition of tobacco sales to minors, which have long been accepted in our society.

C. Potential Nation-wide Influence

Will the San Francisco Healthy Food Incentives Ordinance influence implementation of similar ordinances in other jurisdictions? Thus far, the answer is maybe. Notwithstanding the obvious loophole in the Ordinance, similar “toy bans” may have the ability to affect obesity levels if implemented nation-wide. Because the Ordinance is the first of its kind in a major United States city, little statistical data exists to predict the success or failure of such an ordinance. However, on August 9, 2010, Santa Clara County, California became the first United States jurisdiction to implement an ordinance that prohibits the distribution of toys and other incentives with

91. NETSCAN’S HEALTH POLICY TRACKING SERVICE, *State Actions to Promote Nutrition, Increase Physical Activity and Prevent Obesity: A 2006 First Quarter Legislative Overview*, Apr. 3, 2006, available at <http://www.rwjf.org/files/research/NCSL%20FinalApril%202006%20Report.pdf>.

92. Eric Mar, USA TODAY, *Opposing view on child obesity: Put kids’ health first*, Nov. 8, 2010, available at http://www.usatoday.com/news/opinion/editorials/2010-11-09-editorial09_ST1_N.htm.

93. David W. Freeman, CBS NEWS, *Happy Meal Ban in San Francisco: Food Police or Fat Fighter?*, Nov. 4, 2010, available at http://www.cbsnews.com/8301-504763_162-20021754-10391704.html?tag=contentMain;contentBody.

94. San Francisco Health Code art. 8, § 471.2.

95. HUFF POST SAN FRANCISCO, *supra* note 76.

96. Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 428 (Mar. 2000).

meals, foods, or beverages that do not meet minimal nutritional criteria.⁹⁷ Shortly thereafter, the American Journal of Preventative Medicine conducted analytical research to assess how ordinance-affected restaurants changed their children's menus, marketing and toy distribution practices relative to non-affected restaurants.⁹⁸ This solitary study may provide the only meaningful statistical data to predict the success or failure of the San Francisco Healthy Food Incentives Ordinance.

Overall, the American Journal of Preventative Medicine research on the Santa Clara County ordinance determined that the "ordinance appears to have positively influenced marketing of healthful menu items and toys as well as toy distribution practices at ordinance-affected restaurants, but did not affect the number of healthful food items offered."⁹⁹ Statistical results provide that average Children's Menu Assessment (CMA) scores at affected restaurants "showed a 2.8 to 3.4-fold improvement from pre- to post-ordinance."¹⁰⁰ According to the study, "breakdown of the overall CMA score into its subcategories revealed post-ordinance improvements in the following areas: on-site nutritional guidance; promotion of healthy meals, beverages, and side items; and toy marketing/distribution activities."¹⁰¹ Therefore, significant positive changes were recorded after implementation of the toy ban ordinance.¹⁰²

Differences in the Santa Clara County ordinance and the San Francisco ordinance must be taken into consideration in predicting the success of the latter based on statistical data collected from the former. For instance, the Santa Clara County ordinance only affects four restaurants, whereas the San Francisco ordinance affects almost one hundred restaurants.¹⁰³ Furthermore, since the four affected restaurants in Santa Clara County only had 90 days to comply with the ordinance, further menu and restaurant changes may be possible and will be captured in the

97. Santa Clara County Ordinance Code Chapter XXII, Division A18, §§ A18-350 – A18-355, available at [http://www.sccgov.org/sites/sccphd/enus/Media/Documents/2010PressReleaseArchive/13APublic%20Health%20Department%20\(DEP\)_cdip_attachments_ToyOrdinance%20No.%20NS-300.820_8-5-10\[1\].pdf](http://www.sccgov.org/sites/sccphd/enus/Media/Documents/2010PressReleaseArchive/13APublic%20Health%20Department%20(DEP)_cdip_attachments_ToyOrdinance%20No.%20NS-300.820_8-5-10[1].pdf) (last visited October 19, 2012); Jennifer J. Otten et. al., *Food Marketing to Children Through Toys: Response of Restaurants to the First U.S. Toy Ordinance*, AM. J. PREV. MED. 2011, at 1, available at http://www.ajpmonline.org/webfiles/images/journals/amepre/AMEPRE_3267-stamped.pdf.

98. Otten et. al., *supra* note 97.

99. *Id.*

100. *Id.* at 3.

101. *Id.*

102. *Id.*

103. *Id.* at 4.

future.¹⁰⁴ Overall, these initial observations suggest restaurants can change marketing and advertising quickly when prompted, but menu changes may require more time or a more pervasive ordinance, such as the San Francisco ordinance.¹⁰⁵

The Santa Clara County ordinance was a trivial pebble thrown in the hope of creating a more substantial ripple effect in other cities, counties and states.¹⁰⁶ The San Francisco ordinance primarily aims to raise awareness of the fast food industry's role in combating the current childhood obesity epidemic.¹⁰⁷ Both ordinances may succeed. Nebraska and New York have proposed similar ordinances.¹⁰⁸ New York appears to be first in line to pass similar incentive programs with New York City deputy majority leader Leroy Comrie introducing the Fast Food Toy Ban Bill on April 6, 2011.¹⁰⁹ Comrie has the pledged support of six other council members.¹¹⁰ If approved, the bill would impose a \$200 to \$2,500 fine on any restaurant caught selling toys with unhealthy meals.¹¹¹ Comrie, an obese middle-aged man, considers himself an example of the effect of fast food and unhealthy eating habits and admits that his weight has given him the "impetus to do this bill."¹¹²

V. CONCLUSION

The childhood obesity epidemic in America is a public health concern that obliges government response. While opponents believe the government is overusing and misusing its allocation of power in implementing the Ordinance, such position fails to present a justifiable argument that the Ordinance will prove ineffective. Seventy-three million

104. *Id.*

105. *Id.* at 4-5.

106. Tracy Seipel, SCCGOV, *Supervisors Ban Toys with Fast-food Meals*, Apr. 27, 2010, available at <http://www.sccgov.org/sites/d5/Newsroom/Liz%20in%20the%20News/Pages/Supervisors-Ban-Toys-with-Fast-food-Meals.aspx>.

107. San Francisco Health Code art. 8, § 471.2.

108. Heather Knight, *Happy Meal toy ban prompts ban on bans in other states*, CITY INSIDER, Mar. 20, 2011, available at <http://blog.sfgate.com/cityinsider/2011/03/20/happy-meal-toy-ban-prompts-ban-on-bans-in-other-states/>.

109. Daily Mail Reporter, MAIL ONLINE, '*Don't end up like me*': Obese councilman urges New York City to ban fast food restaurants from giving away free toys to children, Apr. 6, 2011, available at <http://www.dailymail.co.uk/news/article-1373993/New-York-follow-San-Francisco-ban-fast-food-restaurants-giving-away-free-toys-children.html>.

110. *Id.*

111. *Id.*

112. *Id.*

Americans are obese,¹¹³ and one in three children is overweight or obese.¹¹⁴ According to the Institute of Medicine, these Americans will die earlier than they should because of their obesity and the associated health consequences.¹¹⁵ The health and economic effect of rising obesity rates has ignited government intervention on state and federal levels. The government cannot ignore a national health crisis, nor should we expect them to.

If fast food restaurants will hold themselves accountable for their part in the current childhood obesity epidemic and adhere to the intended purpose of the San Francisco Healthy Food Incentives Ordinance, then the Ordinance could initiate the beginning of a meaningful change toward healthier generations.

113. San Francisco Health Code art. 8, § 471.1(1).

114. Fed. Trade Comm'n, *supra* note 9.

115. San Francisco Health Code art. 8 § 471.1(5).