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CAN FOOD COMPANIES BE TRUSTED TO SELF-REGULATE? AN ANALYSIS OF CORPORATE LOBBYING AND DECEPTION TO UNDERMINE CHILDREN'S HEALTH

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I. INTRODUCTION

Despite rising levels of childhood obesity and diabetes, coupled with complaints from public health and children's advocates about the connection to excessive marketing of junk food to children,¹ the government has maintained a hands-off policy in this area. Instead, the food industry is expected to police itself, with modest guidance from federal regulators.

This hands-off policy was made plain last July when the Federal Trade Commission (FTC) and Department of Health and Human Services (DHHS) co-hosted a workshop entitled, "Marketing, Self-Regulation, and Childhood Obesity."² A full two-thirds of the panelists had financial ties to either the food or advertising industry.³ In addition, executives from Kraft and PepsiCo were each given two separate opportunities to speak, an honor not bestowed on anyone

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

2. For information regarding the workshop, including press releases and transcripts of the event, see the FTC Web site, Marketing, Self Regulation and Childhood Obesity, July 2005 Workshop, <http://www.ftc.gov/bcp/workshops/Foodmarketingtokids>.

3. See Michele Simon, *Government Abandons Children to Big Food*, ALTERNET, July 22, 2005, <http://alternet.org/story/23648>; see also FTC Web site, *supra* note 2.

else.⁴ Any advocate voices to be heard were often drowned out.

The only reason the FTC and DHHS decided to hold the meeting at all was that the Institute of Medicine (IOM) recommended they do so in its 2005 report on childhood obesity. Specifically, the IOM called on the DHHS to “convene a national conference to develop guidelines for the advertising and marketing of foods [and] beverages . . . directed at children.”⁵ They also recommended that “[t]he FTC should have the authority and resources to monitor compliance with the food and beverage . . . advertising practices.”⁶ What should have been a forum on how to set limits around the marketing of junk food to children, however, turned into a public relations opportunity for industry to demonstrate what a great job it is doing at self-regulation and in promoting more healthful food.

With the exception of Senator Tom Harkin, Congress has done little to protect children from the onslaught of junk-food marketing.⁷ As a result of this federal inaction, state legislatures have taken an increasing interest in addressing an important avenue for targeting children: the ubiquitous availability of unhealthful food and beverages in public schools. Yet despite an enormous amount of legislative activity, this approach has seen relatively minor success thanks to heavy counter lobbying by the food and beverage industries.

A combination of state and local policymaking, threats of litigation (real and perceived), and general public outcry have placed the food and beverage industry on the defensive about the healthfulness of its products, especially those aimed at children. Not taking the finger pointing lying down, the food industry is responding with a massive public relations campaign designed to control the public dialogue.⁸ Corporate goals include deflecting

4. Mark Berling, Executive Vice President, Global Corporate Affairs, Kraft Foods, and Brock Leach, Sr. Vice President, New Growth Platforms, and Chief Innovative Officer, PepsiCo, Inc., were the only panelists to speak on more than one panel during the workshop. See FTC, Perspectives on Marketing, Self-Regulation and Childhood Obesity, Agenda, July 14–15, 2005, available at <http://www.ftc.gov/bcp/workshops/foodmarketingtokids/agenda.pdf>.

5. COMM. ON PREVENTION OF OBESITY IN CHILDREN & YOUTH, INST. OF MED., PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE 9 (Jeffrey P. Koplan et al. eds., 2005).

6. *Id.* at 177.

7. See *infra* Part V.C.

8. See *infra* Part IV.

attempts to regulate unhealthful products and to generally create a public perception that they are sincere in their efforts to be “part of the solution.”

There has been much debate over whether self-regulation is a viable option, including some discussion of its effectiveness in the realm of food marketing to children.⁹ This article asks the simple question: can we trust the food industry to self-regulate? Self-regulation presupposes that corporations have the ability to recognize their role in society as responsible citizens and will act accordingly. Corporations, in general, have no such ability and are, by definition, designed to further one goal and one goal only: to increase profits for shareholders. Indeed, this is their very reason for existence.¹⁰ Moreover, this objective is completely inimical to the goal of promoting public health and protecting children’s welfare. Because food companies cannot be trusted, the government must step in to protect children’s health.

This Article explains the myriad ways that food companies have proven that they cannot be trusted to serve children’s best interests. They fall broadly into the following categories: (1) lobbying to undermine school-based nutrition policies, (2) deceptive marketing of so-called “healthier products,” and (3) misleading public statements of corporate marketing policies related to children.

II. CORPORATE LOBBYING TO UNDERMINE SCHOOL NUTRITION: FOUR CASE STUDIES

While the federal government focuses much of its obesity-related efforts on educational programs and scientific research, state legislatures are taking a more aggressive, policy-oriented approach. The topic that has garnered the most attention by lawmakers is school nutrition. State legislatures have become a battleground for debates over school vending machines. Over the past three years, almost every state in the nation has proposed legislation that would address the sale of soda and junk food in public schools.¹¹

9. For an excellent discussion of requirements for effective self-regulation, see Angela Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711 (1999).

10. See *infra* note 359 and accompanying text.

11. Data compiled by the Center for Informed Food Choices (on file with author); see also HEALTH POLICY TRACKING SERV., STATE ACTIONS TO

A. Schools Becoming a Junk Food Free-for-All

Most of the controversy has been over the sale of soda and, to a lesser extent, snack foods. These are foods and beverages sold outside the school meal program and are collectively known as “competitive foods” because they compete with the sale of school meals. For public schools that participate in the National School Lunch Program, the U.S. Department of Agriculture (USDA) sets nutrition standards that schools must follow in order to get reimbursed by the federal government.¹² With the exception of one regulation that does not allow the sale of soda or certain candy in the food service area during mealtimes, no federal nutrition standards apply to competitive foods.¹³

A 2001 report to Congress by the USDA cited several problems with competitive foods, including their “diet-related health risks,” their impact on the financial viability of school meal programs, and sending children mixed messages related to nutrition and healthy food choices.¹⁴

PROMOTE NUTRITION, INCREASE PHYSICAL ACTIVITY AND PREVENT OBESITY: A LEGISLATIVE OVERVIEW (2005), <http://www.rwjf.org/files/research/July%202005%20-%20Report.pdf>.

12. Requirements for School Food Authority Participation, 7 C.F.R. § 210.10 (2005).

13. Section 210.11(b) of the *Code of Federal Regulations* requires that “[s]tate agencies and school food authorities shall . . . prohibit the sale of foods of minimal nutritional value The sale of other competitive foods may, at the discretion of the State agency and school food authority, be allowed” Foods of “minimal nutritional value” are defined as, “[i]n the case of artificially sweetened foods, a food which provides less than five percent of the Referenced Daily Intakes (RDI) for each of eight specified nutrients per serving; and in the case of all other foods, a food which provides less than five percent of the RDI for each of eight specified nutrients per 100 calories and less than five percent of the RDI for each of eight specified nutrients per serving. . . protein, vitamin A, vitamin C, niacin, riboflavin, thiamin, calcium, and iron.” 7 C.F.R. § 210.11(a)(2)

14. Letter from Shirley R. Watkins, Under-Sec’y for Food, Nutrition, and Consumer Serv., USDA, to the Honorable Tom Harkin, Chairman, Comm. on Agric., Nutrition, and Forestry, U.S. Senate (Jan. 12, 2001), *available at* http://www.fns.usda.gov/cnd/Lunch/CompetitiveFoods/report_congress.htm (entitled *Foods Sold in Competition with USDA School Meal Programs: A Report to Congress*).

With public schools so desperate for funding, over the past two decades many districts have opened their doors to major beverage companies such as Coca-Cola and Pepsi-Cola, often forming exclusive contracts also known as “pouring rights.” These deals are usually presented as being very lucrative to districts, with schools offered enticing incentives such as sports marquees or cash bonuses. Sometimes these exclusive contracts can lock a district in for many years with the same vendor and the same unhealthful options. Usually the amount of money a school district receives is dependent on soda sales, thus creating a conflict of interest between health and profit.¹⁵

In recent years, many people have begun questioning the wisdom of these arrangements. Major cities across the country that no longer allow schools to sell soda include New York, Los Angeles, Chicago, Philadelphia, San Francisco, and Boston.¹⁶ As a result of this grassroots effort and a collective realization that policy making one school district at a time is inefficient, state legislatures have taken up the matter.

The result so far has been a mix of compromised victories and crushing defeats. In many cases, advocates spend enormous amounts of time and energy trying to get a bill passed, obtaining an impressive amount of public support, only to be out gunned by corporate lobbyists. From 2003–2005, forty-five states introduced 287 bills which sought to limit the availability of soft drinks and junk food in public schools.¹⁷ Only twenty-one states were successful in passing any bill; and only thirty-one bills out of the 287 were enacted.¹⁸

15. For an excellent report on soda contracting in California, see PUB. HEALTH INST. PREVALENCE AND SPECIFICS OF DISTRICT-WIDE BEVERAGE CONTRACTS IN CALIFORNIA’S LARGEST SCHOOL DISTRICTS: FINDINGS AND RECOMMENDATIONS (2002), http://www.calendow.org/news/press_releases/2002/special/press040402/pdfs/sodastudy.pdf.

16. ROSS E. GETMAN, SODA IN SCHOOL: ILLEGALITY OF EXCLUSIVE “POURING RIGHTS” AGREEMENTS IN SCHOOL, <http://www.schoolpouringrights.com> (last visited Sept. 10, 2005).

17. Many bills also contained other provisions and several states passed more than one bill. The data summarized comes from multiple sources. See HEALTH POLICY TRACKING SERV., *supra* note 11; National Conference of State Legislatures <http://www.ncsl.org> (last visited Feb. 11, 2006). Other sources used to summarize data can be found on individual state Web sites, the data of which is on file with author.

18. See *supra* note 17.

Of the thirty-one enacted bills, in many cases, the language changed significantly from the version that was introduced to the version that was passed. Often, what would have been a stronger, more restrictive bill, wound up being a weaker, watered-down version.¹⁹ For example, language may have gone from setting strong nutrition standards to merely recommending that schools pass some sort of policy, thus making compliance entirely voluntary.²⁰

While we cannot place all of the blame for failed bills on the food and beverage industry, it is clear in many cases that trade associations and individual companies had a heavy hand in lobbying against these bills. This Part describes several examples through ongoing research conducted by my organization, the Center for Informed Food Choices. Many of the stories were collected through one-on-one interviews with lawmakers and advocates.

B. Case Study I: California's Soda Bill

Often a policy bellwether for the nation, California has been a hotbed of activity for school nutrition for years, well before the idea caught on with the rest of the nation. In 2002, thanks to an enormous amount of organizing, the Los Angeles Unified School District (the nation's second largest) unanimously passed a policy to prohibit the sale of soda in schools, becoming the first in the nation to do so.²¹ That victory inspired many others around the state and the country.

In 2003, grassroots momentum resulted in proposed legislation that would have stopped soda sales in all public schools throughout the entire state, kindergarten through twelfth grade.²² The nonprofit advocacy group, California Center for Public Health Advocacy (CCPHA) led the charge to pass this ground-breaking bill, which was sponsored by California State Senator Deborah Ortiz.²³ CCPHA and

19. See, e.g., HEALTH POLICY TRACKING SERV., *supra* note 11, at 80 ("Maine's Gov. John Balducci (D) signed a watered down version of [a bill], which sought to implement the recommendations of the Commission to Study Public Health that Concerns Schools, Children and Nutrition.").

20. See *infra* Part III.

21. This policy took effect in January 2004. For a complete history of this victory, see CTR. FOR FOOD & JUSTICE, OCCIDENTAL COLL., CHALLENGING THE SODA COMPANIES: THE LOS ANGELES UNIFIED SCHOOL DISTRICT SODA BAN (Sept. 2002), <http://departments.oxy.edu/uepi/cfj/resources/SodaBan.htm>.

22. S.B. 677, 2003–2004 Leg., Reg. Sess.(Cal. 2003).

23. See California Center for Public Health Advocacy, <http://www.public>

others presented overwhelming scientific evidence of a growing public health menace caused by children drinking too much soda, much of which is consumed at school.²⁴ What should have been a no brainer, protecting kids' health, turned into a bitter battle involving the industry's heaviest hitters.

Wasting no time, the soda industry mounted a strong opposition. According to one observer, "[y]ou could see the Coke and Pepsi lobbyists running down the halls after the legislators. They were there in full force."²⁵ According to Senator Ortiz, the industry front group, Center for Consumer Freedom (CCF) hired two lobbying firms known for raising money for Republicans and moderate Democrats.²⁶ Also, a nutritionist representing CCF testified against the bill, but did not disclose her affiliation and bias—a typical industry tactic.²⁷ How can lawmakers trust the testimony of a so-called expert if they don't know who is paying the bills? One industry consultant admitted with pride that this is their strategy: to hire what they call "third-party experts" who have no obvious affiliation with industry.²⁸ This way, the expert's research credentials serve as the basis for their credibility and the testimony is deemed objective and scientific. Trouble is, bought-and-paid-for science is anything but objective and can easily be manipulated to obtain the desired outcome. The tobacco industry wrote the book on that tactic years ago while fighting off government's attempt to regulate it.²⁹

healthadvocacy.org/limits (last visited Oct. 12, 2005).

24. See ASSEMB. COMM. ON HEALTH, BILL ANALYSIS, S.B. 677, 2003–2004 Leg., Reg. Sess., at 4–5 (Cal. 2003), available at http://info.sen.ca.gov/pub/03-04/bill/sen/sb_0651-0700/sb_677_cfa_20030701_110316_asm_comm.html.

25. Telephone Interview with Jacqueline Domac, Health Teacher, Venice High School, in Venice, Cal. (Aug. 30, 2004).

26. Telephone Interview with Senator Deborah Ortiz, Cal. State Senate, in Sacramento, Cal. (Aug. 30, 2004).

27. *Id.*

28. Interview with Terrence Gaffney, Consultant, in Chicago, Ill. (Sept. 10, 2004). The soda industry also sent paid consultants to testify at hearings in Philadelphia without revealing their affiliation. Interview with John Weidman, Senior Associate, The Food Trust, in Philadelphia, Pa. (Aug. 8, 2005). These experts presented industry-sponsored data to show that soda does not cause obesity. *Id.*

29. See, e.g., Sheldon Rampton & John Stauber, *Tobacco's Secondhand Science of Smoke-Filled Rooms*, PRWATCH, Third Quarter 2000, at 10.

Another industry strategy is personal attacks, especially when they cannot argue the facts. Ortiz has come under attack numerous times by CCF for her nutrition advocacy efforts. "Their tactics are horrific. Their strategy is to attack the individual to discredit them. And this can get very ugly," she said.³⁰ Ortiz told me that CCF's verbal assaults against her have even included oblique references to her being forty and single.³¹ Also, the Cal-Nevada Soft Drink Association, who was strongly in opposition, regularly contributes to members on the relevant committees. "They throw around quite a bit of money," Ortiz said.³² And industry expects a good return on that investment.

A combination of behind-the-scenes and up-front industry lobbying on California's 2003 soda bill resulted in a compromise: to allow the sale of sodas only in high schools.³³ Not coincidentally, most sodas in schools are sold at the high school level. Such an exemption was never the intent of either the nutrition advocates or Senator Ortiz, the people proposing the law in the first place.

What ensued was a legislative debate over whether high school students were "old enough" to make their own choices when it comes to drinking soda.³⁴ This served as a convenient smokescreen for what was really at stake: the huge economic benefit to industry to maintain their significant presence in high schools. Behind the scenes, industry put pressure on certain key members of the California Assembly to do their bidding.³⁵ For example, Charles Frommer, then chair of the Assembly Health Committee, made the absurd argument that many "high school students were eighteen years old, able to vote, could serve in the military, so [they] should be able to make their own decisions."³⁶ Senator Ortiz countered that, at most, twelfth graders are eighteen for half their senior year.³⁷ "And it's a time at which key decisions are being made, and where

30. Interview with Senator Deborah Ortiz, *supra* note 26.

31. When I later shared this story with a colleague who studies tobacco industry tactics (including how they target homosexuals), she explained that this is their subtle way of suggesting that Ortiz is a lesbian.

32. Interview with Senator Deborah Ortiz, *supra* note 26.

33. S.B. 677, 2003–2004 Leg., Reg. Sess. (Cal. 2003).

34. Interview with Senator Deborah Ortiz, *supra* note 26.

35. *See id.*

36. *Id.*

37. *Id.*

the greatest marketing advantage is for industry” she said.³⁸

In the end, procedural tactics trumped public health. Because the health committee held no debate on the forced amendment to exempt high schools, Ortiz’s bill would either die in its entirety, or it would survive with a ban on sodas for grades K–8 only.³⁹ Ortiz took the compromise, but was very frustrated: “I was prepared to have the bill die. I really felt it was a compromise that was unacceptable. But my sponsors, who were the advocates, really felt it was a win, and I allowed them to make the call. I am still disappointed to this day.”⁴⁰

Some advocates were troubled by the weakened legislation, including Jacqueline Domac, who helped pass a policy to remove both soda and junk food throughout the Los Angeles Unified School District. Domac says that she “find[s] it quite interesting that we only care about kids until the 8th grade and suddenly in high school, their health is insignificant . . . [a]s a high school teacher, how do I explain to my students that they are just not important [to lawmakers]?”⁴¹ Why is exempting high schools so critical to industry? Domac agrees with Ortiz that it is all about brand loyalty: “It’s during the high school years that kids form lifestyle habits. That is when a student decides between Coke and Pepsi, and that decision lasts for a lifetime.”⁴²

Postscript: It seems that the tide in California has finally turned. In September 2005, California’s Republican Governor Arnold Schwarzenegger signed into a law a bill that will eventually get soda out of high schools by 2009.⁴³ Having the governor sponsor the bill made a tremendous difference this time around.

38. *Id.*

39. *Id.*

40. *Id.*

41. Telephone Interview with Jacqueline Domac, *supra* note 25.

42. *Id.*

43. S.B. 965, 2005–2006 Leg., Reg. Sess. (Cal. 2005). The bill provides that by 2007, 50% of vending machine slots must no longer contain soda, and that by 2009, no soda can be sold in high schools. *Id.*

C. Case Study II: Junk-food Bill in California

Not satisfied with just going after soda, California nutrition advocates next set their sights on ridding schools of junk food. A 2003 survey of California schools revealed that almost seventy-five percent of schools sold foods such as soda, candy, chips, cakes, and cookies through vending machines.⁴⁴ With rising rates of childhood obesity and diabetes, California State Senator Martha Escutia took the lead in 2003, authoring a bill to address this problem.⁴⁵ The legislation was aimed at establishing reasonable nutrition standards on all foods sold outside the school lunch program.⁴⁶ The California Center for Public Health Advocacy ensured that the nutrition guidelines were thoroughly reviewed.⁴⁷ First developed in 2001 by a panel of ten nationally-recognized school nutrition experts, the rules were further refined by the state legislature over a period of three years.⁴⁸ In support of the bill were no fewer than eighty organizations, including the American Academy of Pediatrics, the California Medical Association, the California Teachers Association, and the California State PTA.⁴⁹ Only five organizations opposed the legislation—four of them industry groups.⁵⁰ A key opponent was the Grocery Manufacturer's Association (GMA), whose 120 members enjoy annual sales of more than \$680 billion in the United States alone, and consist of major food corporations such as Kraft, Mars, and PepsiCo.⁵¹ GMA was already on record as opposing virtually

44. PUB. HEALTH INST., THE 2003 CALIFORNIA HIGH SCHOOL FAST FOOD SURVEY (2003), <http://www.californiaprojectlean.org/Assets/1019/files/2003FastFoodSurvey.pdf>.

45. S.B. 1566, 2003–2004 Leg., Reg. Sess. (Cal. 2004).

46. *Id.*

47. See California Center for Public Health Advocacy, California Limits School Junk Food, <http://www.publichealthadvocacy.org/limits> (last visited Oct. 12, 2005).

48. See Carla Niño & Michele Simon, *Strange Bedfellows Sell Out Children's Health*, SACRAMENTO UPDATE, Oct. 2004, at 3, available at <http://www.capta.org/sections/advocacy/downloads/sac-2004-10.pdf>.

49. ASSEMB. COMM. ON EDUC., BILL ANALYSIS, S.B. 1566, 2003–2004 Leg., Reg. Sess., at 7–10 (Cal. 2004), http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1551-1600/sb_1566_cfa_20040622_114541_asm_comm.html.

50. *Id.*

51. See Grocery Manufacturer's Association, <http://www.gmabrands.com> (last visited Sept. 11, 2005) (follow "Complete Member Listing" hyperlink for current membership) (boasting that its member companies account for more than \$680 billion in annual sales).

every state bill across the nation that would restrict the sale of junk food or soda in schools.⁵² A state the size of California is a large market for the industry, so a defeat there would be devastating both for the lost profits and because of the potential domino effect. Just as in the soda wars, industry was not about to go down without a big fight. But this time, corporate interests found an unlikely ally.

While it was predictable that the junk-food industry would strongly oppose the measure, advocates were surprised to learn that joining the opposition was the California School Food Service Association (CSFSA), an organization of school nutritionists, food managers, and educators.⁵³ Oddly, CSFSA stood alone in opposition among public sector organizations.

The group's chief complaint was that cash-strapped schools need the money that comes from any and all food sales.⁵⁴ But students were never supposed to be responsible for subsidizing their public education with their pocket change in the first place. Moreover, advocates countered, schools in Los Angeles and around the country have proven they can make more money selling more healthful options.⁵⁵

CSFSA also argued that the bill's nutrition standards were overly restrictive,⁵⁶ but an expert panel stood behind these standards.⁵⁷ In contrast, the food service group's proposed nutrition guidelines would have allowed all foods and beverages to be served or sold on school campuses, which obviously amounts to no

52. *See id.* (A search for "schools" results in 126 hits, most of which represents a document publicly filed in opposition to school based policy initiatives).

53. *See* ASSEMB. COMM. ON EDUC., BILL ANALYSIS, S.B. 1566, 20032004 Leg., Reg. Sess., at 10 (Cal. 2004), http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1551-1600/sb_1566_cfa_20040622_114541_asm_comm.html (listing CSFSA as being officially opposed to the bill).

54. *See* SENATE HEALTH & HUMAN SERV. COMM., BILL ANALYSIS, S.B. 1566, 2003-2004 Leg., Reg. Sess., at 7 (Cal. 2004), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1551-1600/sb_1566_cfa_20040322_150542_sen_comm.html (discussing CSFSA's position on the bill).

55. *See* Niño & Simon, *supra* note 48, at 3.

56. *See* ASSEMB. COMM. ON EDUC., BILL ANALYSIS, S.B. 1566, 20032004 Leg., Reg. Sess., at 10 (Cal. 2004), http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1551-1600/sb_1566_cfa_20040622_114541_asm_comm.html.

57. *See* Niño & Simon, *supra* note 48, at 3.

standards at all.⁵⁸ They maintained that their “recommendations focus on limiting calories and portion sizes rather than labeling ‘good’ and ‘bad’ foods,” citing the American Dietetic Association (ADA) for credibility.⁵⁹ While it is true that the ADA espouses the “no good foods/bad foods” rhetoric, the organization’s numerous corporate sponsors have seriously compromised its scientific integrity.⁶⁰

It is not uncommon for lobbying groups to try to persuade legislators to vote a certain way by issuing what is known as a “floor alert.” Its purpose is to succinctly spell out what is at stake with a particular piece of legislation. In the best of circumstances, a floor alert can serve as a legitimate educational tool. However, the tactic can also be abused, especially if it is issued just before the vote, when lawmakers have the least amount of time to check the facts and come to a truly well-informed decision.

At the last minute before the vote on the nutrition standards bill, CSFSA distributed just such a floor alert, urging legislators to vote against the bill.⁶¹ The two-page document, in large, bold type urged lawmakers to oppose the bill, mostly repeating the scare tactic that serious revenue losses would result if the bill were to pass.⁶² On the last day of California’s 2004 legislative session, the bill was defeated by only five votes, even after a second roll call.⁶³

While it is not unusual to see disagreement among advocacy groups with similar goals, it is sad when so much is at stake. In the end, the children suffer because the adults cannot come together and agree on a strategy. It is especially troubling when the real enemy is so formidable. The food industry benefits when the nutrition advocates are splintered. The GMA must have been thrilled to have the CSFSA essentially make the industry’s arguments on the floor of the

58. CAL. SCH. FOOD SERV. ASS’N, CHOOSE SENSIBLY: RECOMMENDED NUTRITION STANDARDS, <http://www.csfsa.org/documents/nutritionstandards%201%2004.pdf> (last visited Oct. 12, 2005).

59. *Id.*

60. See MARION NESTLE, FOOD POLITICS 126–29 (2002).

61. See Niño & Simon, *supra* note 48, at 3.

62. Floor Alert, Oppose S.B. 1566, CSFSA (on file with author).

63. See Niño & Simon, *supra* note 48, at 3; see also COMPLETE BILL HISTORY, S.B. 1566, 2003–2004 Leg., Reg. Sess. (Cal. 2004), available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1551-1600/sb_1566_bill_20041130_history.html.

legislature. It is always better for a message that benefits business to come from school-based representatives rather than corporate lobbyists. Indeed, this is a common tactic of industry—to quietly stand back while a group with more credibility does the up-front lobbying. And this time, the strategy worked like a charm.

Postscript: In September 2005, Governor Schwarzenegger signed into law another bill to get rid of junk food in schools.⁶⁴ Again, his support made the difference.

D. Case Study III: Kentucky's Four-Year Battle

After three previously unsuccessful attempts to improve the nutritional content of products in school vending machines in Kentucky, in March 2005, the state legislature finally passed a compromise bill that only removes soda from elementary schools.⁶⁵ Veteran dietician Carolyn Dennis, chair of the Kentucky Action for Healthy Kids Taskforce, has battled Coca-Cola lobbyists for four years.⁶⁶ Kentucky already has a regulation that says vending machines are not supposed to be turned on until thirty minutes after the last lunch period.⁶⁷ However, as is often the case, Dennis says the rule is not enforced, so the machines are turned on first thing in the morning.⁶⁸ “[A]nd these little kids, they have no judgment; they spend all of their money on candy bars, Coke, and potato chips. And that’s what they have, for breakfast and for lunch,” she said.⁶⁹

Some elementary school principals even announce “soft drink breaks” in the afternoon. Dennis explains:

[O]ne of my task force members was giving a health talk to third-graders—that’s eight and nine year old children and she was interrupted at 2 p.m. when the principal came over the loudspeaker and said, ‘Ok, children, it’s time for your afternoon soft drink break,’ at which point, all but four or five children who couldn’t afford it . . . took their money and followed the teacher out the door, and came back with

64. S.B. 12, 2005–2006 Leg., Reg. Sess. (Cal. 2005).

65. S.B. 172, 2005 Reg. Sess. (Ky. 2005).

66. See Telephone Interview with Carolyn Dennis, Chair, Ky. Action for Healthy Kids Taskforce, in Georgetown, Ky. (Mar. 13, 2005).

67. KY. REV. STAT. ANN. § 158.854(3) (West 2005), available at <http://www.lrc.ky.gov/krs/158-00/854.pdf>.

68. Telephone Interview with Carolyn Dennis, *supra* note 66.

69. *Id.*

their 20 oz. Coke or Pepsi, and she continued her health talk. She couldn't believe it, no one made any connection.⁷⁰

As a result of these and similar problems, Dennis joined a coalition called the Taskforce on Childhood Nutrition and Physical Activity and got to work trying to pass legislation to set nutrition standards.⁷¹ "The first year," Dennis recalls, "the NSDA [National Soft Drink Association-now the American Beverage Association] sent four lobbyists to kill the bill."⁷² The Kentucky Beverage Association (KBA) representative, Ray Gillespie, testified that "there were no soft drinks in elementary schools," remembers Dennis, "which was totally a lie."⁷³

By the fourth attempt, allowing schools to continue to sell soda in middle and high schools was the only way the bill could possibly pass. According to Dennis, "We tried to get 75% of beverages to be healthy K-12, but the beverage association went ballistic on that one because they wanted to be able to sell Gatorade, etc. . . ."⁷⁴

Dennis' team also started tracking campaign contributions. "One of our task force members filed an ethics complaint against the president of the state senate because he accepted money from the soft drink industry . . . We found that a whole lot of legislators accept money from them, it doesn't matter which party or which chamber you're in," she said.⁷⁵

Coca-Cola's lobbyist even objected to using the language "healthy beverages" to replace soda, apparently worried about the implications for its flagship product's reputation.⁷⁶ Coke said they could live with the ban in elementary schools if the bill did not say "healthy." Dennis explains, "The Coke lobbyist wanted [the language] 'school-day appropriate beverages.' We debate[d] it for hours, and finally my colleagues said 'Look, if this will get them off

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* A survey of Kentucky schools revealed that 44% of elementary schools had vending machines. See JANET TIETYEN, KENTUCKY SCHOOL NUTRITION ENVIRONMENT SURVEY (2002), http://www.ca.uky.edu/fcs/healthy_kids/2002/PDF/survey.Tietyen.report.pdf; *infra* note 252 and accompanying text.

74. Telephone Interview with Carolyn Dennis, *supra* note 66.

75. *Id.*

76. *Id.*

our backs, let's do it' . . . then we compromised on 'school-day approved', which I didn't agree with because I don't like the word 'approved.'"⁷⁷ Dennis likens it to a David and Goliath battle.⁷⁸

All these lobbyists . . . work together. The Grocery Manufacturers Association . . . fought us big time, too. I saw them working with the soft drink lobbyists a lot . . . I was told the very first year [by someone from the ethics commission] that next to the pharmaceutical association, you are up against the second-biggest lobby going, and that's the soft drink lobby.⁷⁹

Dennis has sobering advice for other advocates.

You really need to have someone in the capital on [a] daily basis. Because to really understand what's going on, you need to know the players, you need to know who the lobbyists are, and who you're up against. You need to be constantly talking to legislators . . . [P]aid lobbyists have such an advantage because they are there every day and all year long and they develop relationships with legislators.⁸⁰

E. Case Study IV: Connecticut Governor's Coke Connection

In June 2005, Connecticut Governor Jodi Rell vetoed what would have been the nation's strongest school-based nutrition law.⁸¹ With one stroke of the pen, she put to rest an extremely contentious battle to rid Connecticut schools of soda and junk food.

This was the fourth try to get a bill passed in Connecticut. In 2004, advocates attempted to set nutrition guidelines on food and beverages, but ended up with a gutted law.⁸² Lucy Nolan, Executive Director of End Hunger Connecticut, the bill's lead sponsor, says the soda companies have some of the best lobbyists: "Coke has the number one lobbyist in the state. And PepsiCo has a pretty good one

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Michele Simon, *Junk Food Lobby Wins Again*, ALTERNET, June 17, 2005, <http://www.alternet.org/envirohealth/22259/>.

82. Michele Simon, *Thirst For Profit*, MOTHERING, Mar.–Apr. 2005, <http://www.informedeating.org/thirstforprofit2.pdf>.

too. They have lobbyists there who look out for legislation.”⁸³

According to Nolan, the Coca-Cola lobbyist even went around saying that if the concern was diabetes, 100% fruit juice was just as bad as soda.⁸⁴ Nolan then had to draft legislation explaining why juice is better than soda.⁸⁵ In the end, they did not have enough backing. “Pepsi just worked the bill to death. And we thought we had really good votes on it, [but then] we just watched the vote count go down. I was surprised at how the soda companies really went after it,” she said.⁸⁶

In 2005, Nolan and her colleagues tried again with a bill that would have allowed only water, juice, and milk to be sold during the school day in grades K–12.⁸⁷ Once again, advocates faced heavy lobbying by the soft drink industry and a highly politicized legislative battle.⁸⁸

To do its bidding, Coca-Cola hired Patrick Sullivan, of Sullivan & LeShane, called “the most influential lobbying firm in the state.”⁸⁹ For his services, Sullivan is paid \$80,000 annually by Coca-Cola’s New York division, plus an additional \$7,350 a month by its New England subsidiary.⁹⁰ The Connecticut Pepsi Bottlers Association hired Jay F. Malcynsky of Gaffney, Bennett & Associates, the biggest lobbying firm in Connecticut.⁹¹ According to Ethics Commission records, Pepsi pays Gaffney, Bennett \$50,000 a year in fees.⁹² Together, the two firms spent a quarter of a million dollars trying to kill the bill.⁹³

83. Telephone Interview with Lucy Nolan, Executive Director, End Hunger Conn., in Hartford, Conn. (Aug. 24, 2004).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Sullivan & LeShane, <http://www.ctlobby.com/govrelations/html/in dexre.htm> (last visited Sept. 20, 2005).

90. Gregory B. Hladky, *Soda Makers Pull Out All Stops to Put Big Chill on School Ban*, BRISTOL PRESS, May 7, 2005, <http://www.bristolpress.com/site/news.cfm?newsid=14486223&BRD=1643&PAG=461&dept>.

91. *Id.*

92. *Id.*

93. CT Gov. Rell Kow Tows to Big Cola on Junk Food, <http://www.dailykos.com/storyonly/2005/7/30/112038/037> (July 20, 2005, 09:20:38 PDT).

The political struggle involved an eight-hour House debate in which lawmakers engaged in such absurd stall tactics as relating memories of being deprived of candy as a child.⁹⁴ The House finally passed a compromise bill that allowed diet soda and sports drinks to be sold in high schools after the lunch period.⁹⁵ Then the bill had to go back to the Senate, where it had already passed. But this time, lawmakers there attempted to delay the process by adding no fewer than ten unrelated amendments, such as requiring smoke detectors in school bathrooms.⁹⁶

Other underhanded tactics included Coca-Cola's lobbyists sharing data regarding school income from soda sales with lawmakers behind closed doors so that advocates could not refute the information.⁹⁷ Also, a well-stocked Coca-Cola cooler was delivered to the Democratic caucus room in the Capitol just before the House was expected to vote on the bill.⁹⁸ Nolan called the timing "very suspicious."⁹⁹ And in a particularly devious move, while the bill awaited the governor's signature, a sign mysteriously appeared taped to the inside of a high school vending machine that read: "Let the state know how you feel about the state getting into your lunch program," followed by Governor Rell's e-mail address and phone number.¹⁰⁰ The sign was not approved by the school, as required for all public postings.¹⁰¹

94. Alison Leigh Cowan, *Food Fight: Are School Vending Machines a Sweet Deal, or Simply Providing Sweets?*, N.Y. TIMES (Conn. Edition), May 29, 2005, at 1 (noting that this was far longer than debates over the death penalty or same-sex marriage).

95. See E-mail from Lucy Nolan, Executive Director, End Hunger Conn., to author (May 19, 2005, 09:06 EST) (on file with author).

96. See E-mail from Nancy Alderman, President, Env't & Human Health, Inc., to author (May 24, 2005, 12:40 EST) (on file with author).

97. Cowan, *supra* note 94.

98. Alison Leigh Cowan, *Healthy Food in the Lunchroom? First, You Need a Health Debate*, N.Y. TIMES, May 16, 2005, at B1.

99. *Id.*

100. A photo of the sign can be viewed at <http://mysite.verizon.net/vze443zw/pouringrights/rellphoto.html> (last visited Sept. 15, 2005).

101. See E-mail from Lucy Nolan, Executive Director, End Hunger Conn., to author (June 9, 2005, 06:52 EST) (on file with author).

Nolan's group lined up an impressive array of supporters, including the American Academy of Pediatrics, the American College of Preventive Medicine, the American Diabetes Foundation, the American Heart Association, the Center for Science in the Public Interest, the Connecticut PTA, the Connecticut State Dental Association, and the Connecticut Nurses Association.¹⁰² Also, according to one survey, seventy percent of the state's residents favored the bill.¹⁰³

In the end, even with public support, the compromise bill was too much for the governor to sign.¹⁰⁴ Ironically, the most common argument made against such bills is that schools should maintain "local control" over nutrition policy. Indeed, Governor Rell invoked the word "local" no fewer than sixteen times in her three-page veto message.¹⁰⁵ However, her reasoning is hard to swallow. Many school policies are made at the state and even national level, such as President Bush's notorious "No Child Left Behind" policy.

What Connecticut Governor Rell failed to mention in her veto message was a possible conflict of interest: the cofounder of Coca-Cola's lobbying firm, Patricia LeShane, served as the governor's campaign advisor.¹⁰⁶ Also, the LeShane lobbying firm contributed to Rell's successful 2002 campaign for lieutenant governor.¹⁰⁷ The lobbying money spent fighting this bill was such a great factor in the debate that it motivated the state's Senate President Pro Tem Donald Williams Jr. (a strong proponent of the nutrition bill) to take

102. See Educ. Comm., Report on Bills Favorably Reported by Committee, S.B. 1309 (Conn. 2005), http://www.jblei.com/EHC_/attachments/JF_Report_1309.pdf.

103. Mark Winne, *Battling Big Cola*, IN THESE TIMES, June 16, 2005, <http://www.inthesetimes.com/site/main/article/2161> (citing a statewide opinion poll conducted by the Connecticut Center for Research and Analysis).

104. Press Release, Conn. Governor's Office, Governor Rell Vetoes School Nutrition Bill (June 14, 2005) (including Gov. Rell's veto message), <http://www.ct.gov/governorrell/cwp/view.asp?A=1761&Q=294564>.

105. *Id.*

106. Sullivan & LeShane, Firm Bios, Patricia "Paddi" LeShane, <http://www.ctlobby.com/shared/bios/b-patricia.html> (last visited Sept. 25, 2005).

107. Patricia LeShane contributed a total of \$1300 to the 2002 Connecticut gubernatorial campaign. Followthemoney.org, State at a Glance: Connecticut 2002, Contributors, LeShane, Patricia, <http://followthemoney.org/database/StateGlance/contributor.phtml?si=20027&d=4533548> (last visited Aug. 30, 2005).

concerted action for the first time on campaign finance reform.¹⁰⁸

III. ADDITIONAL EVIDENCE OF UNDERMINING SCHOOL NUTRITION

A. Big Soda Lobbying Against Improving School Beverages

In addition to the above examples, Coca-Cola has undermined school nutrition policies with heavy-handed lobbying tactics all over the nation. PepsiCo and regional soft drink associations have been lobbying hard as well. Below are just a few examples of policies that were compromised or completely killed as a result of industry actions:

Arizona: In April 2005, Arizona passed a law that bans the sale of soft drinks and candy during the school day, but only for grades K–8.¹⁰⁹ High schools were exempted as a compromise measure due to heavy industry lobbying.¹¹⁰ The provision that would have extended the ban to high schools was added and removed from the bill several times and, ultimately, the soda lobby won.¹¹¹

Indiana: In June 2004, at the “Summit on Obesity” sponsored by Time Magazine and ABC News, Tommy Thompson, then U.S. Secretary of Health and Human Services, claimed that Coca-Cola was a responsible corporate citizen.¹¹² In response, Charles Brown, Chairman of Indiana’s Public Health Committee, asked why such a responsible corporate citizen would send a team of five lobbyists (including a regional vice president) to defeat his bill that would

108. Mark Pazniokas, *Reform Effort Gains Steam*, HARTFORD COURANT, May 12, 2005, available at <http://www.cleanupconnecticut.org/news/release.php?ID=20>; see also Associated Press, *Lawmakers Continue Debate on Campaign Finance*, (Aug. 12, 2005), <http://www.cleanupconnecticut.org/news/release.php?ID=38> (reporting on bipartisan task force efforts to create limitations on the influence of special interests).

109. H.B. 2544, 47th Leg., 1st Reg. Sess. (Ariz. 2005); see also Anne Ryman, *Napolitano Signs Ban on Sales of Junk Food*, ARIZ. REPUBLIC, Apr. 27, 2005, <http://www.azcentral.com/specials/special12/articles/0427junkfood27.html> (noting that “high schools are exempt” from the bill).

110. See Ryman, *supra* note 109.

111. *Id.*

112. Tommy Thompson, U.S. Sec’y of Health & Human Serv., Remarks at the Time/ABC Summit on Obesity (June 2, 2004) (webcast available at <http://www.rwjf.org/newsroom/activitydetail.jsp?id=10078&type=3>) (author in attendance) (last visited Feb. 6, 2006).

have reduced soda sales in schools by fifty percent?¹¹³

Maine: A policy to remove soda from all public schools K–12 that should have been implemented by fall 2004 was delayed by at least an entire year.¹¹⁴ While the Maine Department of Education had committed to the fall 2004 implementation date, that did not happen.¹¹⁵ This is most likely due to influence from soda industry representatives who had made their opposition known loud and clear during the legislative process.¹¹⁶

New Mexico I: In Albuquerque, New Mexico, Pepsi-Cola has an exclusive contract with the district, which consists of 125 schools.¹¹⁷ In 2004, when two middle schools tried to stock other vending machines with milk, Pepsi-Cola sent a letter warning that they were in violation of the contract.¹¹⁸ Jennie McCary, a registered dietician with Albuquerque Public Schools recalls feeling a sense of shock at finding that Pepsi had an exclusive contract that prevented the district from vending milk products, and that the principals who were trying to improve the nutritional standards for their students were treated so poorly.¹¹⁹

The school advisory council plans to fight the renewal of the contract but that is not until 2007, three years after this event.¹²⁰

New Mexico II: After a hard-fought battle in 2005 in the state legislature, pediatricians, school food directors, and nutritionists gained approval to appoint an expert committee with the authority to establish nutrition standards for schools, with just one catch: the compromise legislation required that the committee include repre-

113. *Id.*; Interview with Representative Charles Brown, Chairman, Ind. Pub. Health Comm., in Williamsburg, Va. (June 3, 2004).

114. As of this writing, the policy is scheduled to take effect fall 2005. E-mail from Rep. Sean Faircloth, Me., to author (July 26, 2005, 11:34 EST) (on file with author).

115. Sean Faircloth, *Six Ways Government Promotes Obesity and What to Do About It*, DIVERSITY: ALLIED HEALTH CAREERS, Fall 2004, <http://www.diversityalliedhealth.com/features/11-01-04a.html>.

116. Tom Bell, *Maine Students to Lose Candy, Soda Machines*, PORTLAND PRESS HERALD, Dec. 12, 2003, at A1.

117. Telephone Interview with Jennie McCary, Registered Dietician, Albuquerque Pub. Sch., in Albuquerque, N.M. (Aug. 11, 2004).

118. *Id.*

119. *Id.*

120. *Id.*

sentatives of the beverage and food industry.¹²¹ At the first committee meeting, Danielle Greenburg, a doctor and obesity researcher, said that banning soft drinks in schools isn't the solution; rather, students need to be educated on how to balance what they eat.¹²² This doctor works for Pepsi.¹²³

Oregon: What started out as a relatively strong piece of state legislation was completely gutted thanks to soda industry lobbying. The original bill would have removed carbonated soft drinks, candy, and fried pastry products from schools and would have set strict nutritional and calorie requirements for other snack items.¹²⁴ The bill that passed, however, called only for schools to have wellness policies.¹²⁵ "An Oregon newspaper editorial squarely places the blame with politicians bowing to corporate pressure."¹²⁶

Sen. Vicki Walker's reconstituted bill resembles the position favored by the Oregon Soft Drink Association, which, coincidentally, has made hefty campaign contributions to Walker and to two other members of the Senate Education Committee: Sen. Ryan Deckert, D-Beaverton, and Sen. Jeff Kruse, R-Roseburg. The three lawmakers each received \$2,000 of the \$91,000 the soft drink lobby poured into legislators' coffers last fall.¹²⁷

Washington D.C.: In 2003, the D.C. Public Schools (DCPS) embarked on an effort to improve the beverage options that were supplied by Coca-Cola. But, the company engaged in a concerted campaign to stall those efforts. Foot dragging took the form of claiming to conduct feasibility studies and economic analyses as well as never returning phone calls or e-mails.¹²⁸ Coca-Cola Enterprises sent a vice president to a meeting with DCPS to challenge the

121. Winne, *supra* note 103.

122. Walter Rubel, *Health Specialists Urge Committee to Restrict Snacks*, DAILY TIMES (Farmington, N.M.), July 15, 2005, at A4.

123. *Id.*

124. Letter from author to Donald S. Clark, Fed. Trade Comm'n (June 7, 2005), available at <http://www.informedeating.org/foodmarketingtokids.html> [hereinafter FTC Letter].

125. *Id.*

126. *Id.*

127. Editorial, *Junk Food Jitterbug: Vicki Walker Dances Away From Tougher Rules*, REGISTER-GUARD (Eugene, Or.), May 16, 2005, at A10.

128. Telephone Interview with Joy Johanson, Senior Nutrition Policy Assoc., Ctr. for Sci. in the Pub. Interest, in Washington, D.C. (Mar. 19, 2005).

nutrition standards that advocates had put forward, asking where the standards came from and complaining that the company had not been adequately consulted and would lose money.¹²⁹

According to Joy Johansen of the Center for Science in the Public Interest, Coke also complained that the advocates' beverage standard for juices—which was 100% juice—was crazy because the company had only two 100% juice products.¹³⁰ “They are a multi-billion dollar corporation, and I think they could come up with a few new juice products if they wanted to,” she said.¹³¹

Washington State: In 2004, the state tried to pass legislation that would have banned selling junk food and soda in schools.¹³² But, according to Seattle School Board member Brita Butler-Wall, seventeen revisions later, the bill was watered down significantly: “It’s pretty weak. It requires that by the fall of 2005, all schools have some sort of policy around junk food and soda.”¹³³ She suspects Coke had an influence on the outcome: “I know that just a few days after we sat down with Senator Cantwell . . . to talk about this . . . Coca-Cola sent out a couple of its representatives from Atlanta to meet with her. So, that certainly didn’t help matters”¹³⁴

B. Trade Association’s Lobbying Machine

At every opportunity, the Grocery Manufacturer’s Association (discussed above in the California case study) puts its members’ economic interests above children’s health. There is no better evidence of this than GMA’s heavy-handed lobbying related to school nutrition. GMA is on record as opposing virtually every state bill across the nation that would restrict the sale of junk food or soda in schools.¹³⁵ A search for the word “schools” on the GMA Web site resulted in no fewer than 126 hits, most of which are either submitted testimony or a letter filed in opposition to a school-related nutrition

129. *Id.*

130. *Id.*

131. *Id.*

132. S.B. 5436, 58th Leg., Reg. Sess. (Wash. 2003).

133. Telephone Interview with Brita Butler-Wall, Member, Bd. of Dir. for Seattle Pub. Sch., in Seattle, Wash. (Aug. 23 2004) (discussing WASH. REV. CODE ANN. § 28A.210.360 (LexisNexis 2005)).

134. *Id.*

135. See *supra* notes 51–52 and accompanying text.

policy.¹³⁶ Here are just a few examples of document titles:

- GMA Letter in Opposition of Texas Food and Beverage Restrictions (May 18, 2005).¹³⁷
- GMA Letter in Opposition to Oregon School Restrictions Bills (Mar. 3, 2005).¹³⁸
- GMA Requests Veto of Kentucky School Restrictions Bill (Mar. 3, 2005).¹³⁹
- GMA Letter in Opposition to California School Nutrition Bill (Mar. 6, 2005).¹⁴⁰
- GMA Comments in Opposition to Oklahoma Food and Beverage Restriction Bill (Feb. 5, 2005).¹⁴¹

This lobbying campaign is quite effective. In addition to the California case study discussed above, similar stories have been repeated across the country. Nutrition advocates, concerned about rising rates of childhood obesity and diabetes, are trying their best to get their state representatives to help them rid schools of sugary beverages and high-fat junk food. Yet, at every step along the way, the GMA and its member companies have beat them back because they have more lobbying resources and money to offer politicians in the form of campaign contributions.¹⁴² Such lobbying efforts demonstrate that the nation's largest trade association of food manufacturers cannot be trusted to self-regulate.

C. Coca-Cola's Disingenuous Arguments

One of Coca-Cola's favorite lobbying tactics is to make arguments that appear to be advancing the interests of schools, but upon closer inspection really further the company's own interests. For example, one of the most common arguments made against passing state-level legislation on school nutrition is that such matters are better decided at the school level.¹⁴³ This is the classic "local control" mantra of school administrators. In the high-powered world

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. FTC Letter, *supra* note 124.

143. Telephone Interview with Kari Bjorhus, Dir. of Health & Nutrition Comm., Coca-Cola Co. (Aug. 25, 2004).

of soda contracting, the “local control” case is now being taken up by representatives from soda industry. For example, Kari Bjorhus, Coca-Cola’s director of Health and Nutrition Communications, said in defense of her company’s lobbying, “A lot of people . . . feel very strongly about local control . . . [for] the parents and the local school administrators to have the flexibility to make decisions that are right for them.”¹⁴⁴

It is ironic, and even perverse, for a multinational corporation like Coca-Cola to argue for local control when they are thwarting the will of local advocates. In California, even long-time local control proponents, such as the Association of California School Administrators (ACSA), are in support of statewide standards.¹⁴⁵ So, who exactly is Coca-Cola arguing on behalf of?

“Local control is a premium,” says Brett McFadden, legislative advocate for the ACSA.¹⁴⁶ He admits that it took some time for his members to come around to supporting state guidelines, but they eventually realized that childhood obesity was too important. “When there is a broader statewide interest in establishing some sort of policy,” he said, “then the state has both a responsibility and the obligation to set forth that policy.”¹⁴⁷ Michael Butler, legislative advocate for the California State PTA agrees, noting that “the California State PTA believes in local control when it serves the best interest of all children and youth, not when it serves to accelerate the sales of carbonated beverages.”¹⁴⁸

Another soda industry tactic is to invoke all-American values such as “freedom” and “choice” in the debate. According to Bjorhus, Coca-Cola “offer[s] a wide variety of beverage choices and . . . it is up to the school to decide which beverages they want to offer their students.”¹⁴⁹ The freedom of choice argument, that high school students should be able to make their own choices, was made in California. California PTA’s Michael Butler says this is not a valid argument: “I can understand [students] making healthy choices, if

144. *Id.*

145. Telephone Interview with Brett McFadden, Governmental Relations, Ass’n of Cal. Sch. Admin. (Aug. 20, 2004).

146. *Id.*

147. *Id.*

148. E-mail from Michael Butler, legislative advocate, Cal. State PTA, to author (Aug. 20, 2004, 09:21 PST) (on file with author).

149. Telephone Interview with Kari Bjorhus, *supra* note 143.

they are making choices among an array of healthy options. But . . . we don't put cigarette vending machines in high schools to allow students to have a 'choice' of using them or not."¹⁵⁰

Rep. Sean Faircloth of Maine is turning the tables on industry's freedom rhetoric. He says, "I find it amusing that there is a concern about freedom of choice. [T]here is definitely a freedom of choice problem—you can't get the healthy stuff!"¹⁵¹ Faircloth also argues that by improving the options in vending machines, "the school would be . . . creating [a] small island of opportunity for healthy choices . . . We should start out with the premise that schools should not be designed to create branding opportunities."¹⁵²

D. Are Schools Getting Taken for a Ride?

In addition to the nutrition arguments, advocates are also starting to question the conventional wisdom that soda contracts are actually an economic boon to schools. Joy Johansen, of the Center for Science in the Public Interest, is not convinced that schools make all that much money from soda vending and believes "that schools have been taken for a ride in a lot of cases . . . [F]or the soda companies, school vending appears to be more about the lifelong branding of a captive audience of children than it is about profits."¹⁵³

In April 2005, the Community Health Partnership released an excellent study that analyzed a sampling of contracts between Oregon school districts and beverage vendors. Among the report's findings were:

- Vendors make more money than schools;¹⁵⁴
- Vendors have exclusive advertising rights to increase products sales;¹⁵⁵ and
- The average contract length was nine years, with some

150. Telephone Interview with Michael Butler, Legislative Advocate, Cal. State PTA (Aug. 17, 2004).

151. Telephone Interview with Rep. Sean Faircloth, Me., in Bangor, Me. (July 9, 2005).

152. *Id.*

153. Telephone Interview with Joy Johansen, *supra* note 128.

154. NICOLA PINSON, CMTY. HEALTH P'SHIP, SCHOOL SODA CONTRACTS: A SAMPLE REVIEW OF CONTRACTS IN OREGON PUBLIC SCHOOL DISTRICTS 1-2 (2004), http://www.communityhealthpartnership.org/images/pages/soda_report/full_report.pdf.

155. *Id.* at 2.

contracts lasting as long as fifteen years.¹⁵⁶

The report also concluded that:

Given the comparatively small amounts paid to schools by vendors, Oregon communities may want to rethink the restrictions placed on their freedom to purchase beverages, and the merit of allowing companies to market and advertise brand products in schools. In the larger picture of school finance, beverage contracts raise a comparatively small percentage of funds. If the fundamental purpose of the contracts is to generate money for under-funded school activities, are these agreements truly helping communities achieve that goal?¹⁵⁷

In 2003, Texas conducted a similar analysis. Some interesting findings:

- Of the districts surveyed, more than half had exclusive vending contracts;¹⁵⁸
- 63% of the districts contracted with Coca-Cola;¹⁵⁹
- Total annual revenue was estimated to be \$54,180,182;¹⁶⁰
- 71% of school districts with more than 1,000 students have exclusive vending contracts, with some requiring the installation of multiple vending machines in all schools, including elementary schools.¹⁶¹

The study also noted that there were significant “non-cash benefits” that included:

Merchandise such as shirts, school supplies, book covers, athletic programs, sports bags, sunglasses, clocks, trophies, plaques, soft drinks and tanks of pre-mix for soft drinks, cups, coolers, and hats; equipment for booster clubs; movie tickets; sponsorship of athletic events and tournaments; [and] fountain drink dispensers.¹⁶²

156. *Id.*

157. *Id.* at 15.

158. TEX. DEP'T OF AGRIC., SCHOOL DISTRICT VENDING CONTRACT SURVEY (2003), http://www.squaremeals.org/fn/render/channel/items/0,1249,2348_2515_3649_0,00.html.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

Furthermore, the report cautioned about the merchandising aspect of the arrangements:

All of this merchandise is prominently branded with the company logos. Students are surrounded by advertising and brand logos on school campuses and even in classrooms throughout the school day. Some company and school officials have acknowledged that the true purpose of these contracts is to develop brand loyalty in students at an early age. Exclusive vending contracts allow unlimited advertising access to their students. Research indicates that it is difficult for young children to understand and resist the message of advertising aimed directly at them. In some industries a brand may represent as much as 25 percent of a company's market value.¹⁶³

The Texas Comptroller's office estimated "that there may be between 26,000 and 39,000 vending machines being operated in Texas schools".¹⁶⁴ No data was available on sales, but based on national industry figures the machines would generate considerably more than the \$54 million reported, which indicates that schools were, indeed, being short changed.¹⁶⁵

The study further estimated that statewide food service operations potentially lose \$60 million per year to competitive food sales.¹⁶⁶ During the 2001 school year, the school food service operations deficit was \$23.7 million and these funds had to be subsidized from other school district sources.¹⁶⁷

No amount of money should be worth sacrificing children's health. Still, as more information emerges about the economics behind these soda contracts, schools should question whether they are really getting the great deals that companies promise.

E. Soda Industry's Shameless Publicity Stunt

Feeling increasing heat from public criticism, state legislative efforts, not to mention threats of litigation, the soda industry decided last summer that it was time to show they really did care. On August

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

16, 2005, with much fanfare, the American Beverage Association (ABA) announced a new school-based policy “aimed at providing lower calorie and/or nutritious beverages to schools and limiting the availability of soft drinks.”¹⁶⁸ Newspaper accounts included such headlines as “Soft Drink Industry Takes High Road,”¹⁶⁹ “Schools Get Ally in Soda Issue: Drink Makers”¹⁷⁰ and “U.S. Beverage Industry Praised for Helping in Childhood Obesity Battle.”¹⁷¹

Unfortunately, the reality of the impact the ABA policy might have is far different from the glowing press accounts. First of all, the ABA is a trade association that does not directly control the sale of soda in schools. Rather, soda is sold to the schools through local distributors who are controlled by the parent companies. There is also no enforcement or oversight mechanism for the voluntary policy. The ABA concedes that “the success of the policy is dependent on voluntary implementation of it by individual beverage companies and by school officials.”¹⁷² The two major soda companies have even boasted that the policy mirrored their own, such as Coca-Cola’s written policy to not sell sodas in elementary schools.¹⁷³ Yet, as we have seen in the Kentucky Case Study, this policy is already routinely violated.¹⁷⁴

168. Press Release, Am. Beverage Ass’n, Beverage Industry Announces New School Vending Policy (Aug. 16, 2005), http://www.ameribev.org/pressroom/2005_vending.asp.

169. Editorial, *Soft Drink Industry Takes High Road*, ATLANTA J. CONST., Aug. 18, 2005, at A18 (The Atlanta Journal-Constitution is the hometown paper of Coca-Cola).

170. Tom Paulson & Gregory Roberts, *Schools Get Ally in Soda Issue: Drink Makers*, SEATTLE POST-INTELLIGENCER, Aug. 17, 2005, http://seattlepi.nwsource.com/local/236881_sodapop17.html.

171. Child Health News, *U.S. Beverage Industry Praised for Helping in Childhood Obesity*, NEWS-MEDICAL.NET, Aug. 17, 2005, <http://www.news-medical.net/?id=12549>.

172. Press Release, Am. Beverage Ass’n, *supra* note 168.

173. See Betsy McKay, *Soda Marketers Will Cut Back Sales to Schools*, WALL ST. J., Aug. 17, 2005, at B1 (noting that “Coca-Cola . . . had already planned to sell only water and 100% juice to elementary schools” and was engaging “in dialogue with [their] school customers to encourage them to adopt the ABA policy”); Press Release, Pepsi-Cola, Pepsi-Cola North America System Supports American Beverage Association’s School Vending Policy (Aug. 16, 2005), <http://phx.corporate-ir.net/phoenix.zhtml?c=78265&p=irol-newsArticle&ID=743869&highlight=>.

174. See *supra* Part II.D.

The policy also applies only to vending machines, ignoring all of the other ways that soda is sold in schools, such as in stores and at sporting events. No explanation was offered by the ABA for the policy's restriction to vending machines, a point that was largely overlooked in the media coverage.

Also, in many cases, schools are locked into long term contracts. This policy would only apply to new contracts, or "earlier if both parties agree."¹⁷⁵ But why would a soda company agree to change an existing contract if it does not have to, and if doing so could hurt it financially? If ABA members really cared about children's health, why not call for an immediate renegotiation of all school contracts?

1. ABA's Non-Nutrition Policy

Even if the ABA policy could actually be implemented, from a nutrition standpoint, the guidelines are feeble. As described by the ABA, they provide for:

Elementary Schools: only water and 100 percent juice.

Middle Schools: only nutritious and/or lower calorie beverages, such as water, 100 percent juice, sports drinks, no-calorie soft drinks, and low-calorie juice drinks. No full-calorie soft drinks or full-calorie juice drinks with five percent or less juice until after school; and

High Schools: a variety of beverage choices, such as bottled water, 100 percent juice, sports drinks, and juice drinks. No more than 50 percent of the vending selections will be soft drinks.¹⁷⁶

The policy, however, has a number of problems:

- Many school districts and states have much more stringent policies and numerous school districts around the nation have banned all soda and other highly sweetened beverages, K-12.¹⁷⁷
- Calling for the elimination of soda in elementary schools is unimpressive when most soda is sold at the high

175. Press Release, Am. Beverage Ass'n, *supra* note 168.

176. *Id.*

177. See, e.g., Rosie Mestel, *Too Much Pop, Too Little Nutrition*, L.A. TIMES, Sept. 5, 2005, at F1 (noting that "the Los Angeles Unified School District already has banned the sale of sodas, certain sports drinks and fruit-based sugar-sweetened drinks composed of less than 50% fruit juice").

school level.

- Sports drinks are high in sugar and calories. The strongest beverage policies in the nation do not allow sports drinks at all.¹⁷⁸
- What kind of nutrition policy sets a cut-off at “five percent or less juice?”
- Why not create a policy for only healthful beverages in all schools?

Also, nutrition advocates who have fought for the nation’s toughest beverage policies say that a 50% soda and 50% more healthful beverage policy simply does not work because kids will always choose the soda.

John Weidman, with The Food Trust in Philadelphia, has been a leader in that city’s efforts to improve school food for several years. He says the 50/50 policy is useless and will do nothing to solve the problem.¹⁷⁹ His city’s school beverage policy for all grades is simply water, 100% juice, and milk.¹⁸⁰ According to Jackie Domac, a teacher at Venice High School, one problem with the 50/50 policy is that the vendor sometimes replaces only the soda and not the more healthful beverages when restocking.¹⁸¹ In other words, they may deliberately sabotage a 50/50 policy because they can make more money by selling soda, which costs less to produce than juice. “[T]hat’s why even if they agree to put some juice in the machines, it will be the last slot, or the juice and water machine will be far removed from the common eating area,” Domac says.¹⁸² “At Venice High School, they made 15 cents on every juice sold versus 37 cents on every soda. So, more than double the profit from the soda. So even if it’s their own product, you think they must want to sell it. They don’t. They have no interest in selling the juice.”¹⁸³

178. See, e.g., *Nutrition Policy and Guidelines—Vending Machines, A La Carte and Competitive Foods*, SUPERINTENDENT’S CIRCULAR (Focus on Children, Boston Public Schools, Boston, Mass.), Sept. 1, 2005, at 3, available at <http://bostonk12.ma.us/dept/docs/FNS-3.doc>.

179. Telephone Interview with John Weidman, Senior Associate, The Food Trust, in Philadelphia, Pa. (Aug. 24, 2005).

180. *Id.*

181. Telephone Interview with Jacqueline Domac, Health Teacher, Venice High School, in Venice, Cal. (Aug. 23, 2004).

182. *Id.*

183. *Id.*

Domac says that she tried to implement a half juice and half soda policy, but that Coca-Cola “totally manipulated the environment. The juices were put further away in the cafeteria. The juice would sell out and wouldn’t get restocked . . . whereas the soda got restocked right away. Or, the juice would be at the bottom.”¹⁸⁴ The healthiest products are stocked at the bottom of the machines, not at eye level, “so you are always going to see the soda first.”¹⁸⁵ Domac recalls, “One time I went to look, after not paying attention for a few weeks, and the healthy beverage slots had been reduced to only four out of 200 vending machine slots. So there is really no incentive” to stock the more healthful products.¹⁸⁶

Another problem with the ABA policy is that it is voluntary and depends on the cooperation of local vendors. Many vendors have already proven that they are unwilling to work with schools to give them the products they want. Domac says that it was always a struggle with Coca-Cola as the vendor:

These people do not work with the districts unless push comes to shove and you put your foot down. We tried to work with them. We wanted all juices and water. And they only brought orange juice and apple juice. They said no other new juices were coming. [Instead] they brought some disgusting soda with five percent milk. And they thought that was healthy. Finally we said, ‘no, you’re going to have to leave.’ And then to sabotage the transition, they left so slowly, leaving machines empty, so we couldn’t put our new machines in with our new vendor . . . Now, they are slowly changing, but only because they have to.¹⁸⁷

2. ABA’s True Motivation: Deflect Further Legislative Action

The ABA’s true purpose in issuing this policy is to deflect the ongoing efforts of state legislators to address the problem. Every time another attempt by a state legislature to pass a bill that limits soda in school is covered in the news, it creates a public relations problem for the industry. But if the companies are perceived as “being responsive” then lawmakers might take the issue off the

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

table.¹⁸⁸ Indeed, some of the media coverage even referred to the policy as representing a “reversal” in the ABA members’ previous efforts at fighting state legislation.¹⁸⁹ While the ABA did say their policy would not replace any existing regulations,¹⁹⁰ which by law it could not, no mention was made whatsoever of the ABA or its members halting any of its lobbying activities.

The ABA even went so far as to get quotes for its press release from three politicians—an adept public relations move—to “prove” that lawmakers back the move. The three politicians were North Carolina Lieutenant Governor Beverly Perdue, California Assemblywoman Gloria Negrete McLeod, and Georgia Senator Renee Unterman.¹⁹¹ Curiously, the new ABA policy would have no impact in North Carolina as that state had passed a bill only a month earlier that almost mirrored the new ABA policy.¹⁹² In California, a stronger law is already on the books, and the state’s largest school districts have even stronger policies in place.¹⁹³ Finally, with Coca-Cola headquartered in Atlanta, Georgia, lawmakers from that state have traditionally been loathed to pass any school vending bill. For example, former Georgia Senator Zell Miller, who has been called

188. Even some industry observers made this point. See Elliot Maras, *Beverage Industry Group Supports Limiting Carbonated Soda In Schools*, VENDING MARKET WATCH, Aug. 17, 2005, <http://www.amonline.com/article/article.jsp?id=14379&siteSection=1> (as noted by the editor, “This new policy is clearly designed to counteract criticism from consumer activists and politicians who say the beverage industry is profiting at childrens’ (sic) expense.”).

189. See Editorial, *supra* note 169 (“The announcement this week by the American Beverage Association represents a reversal by the industry, which had been fighting legislative efforts to ban soft drinks from school vending machines.”).

190. See Press Release, Am. Beverage Ass’n, *supra* note 168 (“The policy will not supersede federal, state and local regulations already in place.”).

191. *Id.*

192. See Associated Press, N.C. Lawmakers Give Final OK to School Vending Machine Rules, (July 27, 2005), <http://www.myrtlebeachonline.com/mld/myrtlebeachonline/12238685.htm>.

193. California law does not allow soda in elementary and middle schools. See CAL. EDUC. CODE tit. 2, § 49431.5 (2005). California also recently enacted legislation that will reduce the sales of, and ultimately remove, sodas from high schools. S.B. 965, 2005–2006 Leg., Reg. Sess. (Cal. 2005) (enacted Sept. 7, 2005). Major cities such as Los Angeles and San Francisco do not allow the sale of sodas in grades K–12. See Jean Merl, *Students Learn to Dispense with Sodas*, L.A. TIMES, Feb. 12, 2004, at A1.

the “Senator from Coca-Cola,” shut down a Senate Agriculture Committee staff discussion of a ban on soda in high schools.¹⁹⁴

What better evidence of the new policy being no more than a publicity stunt than the ABA’s multimillion dollar plan “to run print and broadcast advertising to educate the public about the new policy.”¹⁹⁵ If this policy was truly reflective of a desire to be “part of the solution” to childhood obesity, why would the ABA need to advertise about it? Wouldn’t actually making improvements in schools be reward enough? What possible purpose could an ad campaign serve, other than to promote soda companies as caring, responsible corporate citizens? If this sounds eerily familiar, it should. The ABA is taking a page right out of the tobacco industry’s playbook, which is to spend more money advertising its so-called new responsible image than on actually being responsible.¹⁹⁶

IV. DECEPTIVE PROMOTION OF HEALTH AND NUTRITION

In addition to their lobbying efforts, food companies have proven they cannot be trusted by promoting their products as healthful, when in fact they are not. Food and beverage companies have been facing increasing criticism for promoting unhealthy products to children. One of industry’s main strategies for responding to this public criticism has been to position themselves as part of the solution by reformulating foods, selectively labeling foods, and claiming to improve marketing policies. This Part describes the ways that these tactics operate specifically with food products aimed at children.

A. Kraft Foods: Industry Leader in Sales and Deception

When it comes to assessing food companies and their public image, Kraft Foods stands out. First of all, the company bears the dubious distinction of being owned by Altria, the company formerly known as Philip Morris.¹⁹⁷ Kraft is also the largest food company in

194. Gary Ruskin & Juliet Schor, *Junk Food Nation: Who’s to Blame for Childhood Obesity?*, NATION, Aug. 29, 2005, at 15.

195. Press Release, Am. Beverage Ass’n, *supra* note 168.

196. See, e.g., Tom Price, *Philip Morris Changes Its Name But Not Its Tactics*, CORPWATCH, Mar. 14, 2002, <http://www.corpwatch.org/article.php?id=2035> (discussing the company’s failed \$250 million campaign to improve its corporate image).

197. Numerous experts criticized the name change as nothing more than an

North America and the second largest in the world, with products in 155 countries and net revenues in 2004 of \$32 billion.¹⁹⁸ There are more than fifty Kraft brands worth \$100 million and five worth \$1 billion.¹⁹⁹ Kraft makes familiar household brands in just about every food category, including cheese, cookies, crackers, coffee, candy, cold cuts, cereals, frozen meals, sauces, and condiments. Walk down any grocery store aisle and you are sure to pass a Kraft product. So when Kraft makes a move, people pay attention.

Kraft's tobacco connections should make the public and media especially skeptical when it comes to evaluating the company's claims at being a good corporate citizen. For example, Philip Morris wrote the book on professing to market responsibly when it comes to teens and smoking.²⁰⁰ And yet, Kraft enjoys a relatively squeaky clean reputation and is often referred to as an industry leader on making positive changes in its products and marketing policies. Upon closer inspection, however, Kraft's attempts to position itself as responsible are nothing more than a public relations ploy.

1. Kraft's Meaningless Advertising Policy

In January of 2005, Kraft promised to scale back junk-food ads to children, a move that earned the much free, positive press. But the potential impact of Kraft's promises is unclear. For example, only certain products—including regular Kool-Aid, Oreo cookies, several Post children's cereals, and some varieties of Lunchables—will no longer be advertised to children ages six to eleven. However, according to Kraft's press release, "products that the company will continue to advertise in media aimed specifically at the 6-11 age group include: Sugar-Free Kool-Aid beverages, Lunchables Fun

attempt at reinventing itself and hiding from the tobacco connection. *See, e.g.*, Press Release, Infact, New Study Exposes Truth Behind Phillip Morris Name Change (Mar. 27, 2003), <http://www.stopcorporateabuse.org/cms/page1224.cfm> (citing Elizabeth A. Smith & Ruth Malone, *Altria Means Tobacco: Philip Morris's Identity Crisis*, 93 AM. J. PUB. HEALTH 553, 553 (2003)) (In fact now known as Corporate Accountability International).

198. Kraft Foods, Corporate Fact Sheet, <http://www.kraft.com/profile/factsheet.html> (last visited Sept. 29, 2005).

199. *Id.*

200. *See, e.g.*, Philip Morris USA, Youth Smoking Prevention, http://www.philipmorrisusa.com/en/policies_practices/ysp.asp?source=home_link (last visited Nov. 12, 2005).

Pack Chicken Dunks and 1/2 the Sugar Fruity Pebbles cereal.”²⁰¹ Kraft claims that these products offer “beneficial nutrients or a functional benefit,” and are part of its new “Sensible Solution” program, a self-defined labeling program.²⁰²

Why does Kraft get to define what is and isn’t healthful? Is sugar-free Kool-Aid healthful just because Kraft says so? Does adding a little vitamin C (5.6 mg per serving) to an artificially colored and artificially sweetened drink really make it “better-for-you”? Sugar-free Kool-Aid substitutes sugar with the highly controversial artificial sweetener aspartame, which has been linked to numerous health problems, including seizures, migraines, and brain tumors.²⁰³

Other products aimed at kids that bear the “Sensible Solution” flag include Reduced Fat Chips Ahoy! and Fruity Pebbles with 50% less sugar.²⁰⁴ Making a product lower in fat or sugar does not make it nutritious for the same reason that adding whole grain to Cocoa Puffs does not make that product healthful.

Another problem with industry announcements of improved policy is that there is *no accountability*. Even if Kraft’s new policy is a good thing, who is making sure they stick to it? What if the company changes course next week? Also, the Kraft press release says that the company “will continue to advertise its full portfolio of products in television, radio and print media seen principally by parents and all-family audiences . . . [and] market its products through means such as packaging, websites and in-store promotion.”²⁰⁵ In other words, Kraft will simply transfer its advertising to other media. But those details never got reported in the media.

Countless newspaper stories continue to erroneously report that Kraft has “stopped marketing unhealthy food to kids,” or words to that effect, when the details of their policy are nowhere near that

201. Press Release, Kraft Foods, Kraft Foods Announces Marketing Changes to Emphasize More Nutritious Products (Jan. 12, 2005), <http://www.kraft.com/newsroom/01122005.html>.

202. *Id.*

203. *See, e.g., Dani Veracity, Aspartame Promotes Grand Mal Seizures, Say Health Experts*, NEWS TARGET, June 27, 2005, <http://www.newstarget.com/008952.html>.

204. Press Release, Kraft Foods, *supra* note 201.

205. *Id.*

sweeping.²⁰⁶ This is exactly what Kraft was counting on: that lazy reporters would perpetuate a shorthand way of referring to the policy that makes it sound much better than it is; that's when the public relations strategy has succeeded in achieving its goal.

2. Kraft's Self-Serving and Dubious School Policy

With all the focus on getting junk food out of schools, Kraft has made sure to show how great a corporate citizen it is when it comes to their school policy as well. The company claims to have eliminated all in-school marketing.²⁰⁷ Yet, Kraft still sells products in schools. That the company does not hide this twisted logic makes it all the more remarkable. Specifically, Kraft states:

Kraft has eliminated advertising and promotion in schools around the world. This includes print and broadcast advertising, contests, posters, book covers, product sampling and any other forms of commercial messaging in schools. Kraft-labeled products will continue to be sold in schools.²⁰⁸

It is disingenuous to promise to stop in-school promotion but still *sell* products in school. How can the sale of food not count as promotion? If you asked most nutritionists which is worse, the sale of unhealthful food products to kids or the advertising of them, the answer would be obvious. What if you walked into a school store and measured the amount of square footage taken up by all the packaged foods such as Kraft's ubiquitous cookie brands? Food packaging is designed by highly-skilled marketing experts. That should count as advertising and promotion.

Instead of eliminating their sale, Kraft has set specific nutrition criteria for products sold in school vending machines.²⁰⁹ But how

206. See, e.g., Delroy Alexander & John Schmeltzer, *Kraft to Stop Advertising Its Sugary Snacks to Kids*, CHI. TRIB., Jan. 13, 2005, at C1; Maryanna Lewyckyj, *Kraft Kools to Ads For Kids*, TORONTO SUN, Jan. 13, 2005, at 22; Caroline E. Mayer, *Kraft to Curb Snack-Food Advertising*, WASH. POST, Jan. 12, 2005, at E01.

207. See Kraft.com, *Healthy Living Policies and Practices—Marketing Practices*, http://www.164.109.46.215/responsibility/nhw_marketingpractices.aspx (last visited Sept. 25, 2005).

208. *Id.*

209. See Kraft.com, *Obesity Initiatives*, <http://164.109.46.215/obesity/responses.html> (last visited Sept. 25, 2005).

exactly is Kraft being held accountable to its guidelines? In schools that participate in federal meals programs, specific nutrition criteria must be met and schools are monitored (albeit inadequately) and held accountable when their meals do not conform to government standards.²¹⁰ However, for Kraft's policy regarding nutrition standards on its food sold in schools, no similar system of accountability is even possible. Indeed, Kraft itself admits the challenge of being held to its own standards:

Food companies like Kraft often do not service vending machines directly. Our products are sold to distributors and operators, who, in turn, make decisions on which products will be placed in which machines. Kraft can do its best to work with the vending industry and school authorities to encourage them to follow our recommendations, but we will not have final control over those decisions.²¹¹

Moreover, Kraft admits its own skepticism about school vending concerns:

As with in-school marketing, many interest groups and individuals have expressed concerns about the characteristics of products sold through vending machines in schools. While for most children it's unlikely that products sold through school vending machines account for a significant portion of their total caloric intake, we nonetheless recognize how contentious the debate over school vending has become.²¹²

In other words, Kraft really does not think there is any problem with selling unhealthful products in schools. However, since it has become a political hot potato, they are going to make it look good by claiming to no longer market in schools and by saying they have placed a few nutritional standards on the foods they sell.

Looking at the nutrition criteria that Kraft is employing illustrates why we cannot allow food companies to set their own standards. According to its Web site, Kraft's guidelines for school vending allow foods with "35% or less of total calories from

210. *See* 7 C.F.R. § 210.10 (2005).

211. *See* Kraft.com, *supra* note 209.

212. *Id.*

sugars.”²¹³ However, in a joint report by two agencies of the United Nations, the WHO and the FDA, international nutrition experts recommend limiting sugar intake to less than 10% of calories.²¹⁴ Thus, Kraft is setting nutritional guidelines that allow children to eat up to 3.5 times the amount of the acceptable sugar allowance. Moreover, Kraft’s guidelines exclude naturally occurring sugars²¹⁵ so that means they allow foods with up to 35% *added* sugars to be sold in schools. Added sugars are what most nutritionists advise against; even the relatively weak USDA Dietary Guidelines caution against too many added sugars.²¹⁶

Also, Kraft’s school vending guidelines say they promote “inclusion, where practical, of fiber, whole grains, fruits, dairy and vegetables.”²¹⁷ These are the very foods that the 2005 Dietary Guidelines for Americans emphasize because most people and especially children are not eating enough of them.²¹⁸ Yet, Kraft decides when these foods might be sold in schools. Of course, it is not practical to sell whole grains, such as cooked brown rice or whole grain bread, or fresh fruits and vegetables through school vending machines. So Kraft will just continue to sell highly processed foods that are more practical for sale in schools because those foods earn the highest profits.²¹⁹

3. Kraft’s Policy Omits Branding and Advergaming

Brand licensing is a huge part of corporate marketing and Kraft’s policy—both on advertising and in schools—conveniently side steps this aspect altogether. For example, on ToysRUs.com, you can buy a “Dale Earnhardt, Jr. Oreo Monte Carlo Model Kit.”²²⁰ The

213. See Kraft Marketing Practices, *supra* note 207.

214. WORLD HEALTH ORG. [WHO], DIET, NUTRITION AND THE PREVENTION OF CHRONIC DISEASES, 56–57 WHO Rpt. 916 (2003), available at http://www.who.int/hpr/NPH/docs/who_fao_expert_report.pdf.

215. Kraft.com, *supra* note 207.

216. See U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 2005: KEY RECOMMENDATIONS FOR THE GENERAL POPULATION (2005), available at <http://www.health.gov/dietaryguidelines/dga2005/recommendations.htm> (last visited Sept. 25, 2005)[hereinafter DIETARY GUIDELINES].

217. Kraft.com, *supra* note 207.

218. See U.S. DEP’T OF AGRIC., *supra* note 216.

219. See NESTLE, *supra* note 60, at 17–20.

220. The Dale Earnhardt, Jr. Oreo Monte Carlo Model Kit can be found on

toy car is plastered with the Oreo logo design. The “skill level” is for ages ten and up, and the safety warning says it is not suitable for children under age eight.²²¹ By either criterion, this would violate Kraft’s policy of not marketing unhealthy food to kids aged six to eleven.

You can also purchase a “Nascar Die Cast and Plastic Vehicle: D. Earnhardt Jr. Ritz/Oreo,” which is recommended for kids aged four and up.²²² While this may not technically violate Kraft’s policy of not advertising to children under age six, because the policy is limited to ads in “television, radio and print,”²²³ it certainly appears to violate the spirit of the company’s stated policy (which is clearly designed to make Kraft sound responsible when it comes to young children).

The same goes for “Fisher-Price Games: Oreo Matchin’ Middles,” for kids aged three to seven.²²⁴ This is the manufacturer’s description of the game:

A classic matching game with familiar Oreo cookie theme. Oreo cookie toys pull apart to reveal shapes on top and bottom halves. Two levels of play let beginners and more advanced players reach into the cookie jar to grab their cookie half. Once players find a match, they snap their cookies together and stack ‘em up nearby. The one with the highest stack at the end wins. Oreo Matchin’ Middles is tons of fun for everyone.²²⁵

While this game does not involve eating real cookies, it does result in increased familiarity with Oreo’s products, which is the whole point. Plus, the object of the game is to stack up the most

shop.com, Dale Earnhardt 01 Goodwrench Monte Carlo Model Kit by Revell, <http://www.shop.com/op/aprod-p29905426-k24-g4~dale+earnhardt+oreo+monte+carlo+model+kit+nover?sourceid=3> (last visited Mar. 9, 2006).

221. *Id.*

222. See Amazon.com, Toys & Games, 1:43 Scale NASCAR Die Cast and Plastic Vehicle: D. Earnhardt Jr. Ritz/Oreo, http://www.amazon.com/exec/obidos/ASIN/B000096R3F/ref=pd_sxp_elt_11/002-2963593-3324044 (last visited Oct. 6, 2005).

223. Press Release, Kraft Foods, *supra* note 201.

224. See Amazon.com, Toys & Games, Fisher-Price Games: Oreo Matchin’ Middles, http://www.amazon.com/exec/obidos/tg/detail/-/B00000J161/qid=1122412806/sr=1-2/ref=sr_1_2/002-6325134-9009658?v=glance&s=toys (last visited Oct. 6, 2005).

225. *Id.*

number of cookies, which can be interpreted as encouraging over-consumption.

Another key form of marketing to children is advertising via Web sites with free video games, also known as “advergaming.” While the January 2005 policy announcement omits any mention of Web sites, later, Kraft decided to include them. In September 2005, Kraft announced the following:

By the end of 2006, only products that meet Kraft’s *Sensible Solution* nutrition standards will appear on Kraft websites that primarily reach children ages 6–11. This strengthens earlier marketing policy changes, including advertising only “Sensible Solution” products in TV, radio and print media primarily viewed by children ages 6–11.²²⁶

Kraft’s CEO, Roger Deromedi, made this big announcement himself at California Governor Arnold Schwarzenegger’s Summit on Health, Nutrition and Obesity.²²⁷ Doing so earned Kraft entry into the governor’s “Honor Roll” of companies making significant “commitments” to solving obesity, thus providing the company with abundant free public relations.²²⁸

But why wait until the end of 2006? According to Mark Berling, Kraft’s executive vice president for Global Corporate Affairs, the company needs the time to make the Web changes and develop more “Sensible Solutions” products aimed at kids.²²⁹ Meantime, Kraft will continue to host such Web sites as “NabiscoWorld” where kids can play numerous advergaming featuring kids’ products such as Oreos, Chips Ahoy, and Oreo- and Chips Ahoy-flavored Jell-O Pudding

226. Press Release, Kraft Foods, Kraft Announces Healthy Lifestyle Initiatives at California Summit on Health, Nutrition and Obesity (Sept. 15 2005), <http://www.kraft.com/newsroom/09152005.html>.

227. *Id.*

228. The event was heavily covered by the media, including the New York Times. See Melanie Warner, *Kraft Introduces 2 Somewhat Healthier Cookies Made of Whole Grains*, N.Y. TIMES, Sept. 16, 2005, at C3. Kraft’s CEO also had a coveted spot on a panel of “Leaders of Change” at the event. Get Healthy California, Governor’s Summit on Health, Nutrition and Obesity, Agenda (Sept. 15, 2005), available at http://www.cnr.berkeley.edu/cwh/PDFs/Summit_GHC_agenda.pdf.

229. Interview with Mark Berling, Executive Vice President, Global Corporate Affairs, Kraft Foods, in Sacramento, Cal. (Sept. 15, 2005).

Sticks.²³⁰

Another Kraft Web site, Postopia.com, is chock-full of games aimed at young children, including those that promote Kool-Aid (not the sugar-free variety), every Post kids' cereal (also not the reduced-sugar kind), Oreos, and more.²³¹ If Kraft really cares about children, why not take down these sites altogether until the company can develop more healthful products?

In addition, the Web site policy is limited in that it only applies to product promotion. On the main Kraft Web site, there is a link to the "Kool-Aid Man's House," where young children are encouraged to gather points to buy "stuff" such as the Kool-Aid Man Plush Toy and the Kool-Aid Kite.²³² Kraft's policy does not address this type of branded marketing because it is not promoting a food product, per se.

Finally, Kraft products for kids are tied into numerous kid-friendly characters such as Batman, the Flintstones, the Hulk, and many Disney characters.²³³ If Kraft really cares about children's health, then why not have a policy to stop using children's favorite icons to promote unhealthy foods?²³⁴

Also, Kraft's marketing policy regarding Web sites will not change this strategy since the characters can still adorn "Sensible Solution" products. Psychologist Susan Linn says that using cartoon characters to sell any food to children is harmful because it teaches them to choose food for what's on the package, as opposed to its nutritional value or even taste.²³⁵

230. See NabiscoWorld.com, Games, <http://www.nabiscoworld.com/games/default.aspx> (last visited Feb. 24, 2006).

231. See Postopia.com, Games, <http://www.postopia.com/games/index.aspx> (last visited Oct. 6, 2005).

232. See Kool Aid Stuff, http://www.kraftfoods.com/koolaid/2001/ka_all_stuff.html (last visited Feb. 12, 2006).

233. See, e.g., Press Release, Universal Picture, Universal Announces Incredible Hulk Promo Program!, <http://www.comicbookmovie.com/news/Articles/89.asp> (last visited Feb. 12, 2006). For other examples of this type of cross promotion, see Postopia.com, *supra* note 231.

234. See Angela Campbell, *Restricting the Marketing of Junk Food to Children by Product Placement and Character Selling*, 39 LOY. L.A. L. REV. 449 (2006); see also COMM. ON PREVENTION OF OBESITY IN CHILDREN AND YOUTH, INST. OF MED., *FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY?* (J. Michael McGinnis, et al. eds., 2006).

235. E-mail from Susan Linn, Ed.D, Instructor in Psychiatry, Harvard Medical School, to author (Mar. 20, 2005, 18:49 EST) (on file with author).

4. Hypocrisy Exposed: Fighting for Their Right to Advertise

Less than two weeks after its announcement of improved marketing practices aimed at children, Kraft turned right around to join with other major food companies and ad agencies to create a new lobbying group called, the Alliance for American Advertising.²³⁶ Kraft, and fellow members General Mills²³⁷ and Kellogg comprise the top three advertisers of packaged food to kids with combined annual spending on kids' ads of close to \$380 million in the U.S. alone.

Other alliance founders include the American Association of Advertising Agencies and the Grocery Manufacturers Association (GMA), two powerful trade associations in their own right. The alliance's stated purpose is to defend the industry's First Amendment rights to advertise to children and to promote self-regulation as an alternative to government restrictions.²³⁸

Susan Linn, author of *Consuming Kids* and instructor in psychiatry at Harvard Medical School, is appalled at this industry power grab.

Marketing to children is not an absolute right. Food companies and the advertising industry should be thinking about their responsibilities to children, not about their 'right' to exploit them. Whether we rely on research or common sense, we know that children are more vulnerable to marketing than adults and that they should be protected because of their vulnerabilities.²³⁹

What better evidence do we need that "industry leaders" such as Kraft cannot be trusted to self-regulate than their forming such a lobbying coalition? If Kraft was serious about "being part of the solution," why would this be necessary?

236. See Sarah Ellison, *Divided, Companies Fight For Right to Plug Kids' Food*, WALL ST. J., Jan. 26, 2005, at B1.

237. When I interviewed the General Mill's spokesperson, she refused to comment on the company's involvement in this Alliance.

238. See Ellison, *supra* note 236. The Coalition quickly sought to increase its membership, and PepsiCo was among the first to join. Wendy Melillo, *Ad Group and Food Company Alliance Grows*, MEDIAWEEK, Jan. 31, 2005, http://www.mediaweek.com/mw/search/article_displya.jsp?vnu_content_id=1000779661.

239. E-mail from Susan Linn, *supra* note 235.

B. Coca-Cola's Public Statements: Not the Real Thing

In the sweetened beverage category, Coca-Cola is the recognized major player. According to its Web site, the company "is the world's leading manufacturer, marketer, and distributor of nonalcoholic beverage concentrates and syrups, used to produce nearly 400 beverage brands . . . with local operations in over 200 countries around the world."²⁴⁰ Coke also easily wins the prize for the beverage company that makes the most deceptive statements. And they are often quite brazen about it.

1. Coca-Cola's Misleading Marketing Policy

Coca-Cola claims to not market its products to children under age twelve. Specifically, official corporate policy states:

- 1) In keeping with a policy that has been in place for more than half a century, The Coca-Cola Company and its local bottling partners do not aim or direct any marketing activity from any source to children under the age of 12.²⁴¹
- 2) Marketing or advertising for products bearing trademarks owned by The Coca-Cola Company, such as clothing, toys, novelties and collectibles, are subject to these same guidelines.²⁴²
- 3) We will not promote our brands to children under 12 in schools and will respect their classroom as a commercial-free zone.²⁴³

Yet the company violates this policy in numerous ways. For example:

- Coke-branded toys including checker sets and cars aimed at children as young as age four,²⁴⁴

240. Coca-Cola.com, <http://www.coca-cola.com> (last visited Sept. 26, 2005). Oddly, the number of countries in the world by most accounts is only 193. See, e.g., About.com, The Number of Countries in the World, <http://geography.about.com/cs/countries/a/numbercountries.htm> (last visited Feb. 12, 2006).

241. Press Release, The Coca-Cola Company, The Coca-Cola Company's New Global Advertising and Promotion Policy for Children (July 15, 2003), http://www.coca-colahbc.com/cms/view.php?dir_pk=10&cms_pk=256.

242. *Id.*

243. *Id.*

244. Josh Golin, Program Manager, Campaign for a Commercial Free

- Television product placement, such as on American Idol, a top-rated show for children ages 2–11;²⁴⁵
- Promotional tie-ins, such as sponsoring the Harry Potter movies and other popular children’s media.²⁴⁶

Most importantly, Coca-Cola aggressively markets its products in schools to children of all ages, through exclusive “pouring rights” contracts.²⁴⁷ The company often points to its model guidelines for such school “partnerships,” which recommend that soda not be sold in elementary school, but allows sales in middle and high schools.²⁴⁸ The policy also states that “beverage companies should be responsive and respectful of each school’s choice of beverages.”²⁴⁹

However, the guidelines have no enforcement mechanism. Who is making sure that the policy is carried out in every single school district? It is easy for Coca-Cola to make “policy” that in reality has no impact on local bottlers. The result is good PR for the brand, but no effect on the ground. Moreover, the policy permits the marketing of sugar-laden “sports drinks” to younger children, as well as the use of the Coca-Cola logo on school materials, including those promoting health and nutrition education.²⁵⁰

2. Coca-Cola’s Deceptive Statements on School Policy

At the FTC workshop on marketing and childhood obesity in July 2005, Abigail Rodgers, Coca-Cola vice president of Well Strategies and Communication, made several misleading statements regarding the company’s school policy. For example, she said, “In elementary schools, we do not sell carbonated soft drinks. In middle schools and high schools, over half of what we sell are zero-calorie beverages and non-carbonated beverages.”²⁵¹

Childhood, Statement at the Coca-Cola Annual Meeting of Shareholders (Apr. 19, 2005), <http://www.commercialexploitation.com/actions/cokeshareholderstatement.htm>.

245. *Id.*

246. *Id.*

247. *See supra* notes 15–16 and accompanying text.

248. COCA-COLA COMPANY, MODEL GUIDELINES FOR SCHOOL BEVERAGE PARTNERSHIPS 3 (2001), *available at* http://www2.coca-cola.com/ourcompany/hal_school_beverage_guidelines.pdf.

249. *Id.* at 2.

250. *See* Rhea R. Borja, *Coca-Cola Plays Both Sides of School Marketing Game*, EDUC. WK., Nov. 5, 2003, at 8.

251. Abigail Rodgers, Vice President, Well Strategies and Comm’n, Coca-

A survey of Kentucky schools revealed that soda is sold in 44% of elementary schools.²⁵² Coca-Cola was also a powerful lobbying force against four legislative attempts to pass a state bill to get soda out Kentucky schools, including elementary schools.²⁵³ Ms. Rodgers forgot to mention this and other state bills Coca-Cola has helped kill or weaken, including bills in California, New Mexico, Arizona, Connecticut, Indiana and Oregon, just to name a few.²⁵⁴

Also, a 2003 survey of Texas schools revealed that 63% of districts with exclusive vending contracts have deals with Coca-Cola, and such arrangements do include elementary schools.²⁵⁵

Next, a 2004 survey conducted by the Center for Science in the Public Interest of 1,420 vending machines in 251 schools in 24 states, grades 7–12, found that 70% of the options were sugary drinks such as soda, juice drinks (with less than 50% juice), iced tea, and sports drinks.²⁵⁶ Moreover, *86% of the soda was regular and only 14% of the sodas were diet.*²⁵⁷

Ms. Rodgers' statement was obviously meant to convey the impression that Coca-Cola sells mostly healthful products in middle and high schools. However, CSPI's data makes her statement highly suspect. In addition, just because a beverage is "zero-calorie" or "non-carbonated," that does not automatically make it healthful. Many of Coca-Cola's "fruit drinks," for example, are still very high in sugar and many others contain artificial sweeteners that bear no resemblance to actual fruit.²⁵⁸

Cola Company, Remarks at the FTC Workshop, Perspectives on Marketing, Self-Regulation and Childhood Obesity 151 (July 14–15, 2005) (transcript available at http://www.ftc.gov/bcp/workshops/Foodmarketingtokids/transcript_050714.pdf).

252. See Crystal Harden, *School Food May Go on Diet*, KY. POST, Mar. 12, 2002, <http://www.kypost.com/2002/mar/12/junk031202.html> (online edition).

253. See discussion on lobbying efforts in Kentucky, *supra* Part II.D.

254. See *supra* Part II.

255. FOOD AND NUTRITION DIV., TEX. DEPT. OF AGRIC., SCHOOL DISTRICT VENDING CONTRACT SURVEY, http://www.squaremeals.org/fr/render/channel/items/0,1249,2348_2515_3649_0,00.html (last visited Sept. 20, 2005).

256. CTR. FOR SCI. IN THE PUB. INTEREST, DISPENSING JUNK 4 (2004) http://www.cspinet.org/dispensing_junk.pdf.

257. *Id.*

258. See MICHAEL F. JACOBSON, LIQUID CANDY: HOW SOFT DRINKS ARE HARMING AMERICAN'S HEALTH 10 (2005), http://www.cspinet.org/new/pdf/liquid_candy_final_w_new_supplement.pdf.

Ms. Rodgers also made this statement at the FTC meeting:
Our data, because we've tried to understand what the consumption habits are of full-calorie soft drinks in schools, our data tells us that in high schools, kids are consuming a couple ounces a day on average. So, it is not the kind of extremes that we sometimes think it might be.²⁵⁹

First of all, we are given no citation of the source of this data, so there is no way to verify it. Next, other research defies the notion that high school kids drink little soda. According to the Center for Science in the Public Interest, for example, "[t]eenagers get 13 percent of their calories from carbonated and noncarbonated soft drinks."²⁶⁰ Furthermore, "[s]oda pop provides the average 12 to 19-year-old boy with about 15 teaspoons of refined sugars a day and the average girl with about 10 teaspoons a day."²⁶¹ Trying to obfuscate the science is a tactic taken right out of the tobacco industry playbook.

Finally, Ms. Rodgers made this statement at the same meeting: "Vending machines are turned off, in many cases, during the school day, but in all cases because of regulation in and around meal times."²⁶²

The vague phrase "in many cases" cannot be verified, but anyone who works in a school will tell you that soda machines are in fact almost never turned off during the school day. The second part of this statement is also false. Rodgers is referring to a U.S. Department of Agriculture regulation that says soda may not be sold during meal times.²⁶³ But, in fact, the rule says that soda may not be sold *in food service areas*.²⁶⁴ There is no restriction for sodas sold anywhere else on school grounds, so Ms. Rodgers was giving the false impression that no sodas are sold around meal times when the reality is that kids simply purchase their sodas from the hallway vending machines and bring them into the cafeteria, or from vending machines in the cafeteria just before meal time and save them to have

259. Rodgers, *supra* note 251, at 196.

260. JACOBSON, *supra* note 258, at iv.

261. *Id.*

262. Rodgers, *supra* note 251, at 196.

263. USDA National School Lunch Program, Competitive Food Services, 7 C.F.R. § 210.11(b) (2005).

264. *Id.*

with lunch. In addition, as many teachers and food service staff will attest, this rule is frequently broken with soda vending contractors turning a blind eye.²⁶⁵ Finally, Rodgers gave the impression that the rule applies in all schools everywhere,²⁶⁶ but the regulation only applies in public schools participating in the National School Lunch Program.²⁶⁷

3. Coca-Cola's Public Relations Disguised as Science

In 2004, Coca-Cola created a new entity called the "Beverage Institute for Health & Wellness" to deflect mounting criticism.²⁶⁸ According to its Web site:

The Beverage Institute for Health & Wellness is a research organization within The Coca-Cola Company that supports scientific research, education and outreach with a primary focus on beverages. The Institute supports research that increases understanding of the role that beverages can play in diets and health, in developed and developing countries, around the world.²⁶⁹

In reality, the Institute was formed to shape public opinion and even the very science related to Coca-Cola's beverages. Since its inception, the Institute has sponsored at least three separate academic symposia related to nutrition and health, including:

- 1) The 2005 Harvard Medical School Postgraduate Nutrition Symposium—The Childhood Obesity Epidemic: Predictors and Strategies for Prevention;²⁷⁰

265. See Telephone Interview with Carolyn Dennis, *supra* note 66.

266. See Rodgers, *supra* note 251, at 196.

267. USDA National School Lunch Program, General Purpose and Scope, 7 C.F.R. § 210.1(b).

268. See Press Release, The Coca-Cola Co., Coca-Cola Unveils Plans for Institute Dedicated to the Role of Beverages in Healthy Lifestyles (Mar. 1, 2004), http://www2.coca-cola.com/presscenter/nr_20040220_beverages_healthy_lifestyles.html; see also John N. Frank, *Coca-Cola Plans Institute to Study Health, Wellness*, PR WEEK, Mar. 8, 2004, at 3.

269. The Beverage Institute for Health & Wellness, Mission and Scope, http://www.thebeverageinstitute.org/mission_scope.shtml (last visited Oct. 4, 2005).

270. The Beverage Institute for Health & Wellness, Symposiums, <http://www.thebeverageinstitute.org/symposiums.shtml> (last visited Oct. 4, 2005).

- 2) The 2005 ADA Research Symposium at the 2005 Food & Nutrition Conference & Expo: The Childhood Obesity Epidemic: Predictors and Strategies for Prevention;²⁷¹
- 3) "Managing Sweetness" a conference presented by Oldways Preservation Trust in Mexico City in November, 2004.²⁷²

At the Oldways conference, journalists were offered free travel and accommodations to attend the meeting.²⁷³ The conference featured scientists and chefs talking about the role sugar plays in proper diets.²⁷⁴ According to one account, "[t]he conference aim[ed] to diffuse concerns that sugary foods are a culprit in America's obesity epidemic."²⁷⁵ Out of the meeting emerged such "scientific consensus statements" as: "[g]ood health depends on wise management of calories from all food and drink sources, coupled with wise lifestyle choices that include regular exercise."²⁷⁶ Sounds more like food industry rhetoric than actual science. The very name of the conference, "Managing Sweetness," was a good indication that any consensus that emerged was not going to be negative about sugar.

Another example of Coca-Cola's attempt to manipulate science occurred at the Harvard event on childhood obesity in March 2005. There, Dr. Maxime Buyckx, Coca-Cola's director of nutrition and health sciences, denied any scientific connection between soda and obesity despite a Harvard study concluding that each additional soda a child drinks a day increases their risk of obesity by sixty percent.²⁷⁷ Buyckx claimed that the study was methodologically flawed and

271. *Id.*

272. *Id.*

273. John N. Frank, *Oldways Gathering to Give Sugar Positive PR*, PR WEEK, Sept. 22, 2004, available at <http://www.prweek.com/us/search/article/222977/oldways-gathering-give-sugar-positive-pr>.

274. *Id.*

275. *Id.*

276. *Oldways Develops Tools for Consumers to Manage Sweetness and Focus on the Total Diet Instead of 'Bits and Pieces'*, PR NEWSWIRE, Nov. 10, 2004, <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/11-10-2004/0002402326&EDATE=>.

277. E-mail from Richard A. Daynard, Professor, Northeastern Univ. Sch. of Law, to author (Mar. 19, 2005, 10:09:00 EST) (on file with author). For the results of the study, see David S. Ludwig et al., *Relationship Between Consumption of Sugar-sweetened Drinks and Childhood Obesity*, 357 LANCET 505, 505-08 (2001).

should merely be treated as hypothesis-generating.²⁷⁸

Richard Daynard, professor at Northeastern University School of Law and a long-time tobacco control advocate, was at the meeting and later observed:

[Buyckx's statement] eerily echoed claims the tobacco companies made . . . about the . . . studies [that] showed that smoking causes lung cancer. . . they were all just "hypothesis-generating!" The tobacco industry is currently defending a racketeering suit brought by the Department of Justice based [on] its decades-long campaign of scientific denial and disinformation. Will Coke be next?²⁷⁹

C. McDonald's Misleading Public Statements

When it comes to fast food giants, McDonald's—the largest chain in the world—is an easy target. The company's mascot, Ronald McDonald, is the most recognized character by children, second only to Santa Claus.²⁸⁰ Faced with mounting criticism for targeting children with its unhealthful products, McDonald's has been engaged in an enormous public relations campaign in recent months. Strategies include giving Ronald McDonald a makeover to make him appear more active,²⁸¹ partnering with Oprah's fitness guru Bob Greene,²⁸² and placing health education curricula into schools.²⁸³ Another strategy is to make public statements about how responsible the company is. Unfortunately, they don't always ring true.

1. McDonald's Nutrition Labeling Deception

In addition to promoting legislation addressing school nutri-

278. E-mail from Richard A. Daynard, *supra* note 277.

279. *Id.*

280. See ERIC SCHLOSSER, *FAST FOOD NATION* 4 (2001).

281. *Ronald McDonald Gets an Extreme Makeover*, REUTERS, June 9, 2005, <http://www.msnbc.msn.com/id/8135239/>.

282. See Press Release, McDonald's, McDonald's Offers a Sweetheart of a Deal: Get Fit with Bob Greene For 60 Percent Less (Feb. 14, 2005), http://www.mcdonalds.com/usa/news/current/conpr_02142005.html.

283. See Press Release, McDonald's, McDonald's Teams Up with Educators and Health/Nutrition Experts to Promote Balanced, Active Lifestyles in Schools (Aug. 23, 2005), <http://www.primezone.com/newsroom/news.html?d=84367>.

tion, another goal of nutrition advocates has been to require chain restaurants to provide nutrition labeling on their menu boards, similar to packaged food labeling requirements.²⁸⁴ But, this effort has also been met with much resistance by the food industry. And yet, the very companies fighting these bills try to make themselves look responsible. For example, Michael Donahue, vice president, U.S. Communications and Customer Satisfaction, McDonald's U.S.A, made the following statement at the FTC meeting on marketing and childhood obesity last summer: "Starting over 30 years ago, we started with the first nutritional brochures and helped lead the industry so that all of our competitors and others would do the same"²⁸⁵

The impression this statement is meant to convey is that the company actually cares about sharing nutrition information with customers, when nothing could be further from the truth. For the past several years, consumer groups such as the Center for Science in the Public Interest have been calling on "industry leaders," such as McDonald's, to provide nutrition information in the same place where all other relevant information is posted for consumers—right at the point of purchase, on their menu boards, rather than in brochures or Web sites where customers are unlikely to see the information.²⁸⁶

Yet McDonald's has vigorously resisted any such change in its policy. Maine's state representative, Sean Faircloth, has been an active legislative proponent of menu labeling, among other nutrition policies. He says that the brochures are designed for a strategic purpose: "To create the appearance of accessible information, without the reality of their use. They don't ask you, 'Do you want to Supersize that' in a card or brochure on a table . . . they ask you

284. The restaurant industry conveniently exempted itself from the Nutrition Labeling and Education Act, which was passed by Congress in 1990. *See* Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified at 21 U.S.C. § 343-1).

285. Michael Donahue, Vice President, U.S. Comm. & Customer Satisfaction, McDonald's, *Perspectives on Marketing, Self-Regulation and Childhood Obesity, Remarks at the FTC Workshop*, 154 (July 14-15, 2005) (transcript available at http://www.ftc.gov/bcp/workshops/Foodmarketingto_kids/transcript_050714.pdf).

286. *See* Ctr. for Sci. in the Pub. Interest, *Nutrition Labeling on Menus/Menu Boards at Chain Restaurants*, http://www.cspinet.org/nutrition_policy/policy_options.html#NutritionLabeling (last visited Sept. 27, 2005).

when you are buying the product”²⁸⁷

In Maine, McDonald’s sent a lobbyist who is a former Republican State Senator (and thus obviously well-connected) to successfully defeat that state’s bill.²⁸⁸ Also McDonald’s and all of its thousands of franchises are members of the National Restaurant Association, a powerful lobbying group that is fighting against both national and state legislation to require such nutrition labeling on menus and menu boards in chain restaurants.²⁸⁹

2. McDonald’s Targets Schools Despite Claims to the Contrary

Mr. Donahue also made this statement at the FTC meeting: [T]here’s a lot of controversy about the industry and working with the schools. Ironically, it’s often the schools that approach us first, and they’re so strapped for resources and alternative programs for physical education and other things . . . It doesn’t mean that we’re not talking about the menu choice and other issues, but it means that we have to talk and work with these schools.²⁹⁰

The statement that it is “often” schools that approach McDonald’s is impossible to verify and dubious. Even if it were true, why would it mean that the company *must* “talk and work with these schools?” If McDonald’s really cared about children’s health, why couldn’t the company just say, “Sorry, but we don’t market in schools because our food should really be aimed at parents so they can have more control over what their children eat. Targeting schoolchildren with cheeseburgers and French fries is just not our

287. Telephone Interview with Representative Sean Faircloth, Me., in Bangor, Me. (Mar. 28, 2005).

288. Telephone Interview with Representative Sean Faircloth, Me., in Bangor, Me. (July 9, 2004) (on file with author).

289. The National Restaurant Association Web site provides the current status of pending legislation along with hyperlinks to local Restaurant Association contacts for more information. Nat’l Restaurant Ass’n, Obesity, State Menu Labeling Legislation, http://www.restaurant.org/government/state/nutrition/bills_labeling.cfm (last visited Aug. 31, 2005). The Web site also opposes the federal version of the menu labeling requirement, the Menu Education and Labeling Act (MEAL), which has gone nowhere since first being introduced in 2003 as a result of industry lobbying. National Restaurant Association, Nutrition and Healthy Lifestyles, <http://www.restaurant.org/government/issues/issue.cfm?Issue=nutrition> (last visited Feb. 12, 2006).

290. Donahue, *supra* note 285, at 185–86.

policy.” They could not say that because it would not be good business. But it is not, as Mr. Donahue would have us believe, because McDonald’s is trying to help schools out of financial trouble and they have no other choice.

If schools themselves are approaching McDonald’s, why does the company promote its “fundraising” program called “McTeacher’s Night” so heavily? The way this “program” works is that teachers volunteer to work for a few hours behind the counter at an area McDonald’s and the company donates twenty percent of the proceeds to the school.²⁹¹ The result is heavy promotion of McDonald’s food, as students and their parents are encouraged and expected to dine there that evening (for the school’s sake, of course).

What kind of message does this send to children—to have the adults they look up to all day long working behind the counter, often contradicting the nutrition education they receive in the classroom? In many cities, the program has been controversial and teachers have resisted participation.²⁹² For example, in San Francisco, several elementary school teachers had this to say about the program:

- “We will be endorsing a product that contributes to the epidemic of childhood obesity and heart disease.”²⁹³
- “This is exploiting teachers for a real, live McDonald’s commercial.”²⁹⁴
- “It’s demeaning.”²⁹⁵

Just last year, McDonald’s approached the Evergreen School District in Vancouver, Washington with this program.²⁹⁶ Rafaela Steen, an employee of the district was not happy about the idea, and expressed her concerns to the elementary school principal who was considering having his school participate (the school ultimately decided against the idea.):

It does seem like such a manipulative way for McDonald’s to appear to be helping schools while at the same time indoctrinating young children and families about

291. Meredith May, *Teachers Sizzle Over Fast Food Fund-raiser*, S.F. CHRON., Oct. 15, 2002, at A1.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. E-mail from Rafaela Steen, Employee, Evergreen Sch. Dist., Wash., to author (Aug. 14, 2005, 16:01:00 PST) (on file with author).

McDonald's and all that they represent. Who doesn't look up to their teachers in some way, and to see them behind the counter enthusiastically supporting McDonald's . . . is quite scary.²⁹⁷

What a great deal for the company to get adults to *volunteer* to work for them in exchange for a paltry donation. This is an obvious public relations stunt. If McDonald's truly cared about schools, why not donate the money outright?

3. Litigation Against McDonald's for Deceptive Practices

McDonald's has been the target of litigation at least three times for deceptive behavior. The first case involved claims that the company's french fries were cooked in 100 percent vegetable oil when in fact they were flavored with beef tallow.²⁹⁸ Several vegetarian and Hindu groups sued and the case settled for \$10 million and an apology.²⁹⁹

The second case involved McDonald's' promise to remove trans fat from its cooking oil because of concerns that eating the fat increases heart disease.³⁰⁰ While McDonald's made the announcement to much positive press in September 2002, promising that the change would be made by February 2003, that never happened.³⁰¹ A class action filed in California alleging consumer deception was settled in 2005 for \$8.5 million and promises that the company would be clearer about its future plans to remove trans fats.³⁰²

297. *Id.*

298. Andrew Buncombe, *McDonald's Faces Payout Over Beef Fat on Its Fries*, INDEPENDENT (UK), Mar. 8, 2002, <http://www.commondreams.org/headlines02/0308-02.htm>.

299. *Id.* Most of the money was distributed to vegetarian and Hindu groups for charitable and educational purposes, but not before a series of objections were filed as fights broke out among vegetarian groups over the money. See *McDonald's Fries: Not Done Yet*, HINDUISM TODAY, Oct.Dec. 2003, <http://www.hinduismtoday.com/archives/2003/10-12/66-67%20McDonald's.shtml>.

300. See Press Release, Steven L. Joseph, President, BanTransFat.com, Plaintiffs' Press Release on Settlement of McDonald's Trans Fat Litigation (Feb. 11, 2005), <http://www.bantransfat.com/mcdonalds.html>.

301. *Id.*

302. *Id.* (indicating that \$6 million would go to the American Heart Association).

Finally, the case that has gained the most notoriety is still pending in New York.³⁰³ That case involves two children who ate at McDonald's regularly and are now suffering from diet-related health problems such as obesity, high cholesterol and diabetes.³⁰⁴ The class action alleges the fast food giant misrepresented its products as nutritious and did not reveal potential hazards.³⁰⁵ The named plaintiff's father, Israel Bradley, said he never saw anything in the restaurants that informed him of the food's ingredients.³⁰⁶ "I always believed McDonald's was healthy for my children," he said in an affidavit.³⁰⁷

The media spin about the McDonald's case was that it was simply about getting fat from eating too much fast food.³⁰⁸ But the case is really based on deceptive advertising and how McDonald's marketed its food as healthful. According to Ellen Fried, a Professor of food law at New York University, people are missing the point when they easily discount the case as being frivolous:

People have to go back to a couple of years ago, before all the noise started. When people didn't even think of going to McDonald's every day as being a problem. It was advertised as healthful, perfectly okay to eat everyday and Supersize it and eat more. So, you have to look at what responsibility did McDonald's have to its customers. Obviously, they can't lie or present information in a deceptive way . . . It's about what [McDonald's] told me about eating this way, or didn't tell me.³⁰⁹

303. *Pelman v. McDonald's*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003), was dismissed in 2003 and was recently reinstated by the 2nd Circuit Court of Appeals. See Mark Hamblett, *Part of Parents' Obesity Suit Against McDonalds Revived*, N.Y. L.J., Jan. 26, 2005, available at <http://www.law.com/jsp/article.jsp?id=1106573726371>.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. See Ellen Ruppel Shell, *Are We Turning Our Children Into 'Fat' Junkies?*, OBSERVER (UK), Oct. 12, 2003, available at <http://observer.guardian.co.uk/foodmonthly/story/0,9950,1058656,00.html>.

309. Telephone Interview with Ellen Fried, Adjunct Professor, New York University (Feb. 28, 2005).

While this widely misunderstood case remains the only one of its kind filed anywhere in the nation, the corporate backlash has resulted in a serious threat to consumers' ability to seek redress through the court system. The restaurant industry and its allies have been waging a lobbying campaign to get laws passed in all fifty states to strip away plaintiffs' rights to sue a food company for obesity or obesity-related diseases.³¹⁰ As of this writing, twenty-one states have passed so-called "cheeseburger bills" and more bills are pending, as is federal legislation.³¹¹

These lawsuits have only alleged wrongdoing and, with two cases having settled and the third still pending, no definitive court judgment has yet to be made. However, the suits point to a pattern of conduct that at least suggests we should be cautious about trusting McDonald's to self-regulate effectively.

D. General Mills' Whole Grain Deception

When the federal government updated its Dietary Guidelines for Americans in 2005, one of the recommendations was to emphasize daily intake of whole grains.³¹² It was high time for the government to explain the difference between processed white flour and the nutritional benefits of eating whole grains found in foods such as brown rice and whole wheat bread. The nation's "low-carb" craze had needlessly made too many people carb-phobic when in reality, they just needed to understand this distinction.³¹³ Because the Dietary Guidelines represent an authoritative statement from the federal government about how to eat,³¹⁴ food companies like to take

310. See Public Health Advocacy Institute, Protect Your Rights as a Consumer from the Food Industry, http://phaionline.org/projects_legis.intro.php (last visited Oct. 13, 2005).

311. See National Restaurant Association, State Frivolous Lawsuit Legislation, http://www.restaurant.org/government/state/nutrition/bills_law_suits.cfm (last visited Oct. 13, 2005); Pub. Health Advocacy Inst., *supra* note 310. The U.S. House of Representatives passed the bill in October, but it still faces a Senate vote. See *Cheeseburger Bill Puts Bite into Lawsuits*, CNN.COM, Oct. 20, 2005, <http://www.cnn.com/2005/POLITICS/10/20/cheeseburger.bill/>.

312. The guidelines are updated every five years. See DIETARY GUIDELINES, *supra* note 216.

313. See Dean Ornish, *Was Dr. Atkins Right?* 104 J. AM. DIETETIC ASS'N 537, 538 (2004).

314. Or at least they should. For how they are influenced by industry interests, see NESTLE, *supra* note 60, at 126.

advantage of them to tout their products.

Enter General Mills, a top seller of children's cereals with annual sales of more than \$1 billion.³¹⁵ Just after the release of the Dietary Guidelines in January 2005, General Mills reformulated its cereals sold in the U.S. to contain whole grains and the boxes were plastered with huge "Whole Grain" banners.³¹⁶ In April, with the release of the food pyramid, General Mills placed the new image on its cereal boxes as well.³¹⁷ What about all those high-sugar cereals aimed at kids? Mary Beth Thorsgaard, General Mills spokesperson says, "Even with presweetened cereals, there really is no better breakfast your kid could eat in the morning"³¹⁸ You have to love the corporate-speak they train people to use. Using the passive voice with the made-up word "pre-sweetened" makes it sound like the added sugar somehow occurs naturally. And no better breakfast? Compared to what? Starving?

Marion Nestle, Paulette Goddard Professor of Nutrition, Food Studies, and Public Health at New York University and author of *Food Politics*, responds:

It is hard not to react sarcastically to such statements from cereal makers. I have heard them say that the reason sugary cereals are good for kids is because of the milk [that's added]. That, I suppose, would also be the rationale for giving kids cookies for breakfast. This is a marketing ploy to make people think that whole grain Cocoa Puffs are healthy. Sugar is still the first ingredient.³¹⁹

315. GENERAL MILLS, ANNUAL REPORT 54 (2005), http://www.generalmills.com/corporate/investors/General_Mills_AR2005.pdf.

316. See Kendall Powell, Executive Vice President, General Mills, Remarks at the FTC Workshop, Perspectives on Marketing, Self-Regulation and Childhood Obesity, 145-46 (July 14-15, 2005) (transcript available at http://www.ftc.gov/bcp/workshops/Foodmarketingtokids/transcript_050714.pdf).

317. See General Mills, General Mills Announces Major Nutrition Education Initiative in Conjunction With New Food Guide Pyramid (Apr. 19, 2005), http://www.generalmills.com/corporate/health_wellness/in_the_news_detail.aspx?itemID=10561&catID=7586§ion=news.

318. Telephone Interview with Mary Beth Thorsgaard, Spokesperson, General Mills (Mar. 14, 2005).

319. E-mail from Marion Nestle, Professor, New York University, to author (March 14, 2005, 09:18 EST) (on file with author).

Also, “[e]ach serving contains 26 grams of carbohydrate of which 13 come from sugars, 1 gram of protein, and 1 gram of fiber, for 120 calories, the equivalent of a small cookie. The net benefit is one gram of fiber and that’s not much benefit.”³²⁰

At the FTC meeting on marketing and childhood obesity last summer, Kendall Powell, General Mills’ executive vice president of U.S. Retail, talked about how the company has “reformulated” all of its cereals to contain whole grain. He said, “General Mills’ whole grain initiative will provide 26 million servings of whole grain per day across the country and kids in America are going to get 12 million servings of whole grain thanks to these products.”³²¹

Such a statement is obviously meant to sound impressive from a public health perspective. The average person hearing that might think, “Wow, General Mills is really being a responsible corporate citizen by providing Americans with all that healthful whole grain in their cereals.” But if you take a closer look, the statement becomes less impressive and downright deceptive.

First of all, what does it mean that General Mills is “providing” children with twelve million servings of whole grain per day? Presumably, that figure is based on General Mills’ projected sales, but it would be impossible for any health researcher to verify the data. Next, the statement leaves out any consideration of the nutritional value of the rest of the cereal contents. Mr. Powell also said that “obesity is about calories and cereal is a low-calorie way to start the day.”³²² But, nutrition is not just about calories; it is also about the actual nutrients (or lack thereof) in the food.

General Mills likes to talk mostly about their Cheerios brands. But, what Mr. Powell failed to mention is how General Mills also sells the following cereals aimed at children: Whole Grain Reese’s Puffs, Whole Grain Cookie Crisps, Whole Grain Cocoa Puffs, Whole Grain Lucky Charms, and Whole Grain Chocolate Lucky Charms.³²³ Ingredients in Chocolate Lucky Charms include: whole grain oats, sugar, canola oil, and marshmallows, which are made of sugar, corn

320. E-mail from Marion Nestle, Professor, New York University, to author (Aug. 11, 2005, 10:31 EST) (on file with author).

321. See Powell, *supra* note 316, at 146.

322. *Id.* at 145.

323. See General Mills, Big G Cereals, <http://www.generalmills.com/corporate/brands/product.aspx?catID=50#> (last visited Oct. 14, 2005).

starch, corn syrup, dextrose, gelatin, two yellow dyes, blue dye, red dye, and artificial flavor.³²⁴ Thank goodness for the whole grain!

E. General Mills Campaign Flouts CARU Guidelines

In addition, for General Mills to present itself as a responsible corporate citizen that cares about children flies in the face of their campaign called "Choose Breakfast," which clearly violates children's advertising guidelines. On June 22, 2005, General Mills announced this new children's television advertising campaign in order to "communicate the benefits of breakfast to children."³²⁵ While General Mills attempts to cloak the campaign with public service respectability by dubbing it "non-branded," the ten-second spots are paired with twenty-second spots for the company's kid-oriented cereals including Lucky Charms, Cocoa Puffs, and Trix.³²⁶ Adding bang to its buck, the company's popular mascots such as the Trix rabbit and Lucky Charms leprechaun will tout physical activity on cereal boxes (presumably to work off all that sugar).³²⁷

According to guidelines from the Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus, these ads are not supposed to appeal to a kid's sense of fantasy, for example, where a bowlful of cereal transforms a child into a super-strong, super-smart, superhero.³²⁸ As noted previously by myself and food law expert Ellen Fried:

[A]ll three of the General Mills spots depict that exact scenario: a young girl who has eaten breakfast is able to escape danger with lightening speed in contrast to a sluggish non-breakfast eater; a young boy outruns and

324. *Id.* (click on Lucky Charms hyperlink for an image of the nutritional values panel).

325. Press Release, General Mills, General Mills Launches New Children's Advertising Initiative (May 22, 2005), http://www.generalmills.com/corporate/media_center/news_release_detail.aspx?itemID=11144&catID=227.

326. *Id.*

327. *See id.* ("The advertising campaign will be supported with kid-friendly health and fitness-related messaging on more than 300 million boxes of cereal this year and on the company's Web site"); *see also* Janet Adamy, *General Mills Touts Sugary Cereal as Healthy Kids Breakfast*, WALL ST. J., June 22, 2005, at B1.

328. *See* CHILDREN'S ADVERTISING REVIEW UNIT, COUNCIL FOR BETTER BUSINESS BUREAUS, SELF-REGULATORY GUIDELINES FOR CHILDREN'S ADVERTISING 4 (2003), <http://www.caru.org/guidelines/guidelines.pdf>.

outmaneuvers an adult thief and credits his breakfast; and another young boy prepares to enter a boxing ring to face a menacing adult opponent—but only after eating his breakfast. Not coincidentally, all three spots depict breakfast as including a nice big bowl of cereal.³²⁹

With these ads being shown just prior to commercials for kids' cereals, it does not take a great leap of logic to assume that kids will associate these behaviors with eating General Mills brands cereal. Children cannot possibly be expected to distinguish between a Trix commercial and the “non-branded” PSA.

CARU should have taken swift action to banish the ads, but instead, they joined hands with General Mills by anointing their campaign. The company deftly sought pre-approval and got even more.³³⁰ Indeed, CARU director Elizabeth Lascoutx heaped praise on General Mills. In a General Mills press release, she is quoted as saying that “[e]nsuring that positive, non-branded health messages like Choose Breakfast are being delivered to children is not only responsible, but commendable.”³³¹

Either Lascoutx did not see the ads, did not know they were being corrupted by General Mills' branded spots or is not familiar with the guidelines of the agency she directs—none of which is acceptable for an organization charged with protecting our children from unscrupulous advertisers.³³² This cooperative effort between the regulator and the regulated should be evidence enough of the utter failure of self-regulation.

F. Nickelodeon's Misleading Policy Statements

Food companies are not the only ones who cannot be trusted when it comes to their public statements and policies. The cable channel, Nickelodeon, is the recognized industry leader in children's commercial television. As a result of public criticism for their role in being an outlet for marketing of junk food to kids, they too have gone on the defensive to claim they care about children's health and

329. Michele Simon & Ellen Fried, Kids Cereal Maker Flouts Ad Rules, (June 25, 2005), <http://www.informedeating.org/Kids%20Cereal%20Maker%20Flouts%20Ad%20Rules.html>.

330. *Id.*

331. Press Release, General Mills, *supra* note 325.

332. Simon & Fried, *supra* note 329.

well-being. But their actions also speak louder than words.

At the Institute of Medicine's (IOM) Committee on Food Marketing and the Diets and Children and Youth workshop in January 2005, Marva Smalls, executive vice president of Nickelodeon, made several noteworthy comments.³³³ For example, she said, "Most advertisers religiously adhere to the guidelines set by . . . CARU. We would know. We're part of CARU and sit on the board."³³⁴ This statement has been disputed by other commentators, and is an exaggeration at best.³³⁵ Also, the fact that a major children's television channel is represented on the board of the very organization charged with monitoring its practices only furthers the point that CARU is the fox guarding the henhouse.

Ms. Smalls also claimed that Nickelodeon's own policy goes beyond that of CARU in the following ways:

- 1) Advertisements should not encourage or condone excessive consumption;³³⁶
- 2) Portion size should be appropriate to the setting portrayed . . . ;³³⁷ and
- 3) Advertisements for food products should depict a balance either in terms of nutrition or behavior, to communicate the role of the product in the framework of a healthy lifestyle.³³⁸

Smalls then remarked that the channel had implemented a policy to pull ads that did not meet these criteria, but did not have to, because food advertisers had voluntarily changed their ads.³³⁹ That all sounds quite impressive, but missing was any explanation of Nickelodeon's oversight to ensure that its advertisers actually

333. See Marva Smalls, Executive Vice President, Nickelodeon, *Moving the Needle, Remarks at the Institute of Medicine Workshop on Strategies that Foster Health Food and Beverage Choices in Children and Youth* (Jan. 27, 2005) (transcript available at <http://www.iom.edu/Object.File/Master/24/712/0.pdf>).

334. *Id.* at 11.

335. See e.g., Ellen Fried, *Assessing Effectiveness of Self-Regulation: A Case Study of the Children's Advertising Review Unit*, 39 LOY. L.A. L. REV. 93 (2006).

336. Smalls, *supra* note 333, at 11.

337. *Id.*

338. *Id.* Nickelodeon's policy is very similar to CARU's guidelines and it is not clear exactly how it is stronger.

339. *Id.* at 12.

continue to adhere to their rules (if indeed they ever did). Do they have screeners who look for future violations? Do they have a complaint process set up for viewers? Where is the accountability?

Demonstrating this lack of oversight, less than two months after Nickelodeon's statement to the IOM committee, the company announced a partnership with Dairy Queen to promote their "DQ Crew Club" on Nickelodeon's Web site.³⁴⁰ The DQ Crew Club is aimed at children as young as age three and features 3D-Web games and the chance to earn coins redeemable for prizes such as a twelve-speed bike, a scooter, or rollerblades.³⁴¹

Typical Dairy Queen products include: the Brownie Earthquake, the Chocolate Chip Cookie Dough Blizzard, sundaes, and banana splits.³⁴² For meals, there's the Bacon Double Cheeseburger, fries, hot dogs, and one chicken salad.³⁴³ It is unclear how such a menu satisfies this Nickelodeon guideline: "Advertisements for food products should depict a balance—to communicate the role of the product in the framework of a healthy lifestyle."³⁴⁴

Also, at the FTC meeting on marketing and childhood obesity, Nickelodeon took the opportunity to announce that its popular children's character, SpongeBob, would begin hawking spinach and carrots.³⁴⁵ Notably lacking was any promise of removing his image from such unhealthful products as Pop Tarts, Keebler Cheez-Its, and Breyers cookie-dough ice cream. How can promises of marketing healthful food have any measurable impact without any corresponding policy to curb junk-food ads? Ms. Smalls also touted the company's brief ad spots that encourage kids to be active.³⁴⁶ Such moves are disingenuous to say the least, considering that the

340. *Dairy Queen Partners with Nickelodeon to Promote New Online Kids Site*, QSR, Mar. 22, 2005, <http://www.qsrmagazine.com/shells/full.phtml?id=4458>.

341. *Id.*

342. Dairy Queen, Menu, <http://www.dairyqueen.com/en-us/menus+and+nutrition/menu/default.htm> (last visited Sept. 25, 2005).

343. *Id.*

344. Smalls, *supra* note 333, at 11.

345. See Marva Smalls, Executive Vice President, Nickelodeon, Moving the Needle, Remarks at the FTC Workshop, Perspectives on Marketing, Self-Regulation and Childhood Obesity 280–281 (July 14–15, 2005) (transcript available at http://www.ftc.gov/bcp/workshops/Foodmarketingtokids/transcript_050714.pdf).

346. See Smalls, *supra* note 333, at 8.

company makes its money by keeping children from being active and by bombarding them with ads for junk foods.

G. Children's Advertising Review Unit's "Compliance Rate"

At the FTC meeting last summer, CARU was placed on the defensive with Senator Tom Harkin's opening remarks, in which he said CARU "has become a poster child for how not to conduct self-regulation."³⁴⁷

Obviously feeling the need to respond, CARU's director, Elizabeth Lascoutx spoke strongly about how effective the agency was. Her strategy was to emphasize CARU's 97% "compliance rate," giving the impression that self-regulation was a big success.³⁴⁸ Using the term compliance rate conveys the idea that the industry is in compliance with CARU's guidelines 97% of the time. This, however, is not what Ms. Lascoutx meant. Her specific comment was, "We have a compliance rate of over 97% when we ask for modification."³⁴⁹ This is very different than just saying "compliance rate." The reality is that *when CARU even bothers to take up a case, the companies comply 97% of the time.*

The other problem with this "compliance rate" is that it is unverifiable. We really have no idea what it is based on. For example, what are the criteria for determining what complies with a request for modification? Sometimes a company says its ad campaign that should be modified under the guidelines has already run its course; does this count? It would be impossible for any researcher to empirically duplicate these results.

Ms. Lascoutx also claimed, "We don't miss anything."³⁵⁰ How she can claim that her six-person shop effectively monitors all the ways that children are bombarded with marketing these days (let alone food ads) is mind boggling. The bottom line is that to speak of

347. Senator Thomas Harkin, U.S. Senate, Remarks at the FTC Workshop, Perspectives on Marketing, Self-Regulation and Childhood Obesity 32 (July 14–15, 2005) (transcript available at http://www.ftc.gov/bcp/workshops/Foodmarketingtokids/transcript_050714.pdf).

348. Elizabeth Lascoutx, Dir., CARU, Remarks at the FTC Workshop, Perspectives on Marketing, Self-Regulation and Childhood Obesity, Day Two, 39 (July 14–15, 2005) (transcript available at http://www.ftc.gov/bcp/workshops/Foodmarketingtokids/transcript_050715.pdf).

349. *Id.*

350. *Id.*

a “97% compliance rate” is completely meaningless and therefore intended to mislead the audience and deflect government action.

H. Trade Group’s Disingenuous Recommendations

Finally, much was said at the FTC workshop regarding GMA’s proposed recommendations to strengthen CARU. GMA was using this event as an opportunity to gain positive PR for itself and its members. First of all, news of the proposal was made available to the press just prior to the event. The Wall Street Journal ran a story about it the day before the meeting, before any advocates could respond.³⁵¹ Next, several members of the food industry strategically referenced the proposal before GMA took its turn in formally presenting it on the second day.³⁵² Thus, the public was given the distinct impression that food companies were sincere in their concern about the issue and were at-the-ready to strengthen the self-regulatory system.

And yet, numerous questions remain about GMA’s sincerity. First of all, their statement only represents a tiny fraction of the trade association’s membership—9 out of 120 companies, a mere 7.5%.³⁵³ According to GMA, “[t]he statement was issued on behalf of Campbell Soup Company; General Mills, Inc.; The Hershey Company; Kellogg Company; Kraft Foods Inc.; Nestlé USA; PepsiCo, Inc.; Sara Lee Corporation; and Unilever United States, Inc. . . .”³⁵⁴

How can a statement that only represents nine companies speak for the industry’s largest and most powerful trade association? Where do the other 131 companies stand on the matter? These

351. Sarah Ellison, *Food Makers Propose Tougher Guidelines for Children’s Ads*, WALL ST. J., July 13, 2005, at B1.

352. See, e.g., Alan Harris, Executive Vice President, Kellogg Co., Remarks at the FTC Workshop, Perspectives on Marketing, Self-Regulation and Childhood Obesity 259 (July 14–15, 2005) (transcript available at http://www.ftc.gov/bcp/workshops/Foodmarketingtokids/transcript_050714.pdf).

353. See Grocery Manufacturer’s Ass’n, General Member Companies, <http://www.gmabrands.com/membership/general/generalmemlist.cfm> (last visited Oct. 27, 2005).

354. Press Release, Grocery Manufacturer’s Ass’n, GMA Statement Regarding Proposals to Strengthen Self-Regulation of Children’s Advertising (July 15, 2005), <http://www.gmabrands.com/news/docs/NewsRelease.cfm?DocID=1542&>.

companies include such members as Coca-Cola, Cadbury Schweppes, and Mars, whose products are very much aimed at children, especially in schools.³⁵⁵ It is deceptive for GMA to present itself as speaking for an entire industry, even if those nine companies are among the “industry leaders.”

Next, GMA’s recommendations for improving CARU includes “[e]xpand[ing] CARU’s guidelines to address advertising contained in commercial computer games, video games and interactive websites.”³⁵⁶ This is progress, but if GMA really wants CARU to expand its scope, how about recommending that CARU enforce its guidelines in schools? Right now, CARU does nothing about in-school promotions such as fundraisers at Chuck E. Cheese’s restaurants or contests sponsored by candy companies.³⁵⁷

And what about ads children see on Channel One, which is widely viewed in schools? Also, why is the *selling* of products in schools not considered a form of promotion under CARU’s purview? GMA needs to include *all* forms of marketing to children in its proposal if we are to believe that they are serious.

Next, GMA failed to disclose its record opposing even the most nominal efforts by state governments to improve self-regulation. For example, GMA sent a letter to the California Legislature in opposition to a joint resolution (meaning it was voluntary, without the force of law) asking industry to simply adhere to a voluntary code of practice with respect to food and beverage advertising.³⁵⁸ If GMA is in favor of self-regulation, then why oppose a bill that simply asks industry to voluntarily comply with a set of nutrition guidelines? Because GMA is not interested in actually adhering to any self-regulatory system, but rather in creating the *appearance* of effective self-regulation in order to deflect government action.

355. Grocery Manufacturer’s Association, *supra* note 353.

356. Press Release, Grocery Manufacturer’s Ass’n, *supra* note 354.

357. Caroline E. Mayer, *Minding Nemo: Pitches to Kids Feed Debate About a Watchdog*, WASH. POST, Feb. 27, 2005, at F1.

358. Letter from Kristin Power, Dir., State Affairs, Grocery Manufacturer’s Ass’n, to Hon. Sheila Kuehl, Member, Cal. State Senate (Apr. 29, 2004), <http://www.gmabrands.com/industryaffairs/docs/comment.cfm?DocID=1339>.

V. CONCLUSIONS

A. Food and Beverage Companies Cannot Be Trusted

How can we possibly trust companies to self-regulate when they:

- 1) Lobby vociferously against policies to improve children's health;
- 2) Make misleading statements and misrepresent their policies at government meetings and in other public venues; and
- 3) Make public promises of corporate responsibility that sound good, but in reality amount to no more than a public relations campaign?

Food and beverage companies and their representatives have, at every opportunity, proven that we cannot believe what they say. If actions speak louder than words, then the activities described in this article should be a deafening chorus of, "Do not trust us."

B. A Corporation's Legal Obligation Is to Shareholders

That industry cannot be trusted should really come as no surprise. It is not a corporation's job to protect public health; that is the government's role. A corporation's legal obligation is to make as much money as possible for its shareholders, and all other concerns must be secondary.³⁵⁹ In recent decades, there has been increased debate over whether corporations should consider social goals, as balanced against economic gains. Putting aside the moral imperatives that they do so, the question remains, does the law allow for so-called "corporate social responsibility?" The modern debate is over the extent to which the law should acknowledge the social obligations of a corporation and take into account the interests of outside "stakeholders," rather than just those of shareholders.³⁶⁰

The traditional approach is advocated by Nobel Prize-winning economist Milton Friedman who claims "the only social

359. See *Dodge v. Ford Motor Co.*, 170 N.W.2d 668, 684 (Mich. 1919).

360. See Gunther Teubner, *Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility*, in *CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES* 149, 149-54 (Klaus J. Hopt & Gunther Teubner eds., 1985).

responsibility of business is to make a profit.”³⁶¹ Those who espouse this approach see the only role of the corporation as profit maximization for shareholders, and view corporate social responsibility for altruistic purposes as socialism.³⁶² While corporate managers should not completely ignore social concerns, they are to act on them only when it would result in increased profits.³⁶³ Under the market system, a corporation that trades high social standards for economic incentives will not be able to compete and, thus, will be driven out of business.³⁶⁴

Another approach embraces some social responsibility beyond what the law requires; however, it is often questionable whether corporations taking this approach are actually acting out of altruism as they claim.³⁶⁵ An example of this approach is the Ben & Jerry’s strategy of “doing well by doing good” through a three-part mission to achieve product, social, and economic greatness.³⁶⁶ The idea is that if a corporation takes care of its customers, shareholders will eventually benefit.³⁶⁷ While studies and success stories exist to support this position,³⁶⁸ they are few and far between and any aggregate benefits to society remain an open question. Meanwhile, in 2000, Ben and Jerry’s sold out for \$326 million to multi-national corporation Unilever, causing some observers to predict the end of the company’s socially-inclined agenda.³⁶⁹ The results since that time have been mixed. While some original practices remain, other commitments made by Unilever such as using more “fair trade” suppliers and introducing an organic brand of ice cream were never honored, causing a serious rift between Unilever and Ben & Jerry’s

361. CHRISTOPHER LASZLO, *THE SUSTAINABLE COMPANY* 46 (2003).

362. Lord Wedderburn of Charlton, *The Legal Development of Corporate Responsibility: For Whom Will Corporate Managers Be Trustees?*, in *CORPORATE GOVERNANCE AND DIRECTORS’ LIABILITIES*, *supra* note 360, at 3, 17–18.

363. *Id.*

364. LASZLO, *supra* note 361, at 37.

365. *Id.*

366. Alan Parker, *The Expert View: Ben & Jerry’s Homemade Inc., U.S.*, in *BUILDING CORPORATE ACCOUNTABILITY* 129, 129–132 (Simon Zadek et al. eds., 1997).

367. LASZLO, *supra* note 361, at 35.

368. *See id.* at 36, 53.

369. Donella H. Meadows, *The Global Citizen: The Globalization of Ben and Jerry’s*, *ALTERNET*, Apr. 1, 2000, <http://www.alternet.org/story/68/>.

founders.³⁷⁰

Furthermore, scandals such as those at Enron and WorldCom have only furthered the public perception that corporations act only in their own self-interests, often to the detriment of the public good. Therefore, despite corporate attempts at proclaiming their allegiance to the environment or some other social good, the underlying drive for profit maximization remains. The food industry is just another example of this model.

C. Government Must Protect Children

Because the food industry cannot be trusted to self-regulate, the government must step in to protect children from the onslaught of marketing that is significantly impacting their health and well-being. How should the government do this exactly? One way is to give the FTC back its full authority to regulate junk-food advertising aimed at children, as Senator Tom Harkin proposes in his Healthy Lifestyles and Prevention (HeLP) America Act of 2005.³⁷¹ This far-ranging legislation addresses the following:

- 1) "Protect Kids from Unfair Junk-food Advertising: Restores the rulemaking authority of the Federal Trade Commission to issue restrictions on advertising with respect to children."³⁷²
- 2) "Food Advertising in Schools: Gives Secretary of Agriculture authority to prohibit the marketing and advertising of food in schools participating in the School Lunch or Breakfast programs."³⁷³
- 3) "Harkin Fruit and Vegetable Program: Expands the program to more schools and creates healthy cooking demonstrations."³⁷⁴
- 4) "Nutrition Promotion and School Lunch Protection: Requires USDA to update its definition of foods of

370. Jim Slama, *Crisis and Opportunity at Ben and Jerry's*, ALTERNET, Jan. 2, 2001, <http://www.alternet.org/story/10273/>.

371. Press Release, Senator Thomas Harkin, U.S. Senate, Harkin Pushes Comprehensive Wellness Initiative to Fight Chronic Disease, Obesity and Reduce Health Care Costs (May 18, 2005), <http://harkin.senate.gov/news.cfm?id=237846>.

372. *Id.*

373. *Id.*

374. *Id.*

minimal nutritional value, which has not changed in over 30 years, to conform with current nutrition science.”³⁷⁵

- 5) “Restaurant Nutrition Labeling: Requires nutritional information on menus of chain restaurants.”³⁷⁶

All of these ideas are excellent and would go a long way in addressing the problem of junk-food marketing to children. It is especially important to deal with these issues at the national level because of the inefficiency in trying to pass bills state by state, not to mention one school district at a time. And yet, local-level policymaking is often all that advocates are left with because of the insurmountable political hurdles that are ever-present at the federal level and increasingly, as this Article demonstrates, at the state level.

Because the food and beverage industries will remain such a powerful lobbying force, we must also begin a dialogue about changing the government structures that allow industry to wield such enormous influence over the public process. Therefore, the solution lies not just in passing a new law, or in giving a government agency more authority, but rather in examining our economic system at its most fundamental levels and in understanding how the corporate drive for profits has created this mess in the first place. We must examine how government can be restructured to stop perpetuating the problem and, instead, begin to solve it.

As long as the federal government maintains a hands-off policy and permits corporate self-regulation, there will be no accountability whatsoever. We are left with an unacceptable status quo (or worse) for the foreseeable future. The stakes are far too high. We cannot stand idly by and allow current and future generations of children to suffer the consequences. We cannot grant corporations unfettered access to young and vulnerable minds. If we do, we will all eventually pay the price.

375. *Id.*

376. *Id.*