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## Catch Me If You Can: Big Food Using Big Tobacco's Playbook? Applying the Lessons Learned from Big Tobacco to Attack the Obesity Epidemic

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<b>Citation</b>	Rohit Malik, Catch Me If You Can: Big Food Using Big Tobacco's Playbook? Applying the Lessons Learned from Big Tobacco to Attack the Obesity Epidemic (2010).
<b>Accessed</b>	February 19, 2015 9:22:05 AM EST
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*(Article begins on next page)*

**Catch Me If You Can: Big Food Using Big Tobacco's Playbook?  
Applying the Lessons Learned from Big Tobacco to Attack the Obesity Epidemic**

Abstract:

This paper applies the lessons learned from the regulation of the tobacco industry to counter the obesity epidemic. The similarities between the tobacco industry and food industry are more than meets the eye. Both industries are dominated by a few major companies. Big Food and Big Tobacco both rely on marketing to lure children into buying their products, creating life-long customers. And, both industries focus on creating habits and addictions to keep children and adults to keep coming back for more. For decades, beginning in the mid-twentieth century, Big Tobacco has been the bulls-eye target for federal and state regulators as well as plaintiffs' lawyers. And for decades, the tobacco industry managed to dodge the onslaught. Big Tobacco poured massive lobbying dollars into Congressional coffers, denied the science underlying the deadly and addictive effects of nicotine, and acted "socially responsible." It then put a mask on, acquiring the major food companies and sometimes changing its brand name to burnish its public image in the American eye. By acquiring the food companies, Big Tobacco found the right partner in luring kids early through advertising. Now, the very food companies that Big Tobacco saw as relatively socially responsible are coming under attack for promoting the obesity crisis. And some of these food companies are using tactics from Big Tobacco's playbook to evade the regulators and deny claims in court. Our nation waited for too long before it made inroads into regulating the nicotine that contributed to an epidemic of lung cancer, emphysema, and atherosclerosis. We cannot afford to wait again. We have to take active measures in adopting both a collaborative and regulatory approach to the food industry before the obesity epidemic becomes a crisis crippling our health care system, our workforce, and our children. This paper offers some proposals for regulating the food industry by exploring lessons from tobacco regulation.

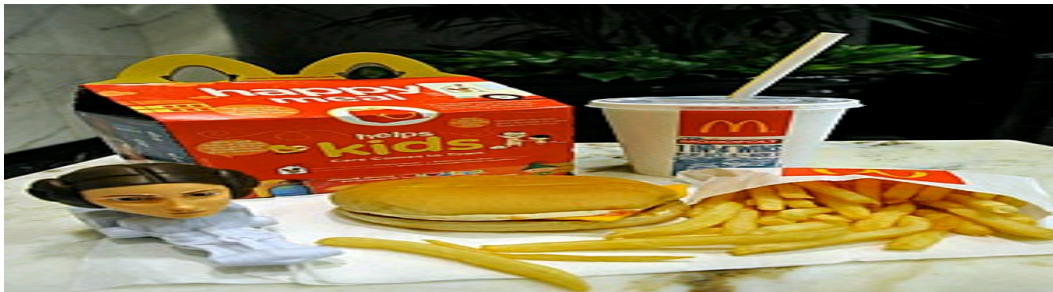
December 6, 2010

*Food and Drug Law Seminar Paper*

Option 2 of the 3<sup>rd</sup> Year Written Work Requirement (Satisfies One-Half of Requirement)

*“America’s eating habits and lack of physical activity are literally killing us, and they’re killing us at record levels...Food companies are becoming increasingly responsive, and Kraft, Coca-Cola, PepsiCo, and McDonald’s are committed to taking positive steps.” -- Tommy Thompson, U.S. Secretary of Health and Human Services at June, 2004 Time Magazine/ABC News “Summit on Obesity”*

*“Why, if Coca-Cola is such a responsible corporate citizen, did it send a team of five lobbyists to kill his school nutrition bill?” Charlie Brown, Chairman of Indiana’s Public Health Committee, Response to Tommy Thompson at Time Magazine/ABC News “Summit on Obesity”*



## **Introduction:**

*“Gray began buying businesses outside the tobacco industry, mostly in the food business, which Reynolds executives saw as an easy mark for their marketing acumen. Anyone who could sell a product linked with cancer, Reynolds executives were fond of saying, ‘call sell anything.’”<sup>1</sup>*

It should have come as no surprise that RJ Reynolds Tobacco, one of the nation’s foremost tobacco companies, would buy one of the nation’s largest junk food companies, Nabisco. Marketing and advertising prowess drove each company’s success. In 2006, the six largest tobacco companies spent approximately \$13 billion.<sup>2</sup> The food industry targeted children alone with \$1.6 billion in advertisements for soda, fast food, and cereal.<sup>3</sup> The food industry spent approximately \$36 billion on food advertisements in total, compared with less than \$10 million in advertisements for healthy eating.<sup>4</sup> These advertisements have had detrimental impacts on health consumption choices, particularly those of children. In the case, *Lorillard v. Reilly* (June, 2001), the court quoted the Surgeon General’s and Institute of Medicine’s Report: “There is sufficient evidence to conclude that advertising and labeling play a significant and important contributory role in a young person’s decision to use cigarettes or smokeless tobacco products.”<sup>5</sup>

Like the tobacco companies, the food companies view children as their primary customers. By hooking children early, these companies have life-long customers. The

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<sup>1</sup> Bryan Burrough and John Helyar, *Barbarians at the Gate: The Fall of RJR Nabisco*. New York: Harper Business.

<sup>2</sup> See FTC Annual Report on Cigarette Sales and Advertising, 2006.

<sup>3</sup> See FTC Report on Food Marketing: Perspectives on Marketing, Self-Regulation, and Childhood Obesity (April, 2006).

<sup>4</sup> See National Consumers Union (2005), available at [http://www.consumersunion.org/pub/core\\_health\\_care/002657.html](http://www.consumersunion.org/pub/core_health_care/002657.html).

<sup>5</sup> See *Lorillard Tobacco Co. v. Thomas F. Reilly*, Attorney General of Massachusetts (2001). See, e.g., 60 Fed.Reg. 41332. See also Pierce et al., Tobacco Industry Promotion of Cigarettes and Adolescent Smoking, 279 JAMA 511, 514 (1998). The study also found that children chose fewer brands than adults, and that those brands they chose were heavily advertised to them.

lifetime expected revenue source from a child far exceeds that of an adult. Moreover, habits develop early in life.<sup>6</sup> The tobacco and food companies channel much of their advertisements towards children, whether with Joe Camel or Ronald McDonald.

Several corporations in the food industry have applied lessons from Big Tobacco to maximize their profits.<sup>7</sup> To maximize profits, companies must boost revenues and reduce costs. In order to increase revenues, food companies, like their tobacco counterparts, must distinguish themselves from each other. Product differentiation is the key to success in the food industry.<sup>8</sup> The food industry features easy entry and few technological advantages. In short, it is a commodity industry for which branding and marketing are the keys to success. Therefore, to differentiate themselves, food companies invest billions of dollars in marketing.<sup>9</sup> They then lock in customers at an early age through targeted advertising, which can range from commercials on Saturday morning cartoons to exclusive contracts with schools to provide lunches and fill vending machines.<sup>10</sup>

The other way to increase profits is cost reduction. Food companies decrease costs by purchasing fat-inducing ingredients, such as high fructose corn syrup and hormone-pumped cows, which tend to be cheaper instead of healthier, more expensive supplies. Most cereal manufacturers, even the allegedly healthy ones, use high fructose

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<sup>6</sup> See American Heart Association, available at <http://www.americanheart.org/presenter.jhtml?identifier=3069512>

<sup>7</sup> See Michele Simon, *Appetite for Profit*, Nation Books. (2006).

<sup>8</sup> See Product Differentiation, Economics Web Institute, available at <http://www.economicswbinstitute.org/glossary/product.htm>.

<sup>9</sup> See Expense allocations for the major food companies. McDonalds, Pepsi, Kraft.

<sup>10</sup> See Anna White, Multinational Monitor, available at <http://www.essentialaction.org/spotlight/CokeSchool.html>.

corn syrup instead of sugar.<sup>11</sup> The reason is that the corn industry is heavily subsidized by the federal government and can provide billions of bushels of corn at rates much cheaper than sugar.<sup>12</sup> However, high fructose corn syrup is known to cause significant health ailments and is known to have various addictive properties.<sup>13</sup> High fructose corn syrup is the nicotine of the food industry. Just as the big tobacco companies used nicotine and advertisements to create addictions and “get one’s fix,” the food companies are using their ingredients and commercials to create lifelong habits.

Regulating such practices by the food industry has benefits and costs. The danger with more stringent regulation by the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC) is the creation of higher barriers to entry to small upstarts that can produce healthier items. However, the dangers of ineffective FDA regulation of the food industry is a proliferation of food products that contribute to obesity. The data reveal that industry is gravitating towards healthier items due to fears of more FDA and state regulation.<sup>14</sup> The *fear* of regulation and litigation may be more effective than *actual* regulation or litigation in inducing companies to produce healthier food.

Congress and the regulators took the wrong approach in regulating Big Tobacco. The regulators had no teeth, yet continued to point the accusatory finger. They did not attempt to create an effective partnership that emphasized regulation when appropriate

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<sup>11</sup> See Bocarsly ME, Powell ES, Avena NM, Hoebel BG, “High-fructose corn syrup causes characteristics of obesity in rats: increased body weight, body fat and triglyceride levels,” *Pharmacol Biochem Behav.* (Nov. 2010).

<sup>12</sup> See Michael Pollan, *The Omnivore’s Dilemma: A Natural History of Four Meals* (2006).

<sup>13</sup> See supra note 11, Bocarsly, et al.

<sup>14</sup> See Hank Cardello, *Stuffed: An Insider’s Look at Who’s Really Making America Fat.* (2010). See also Brie Cadman, “Will the Food Industry’s Labeling Initiative Really Combat Obesity?,” *Change.Org.*, available at [http://health.change.org/blog/view/will\\_the\\_food\\_industrys\\_labeling\\_initiative\\_really\\_combat\\_obesity](http://health.change.org/blog/view/will_the_food_industrys_labeling_initiative_really_combat_obesity), (Oct. 29, 2010).

and collaboration where necessary. Only now has Congress provided FDA with authority to regulate tobacco, which promises to yield more a more effective partnership in addressing the adverse impacts of Big Tobacco on public health.<sup>15</sup> In the case of Big Tobacco, Congress and the regulatory agencies failed to intervene until it was too late for the American public. Congress and the regulators must not fail again. The stakes are high in effectively crafting obesity regulations, and the potential benefits to public health are extraordinary. The United States cannot leave this crisis to consumers to fend for themselves. The FDA must step up to the plate in curbing advertising and labeling practices that contribute to the obesity crisis, while providing incentives to corporations to produce and promote healthier foods. The FDA must also educate consumers on the importance of eating healthy and exercising. In addition, Congress must give the FDA stronger authority and enforcement powers as it did recently in the tobacco case.

Although the FDA, along with the FTC, plays an important role to play in curbing the obesity epidemic, it cannot act alone. The agency must work with consumer groups, the food industry itself, and the states. A multi-pronged assault on obesity, not unilateral or ad hominem attacks on corporations, is critical. Compromise with industry presents dangers of watered-down regulation or litigation, but vicious legislative attacks on particular corporations or industries will result in retaliation in the form of mammoth lobbying dollars to prevent passage of these bills.<sup>16</sup> If the FDA acts alone with its small

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<sup>15</sup> See Family Smoking Prevention and Tobacco Control Act, available at <http://www.thomas.gov/cgi-bin/bdquery/z?d111:HR01256:/bss/111search.html> (2009-2010, 111th Congress).

<sup>16</sup> See the American Personal Responsibility in Food Consumption Act, HR 554, available at <http://www.govtrack.us/congress/billtext.xpd?bill=h109-554>. The bill is also known as the Cheeseburger Bill. The bill prevents civil actions that allege that organizations are a proximate cause of their obesity, unless an individual justifiably relied on the marketing, advertising, or labeling of a product by an organization that had the intent to violate a federal or state statute against such promotions, and such a reliance was the proximate cause of that individual's obesity or weight gain. The bill also does not apply to actions by the Federal Trade Commission under the FTC act, or the Food and Drug Administration under

budget compared to corporations' advertising coffers, it risks regulatory capture and losses in the courts. If it holds hands with the very companies it is trying to regulate, it risks losing its regulatory teeth. Recognizing these challenges between the food industry and the FDA, as well as preventing the recurrence of the endless game of cat and mouse played during the tobacco crisis, is a critical first step in mitigating the obesity epidemic. The second step will be for the FDA to begin regulating food companies in a collaborative way, enlisting partners from a wide network of organizations.

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the Food, Drug, and Cosmetic Act. Congressman Ric Keller (R-FL), the bill's sponsor, received \$300,000 in lobbying expenditures from the fast food industry. The Senate never voted on the bill.

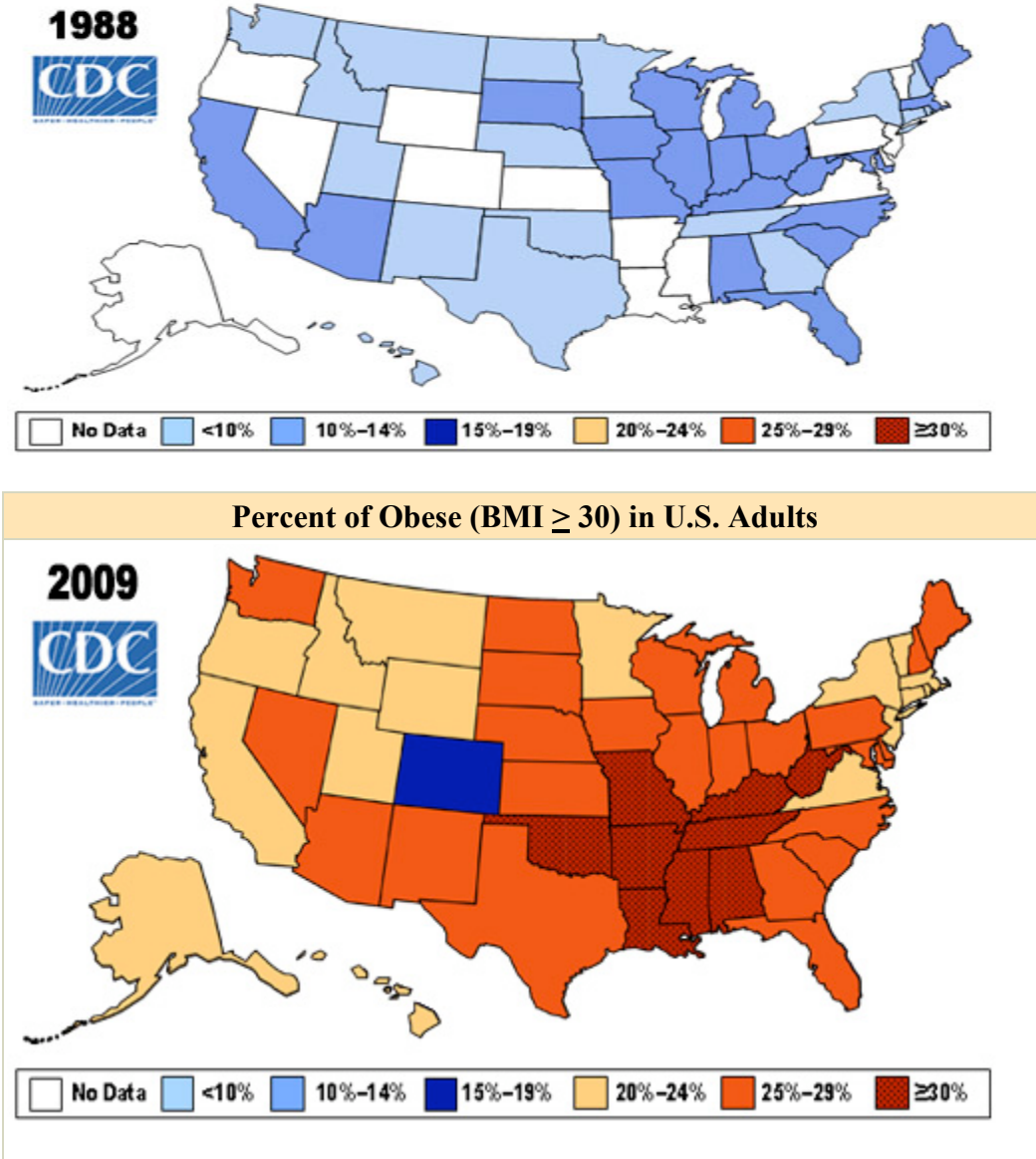


## I. Preface: Surgeon General’s Warning

In December 2001, the US Surgeon General issued a “call to action” on obesity.

The report cited that close to two-thirds of Americans are overweight or obese.<sup>17</sup>

Figure 1: Maps of Obesity Rates in the United States  
Percent of Obese (BMI  $\geq$  30) in U.S. Adults



<sup>17</sup> See Surgeon General’s Report. US Dept. of Health and Human Services, “The Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity,” 2001.  
<http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

Source: Centers for Disease Control and Prevention

Figure 1 from the Centers for Disease Control and Prevention suggests that obesity has become an epidemic, with no states having obesity rates greater than 15% in 1988 to forty-eight states with obesity rates above 20% in 2009.<sup>18</sup> The trend is especially disturbing in the Southern United States. Obesity is one of the major public health problems in the United States, if not the most significant. Excessive weight for a given height can lead to heart diseases, diabetes, several forms of cancer, and other chronic health problems.<sup>19</sup> Childhood obesity increases the risk for insulin resistance, glucose intolerance and development of type 2 diabetes.<sup>20</sup> According to the Surgeon General's report, approximately 300,000 people in the United State die each year due to obesity-related conditions. Between 1990 and 2000, the percentage of children who are overweight or obese doubled and the percentage of adolescents who are overweight or obese tripled.

Although Surgeon General David Satcher outlined in this report the importance of community responsibility in resolving the obesity epidemic,<sup>21</sup> he is actually addressing personal responsibility: "Many people believe that dealing with overweight and obesity is a personal responsibility. To some degree they are right, but it is also a community responsibility." By community responsibility, he includes such things as requiring daily physical education in the schools, providing healthy lunches at school, educating women

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<sup>18</sup> See Centers for Disease Control for the definition of obesity: Body Mass Index (BMI) of 30 or higher. Body Mass Index (BMI) is a measure of an adult's weight in relation to his or her height, specifically the adult's weight in kilograms divided by the square of his or her height in meters.

<sup>19</sup> See Surgeon General's Call to Action, *supra* note 18.

<sup>20</sup> See Abdullah, et al., "The magnitude of association between overweight and obesity and the risk of diabetes: A meta-analysis of prospective cohort studies: 21 May 2010 (309-319). *Journal of Diabetes Research and Clinical Practice*, Volume 89, Issue 3.

<sup>21</sup> According to Satcher, community responsibility includes providing healthy lunches in schools. See Surgeon General's Call to Action, *supra* note 18.

about the benefits of breastfeeding, and providing parks in which to jog or bike. In only a few places in his report does he mention the responsibility of corporations with advertisements, except for a few statements about “encouraging the food industry to provide reasonable portion sizes,” “examining the marketing practices of the food industry and the construction of new food outlets,” “ensuring the meals provided through the school lunch programs meet nutrition standards,” “evaluating the financial and health impact of school contracts with vendors of high-calorie foods and beverages of low nutritional value,” and “enforcing existing Department of Agriculture regulations prohibiting foods of minimal nutritional value during mealtimes in schools areas and vending machines.”<sup>22</sup> During his limited discussion of community responsibility, he is actually discussing personal responsibility under the guise of the name “community responsibility.” While he emphasizes the importance of “examining marketing practices” by “evaluating the financial and health impacts of school contracts,” he does not stress the need to actually *prevent* deleterious marketing practices and hold contracts harming the health of children as “unenforceable” and “unconscionable.”<sup>23</sup>

In only a few places in his report does he mention the responsibility of industry. And even in those places, he wants to *encourage* the food industry to “provide reasonable food and portion sizes” and “create and sustain” a healthy environment. He pays short shrift to the importance of regulating the food industry in order to provide them with specific deterrents and incentives to produce and market healthier foods. In addition, although the Surgeon General’s Report can provide helpful policy prescriptions, it has no claws to regulate.

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<sup>22</sup> Id.

<sup>23</sup> Id.

Satcher's primary emphasis on community responsibility is a mistake and risks failed prioritization. Industry is a major player in the obesity epidemic, and therefore, must be at the top of the priority list. Food marketers spend more than \$36 billion a year, much of which helps cultivate poor eating habits in children.<sup>24</sup> Children, in particular, have become a focus of the debate. Companies, such as McDonald's and Coca-Cola, are targeting this vulnerable population. The result, according to the most recent Surgeon General's Report, is that one in three children is overweight or obese.<sup>25</sup> This is especially troubling because obese children are likely to become obese adults.

The recent Surgeon General's Report's efforts at stemming the obesity epidemic are more encouraging. Surgeon General Benjamin encourages greater consumer knowledge so that consumers demand healthier products and industry marketing tactics adjust accordingly. But why should it be up to the consumer to influence marketing trends, and not the government to influence corporations to change their marketing trends? Surgeon General Benjamin merely wants to "strengthen and expand the blueprint" laid out by her predecessor.

On the other hand, she does emphasize food advertising's detrimental impacts on children: "The more time kids spend watching television, the more likely they are to consume the high calorie foods advertised."<sup>26</sup> She also cites the Centers for Disease Control and Prevention to "limit the advertisements" of less healthy foods and beverages to control the obesity epidemic. She makes some positive strides by emphasizing the

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<sup>24</sup> See Marion Nestle, quoted in J.M. Hirsch, "Food Industry a Target in Obesity Fight," March 19, 2006. [www.forbes.com/feeds/ap/2006/03/18/ap2605096.html](http://www.forbes.com/feeds/ap/2006/03/18/ap2605096.html).

<sup>25</sup> See Surgeon General's Report, 2010. <http://www.surgeongeneral.gov/library/obesityvision/obesityvision2010.pdf>. The prevalence of obesity changed little in the 1960s and 1970s, but increased dramatically in the 90's. The rate for adults rose from 13.4% in 1980 to 34.3% in 2008. For children, the rate increased from 5% in 1980 to 17% in 2008.

<sup>26</sup> See Surgeon General's Report, 2010.

need to “limit advertisements” rather than to simply “examine marketing practices.”

However, like the Surgeon General’s Report that preceded hers, this report lacks teeth or regulatory enforcement powers.

## **II. Advertising and Obesity: Lessons from Big Tobacco**

Many food companies claim to be socially responsible, and their public relations efforts have thwarted government regulation and lawsuits. The food industry lobbies government to spread the gospel that eating is an individual choice for which the industry is not to blame. However, one of the strongest determinants of individual choice is advertising, especially when those advertisements are directed at children who lack the critical thinking faculties to distinguish healthy foods from unhealthy foods. It is difficult to teach good nutrition when chips, soda, and candy are sold in schools and marketed on television with friendly cartoon characters during children’s programming. Many companies in the food industry have resorted to the same tactics as Big Tobacco: marketing to the children who constitute its most significant consumer base, forming scientific “front groups” that hide their funding sources, buying off health experts, and political lobbying.<sup>27</sup> Therefore, the regulatory and litigation apparatus to defend against these industry attacks can also draw from the regulatory and litigation defensive maneuvers used in the tobacco wars.

The main lessons from Big Tobacco with respect to advertisements are threefold. First, focus on one industry at a time, such as fast foods, snack foods, or beverages. The successes against the tobacco industry depended partly on the fact that tobacco was one

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<sup>27</sup> See Kelly Brownell and Kenneth Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?* The Millbank Quarterly, Vol. 87, No. 1 (2009) (259-294).

industry with one major product. It was easier to attack one product as responsible for health ills rather than to argue how several different products can contribute to lung cancer and other ailments.

Second, focus on attacking the malicious marketing and advertising techniques of the food companies towards children rather than on whether particular foods are a *proximate cause* of obesity. In the beginning, tobacco litigation and regulation succeeded by focusing on advertisements towards children, not on the addictive properties of nicotine. The success of scientifically proving the addictive and deleterious properties of nicotine occurred several decades later, after costly and protracted fights with industry, featuring resistance and denial. The regulations on advertising cigarettes to children on television and radio, on the other hand, were associated with a significant drop in smoking rates.<sup>28</sup>

Third, and perhaps most importantly, be wary of lobbying from the food industry that exacerbates the abuse of the legislative and regulatory system. The potential capture of the nation's federal regulatory apparatus would enable the food industry to consolidate around a few major players with significant market power. These few major players form an oligopolistic cartel that could actually worsen the obesity epidemic. In major tobacco litigation, for instance, major tobacco companies relied on federal legislation for labeling potential health hazards to argue that federal legislation preempted more stringent state laws.<sup>29</sup> Big Tobacco usually won these cases. These lax federal laws on

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<sup>28</sup> In 1969, the FCC banned cigarette advertisements from television and radio. (The number of children who smoked after this regulation fell). A recent study showed that youth who watched 5 or more hours of TV per day were 5.99 times more likely to initiate smoking behaviors (95% confidence interval: 1.39–25.71) than those youth who watched <2 hours. See Gidwani et al., *Television Viewing and Initiation of Smoking Among Children*. PEDIATRICS Vol. 110 No. 3 September 2002, pp. 505-508

<sup>29</sup> See *Lorillard v. Reilly* (2001) supra note 5. See also *Thomas Cipollone v. Liggett Group* (2001).

labeling resulted from decades of lobbying by the tobacco industry against heavy regulation and in favor of preemption of strict state laws.

In the case of food, many states, such as New York and Massachusetts, have passed laws clamping down on the food industry by requiring labeling and limits on advertising.<sup>30</sup> Recently San Francisco passed an ordinance banning toys in unhealthy foods.<sup>31</sup> It would be a shame to see a combination of Congressional legislation and FDA or FTC regulation reduce the effectiveness of these state laws restricting advertisements to children.

The Big Food companies argue that they should not be blamed for the obesity epidemic because they are simply responding to consumer demand with both their advertisements and their sales. It is unclear, however, whether they are simply responding to consumer demand, or actually *creating* it.<sup>32</sup> Wharton marketing professor Barbara Kahn writes, "marketers typically go after customer value, which includes offering products that customers are willing to pay for. Marketers are not making people eat unhealthy foods. They are just delivering what the customer wants... But if the company is *creating* a demand, and if these people wouldn't otherwise be eating that food, then you are getting into a gray area."<sup>33</sup> Margot Wootan, director of nutrition policy at

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<sup>30</sup> See New York – Regulation of Smoking in Work and Public Places, §1399, available at [http://www.nyhealth.gov/regulations/public\\_health\\_law/section/1399/](http://www.nyhealth.gov/regulations/public_health_law/section/1399/). See also Massachusetts, Law about Smoking, available at <http://www.lawlib.state.ma.us/subject/about/smoking.html>. Food example?

<sup>31</sup> See *San Francisco Bans Happy Meals*, available at <http://www.latimes.com/business/la-fi-happy-meals-20101103.0.5438230.story>. The Mayor of San Francisco, Gavin Newsome, is likely to veto the bill.

<sup>32</sup> See Margo Wootan, *Food Fight: Obesity Raises Difficult Marketing Questions*, available at <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1149> (2005).

<sup>33</sup> *Id.*

the Center for Science in the Public Interest, says there is no question that companies try to create demand for their product, often at the expense of healthier options.<sup>34</sup>

### **III. Corporate Social Responsibility and Obesity: Lessons from Big Tobacco**

Besides lobbying the government and preempting state regulation, food companies are also evading regulatory scrutiny by proclaiming the mantra of “corporate social responsibility.” The idea behind corporate social responsibility in the obesity epidemic is whether food companies are doing their fair share to promote better nutrition and exercise. Their version of social responsibility is personal responsibility, in other words shifting the onus to the consumer for the consumer’s own health. Weight gain is a simple calculus: Calories in – Calories out. The “calories in” results from higher food consumption. The “calories out” results from physical activity. The food companies are increasing the number of “calories in” without promoting enough the importance of exercise, or “calories out.” Through sales and marketing to adults and especially children, McDonalds, Kraft, Coca Cola, and Pepsi are fattening our collective belly. These companies’ market shares depend on the shares of the human belly that they garner. Their market shares do not depend on the burning of these calories.

To be sure, the food companies have taken a few strides to promote exercise as a measure of social responsibility, but these efforts are far from adequate. Moreover, these efforts at promoting exercise shift the blame to consumers and away from the food companies that are responsible for the excessive “calories in.” For instance, several of the food and beverage companies have formed the Healthy Weight Commitment

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<sup>34</sup> Id.



Foundation,<sup>35</sup> committed to reducing obesity over a six-year period, up to 2015. This foundation consists of forty companies that are spending a mere \$20 million, or \$500,000 per company, to promote exercise awareness, or personal responsibility for the obesity crisis.<sup>36</sup> The foundation is not committed to curbing the deleterious marketing practices or to reducing calorie or portion sizes.

Eliminating, or containing, the obesity epidemic is about more than mere exercise. In a Q&A interview with Fortune, PepsiCo's (PEP) CEO Indra Nooyi declared: "If all consumers exercised, did what they had to do, the problem of obesity wouldn't exist."<sup>37</sup> Granted, exercise is a critical element in reducing the extent of the obesity epidemic, but it is a habit that does not develop overnight. In addition, the food and beverage companies are not promoting exercise as part of their advertisements. The one organization that they formed towards promoting exercise lasts until only 2015 and is committed to spending a paltry sum. It is unclear how the foundation is working and what it has accomplished thus far in reducing obesity levels.

The food industry appears to be using tactics from the tobacco playbook in feigning socially responsibility. The tobacco industry's playbook emphasized personal responsibility, lobbying to prevent government regulation, criticizing the "junk" science that found harms associated with smoking, introducing "safer" products, and manipulating and denying the addictive nature of their products and their marketing to

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<sup>35</sup> See Healthy Weight Commitment Foundation, available at <http://www.healthyweightcommit.org/about/overview/>

<sup>36</sup> Philanthropy News Digest, "Healthy Weight Commitment Foundation Launched to Help Reduce Obesity," available at <http://foundationcenter.org/pnd/news/story.jhtml?id=268300002>

<sup>37</sup> See JP Mangalindan, "If All Consumers Exercised, Obesity Wouldn't Exit." Fortune Magazine Interview with Indra Nooyi, Pepsi CEO. April 27, 2010.

children.<sup>38</sup> In January 4, 1954, the CEOs of the major tobacco companies published a ‘Frank Statement to Cigarette Smokers’ clarifying that “we accept an interest in people’s health as basic responsibility, more important than every other consideration in the business.”<sup>39</sup>

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<sup>38</sup> See Kelly Brownell and Kenneth Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died: How Similar is Big Food?*, *The Millbank Quarterly*, Vol. 87, No. 1, 2009 (259-294).

<sup>39</sup> See “A Frank Statement to Cigarette Smokers,” Tobacco Industry Research Committee, 1954, available at <http://www.tobacco.org/Documents/dd/ddfrankstatement.html>. See also <http://www.tobaccoinstitute.com/>.

# A Frank Statement to Cigarette Smokers

RECENT REPORTS on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings.

Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research. However, we do not believe that any serious medical research, even though its results are inconclusive should be disregarded or lightly dismissed.

At the same time, we feel it is in the public interest to call attention to the fact that eminent doctors and research scientists have publicly questioned the claimed significance of these experiments.

**Distinguished authorities point out:**

1. That medical research of recent years indicates many possible causes of lung cancer.
2. That there is no agreement among the authorities regarding what the cause is.
3. That there is no proof that cigarette smoking is one of the causes.
4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed the validity of the statistics themselves is questioned by numerous scientists.

We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business.

We believe the products we make are not injurious to health.

We always have and always will cooperate closely with those whose task it is to safeguard the public health.

For more than 300 years tobacco has given solace, relaxation, and enjoyment to mankind. At one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence.

Regardless of the record of the past, the fact that cigarette smoking today should even be suspected as a cause of a serious disease is a matter of deep concern to us.

Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.
2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.
3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities.

This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.

## TOBACCO INDUSTRY RESEARCH COMMITTEE

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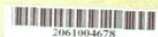
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Despite claiming to accept social responsibility for people's health, the tobacco industry, like the food industry, placed a premium on personal responsibility and consumer choice. At the 1996 shareholders' meeting of cigarette and food manufacturer RJR Nabisco, a woman in the audience asked company chairman Charles Harper whether he would want people smoking around his children and grandchildren. Mr. Harper responded, "If the children don't like to be in a smoky room... they'll leave." When the woman responded that an infant can't leave the room, Mr. Harper responded, "At some point, they learn to crawl, okay?"<sup>40</sup>

The food industry has also heralded personal responsibility as its mantra to evade blame for the obesity crisis. It has lobbied congressmen to pass legislation that puts the onus on the consumer to choose healthy foods rather than industry to provide healthier low-calorie options. Congressman Ric Keller (R-FL), who sponsored legislation to ban lawsuits against the fast-food industry for health damages stressed the need for personal responsibility: "We've got to get back to those old-fashioned principles of personal responsibility, of common sense, and get away from this new culture where everybody plays the victim and blames other people for their problems."<sup>41</sup> Industry is shifting the blame away from themselves, the producers, and towards the consumers to whom they are heavily marketing. This blame shifting begs the question of whether consumers who are bombarded with billions of dollars in ads can be expected to make rational decisions concerning their health. Corporations employ marketing strategies and tactics based on

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<sup>40</sup> See RJR Nabisco, 1996. Annual Meeting of Shareholders (proceedings). Winston Salem, NC, Apr. 17<sup>th</sup>, 61-62.

<sup>41</sup> "House Bans Fast-Food Lawsuits," CNN, March 10, 2004. available at [http://articles.cnn.com/2004-03-10/justice/fat.lawsuits\\_1\\_frivolous-lawsuits-fast-food-industry-personal-responsibility?\\_s=PM:LAW](http://articles.cnn.com/2004-03-10/justice/fat.lawsuits_1_frivolous-lawsuits-fast-food-industry-personal-responsibility?_s=PM:LAW).  
"Trial lawyers have targeted the fast-food industry as the next big tobacco by bringing these insane lawsuits."

psychological research to lure consumers into purchasing their products, leaving them with little ability to exercise choice.

We can expect these corporations to seek the highest market shares and profits possible, not the highest shares of benefits to human health possible. By law, a CEO's fiduciary duty is to maximize profits to shareholders.<sup>42</sup> In *Appetite for Profit*, Michele Simon writes, "...under our current economic system it's not a corporation's job to protect public health...in fact, managers who willfully allow the bottom line to suffer to protect the public good can be sued by company shareholders for breach of their legal obligations."<sup>43</sup> Simon concludes that because fiduciary duties of managers are to maximize shareholder value, "we really cannot expect food companies to be the guardians of public health." If we cannot *expect* them to be "guardians," the government can encourage or require them to do so with incentives, regulation, or the threat of regulation.<sup>44</sup>

#### **IV. Legislation and Litigation Affecting the Tobacco Industry and Food Industry**

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<sup>42</sup> See R. Cammon Turner, "Shareholders vs. the World," ABA Section of Business Law. (1999) <http://www.abanet.org/buslaw/blt/8-3shareholders.html>Corporations, "Fiduciary Duties." See also Milton Friedman, *Capitalism and Freedom*. (1962): "There is one and only one social responsibility of business- to use its resources and engage in activities designed to increase its profit so long as it stays will the rules of the game, which is to say, engages in open and free competition, without deception or fraud."

<sup>43</sup> See Simon, *Appetite for Profit*, supra note 7.

<sup>44</sup> Moreover, even without the threat of regulation, these corporations may find profits in selling healthier products than unhealthier ones. In fact, as consumers become more health conscious, they are switching to healthier options, and these companies could respond accordingly. It is unclear, however, the extent to which these companies are responding to more health-conscious consumers in a re-design of their product line. For healthier products initiatives, see for example Pepsi's website on "Human Sustainability," available at <http://www.pepsico.com/Purpose/Human-Sustainability.html>. See also McDonald's website on eating healthy, available at <http://www.fitnessandfreebies.com/food/articles/mcdonalds.html>. Whether or not these healthy initiatives by Pepsi and Coke are mere lip service, or will form a core of their respective business models, remains to be seen.

The timeline below reveals the extensive federal legislation that the tobacco industry has faced over the past four decades. The legislation has fallen into a few categories: bans on marketing, advertising, and labeling practices, limitations on smoking in public places, and excise taxes. Despite scientific evidence confirming the dangers and addictiveness of smoking, only last year did the federal government pass legislation granting the FDA authority to directly regulate tobacco products.

**Table 1: Timeline of Federal Legislation and Litigation Against the Tobacco**

**Industry**

<u>Date</u>	<u>Federal Legislation/Guidelines/Litigation</u>
1964	Advisory Committee to the Surgeon General issued its monumental unanimous report stating that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." The committee stated unequivocally that "cigarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs other factors." <sup>45</sup>
1965	In response to the Surgeon General's warning, Congress passed the Federal Cigarette Labeling and Advertising Act requiring the following Surgeon General's Warning on the side of cigarette packs: "Caution: Cigarette Smoking May Be Hazardous to Your Health." <sup>46</sup>
1970	Congress enacted the Public Health Cigarette Smoking Act of 1969. <sup>47</sup> Introduced in 1969, the legislation amended the 1965 Federal Cigarette Labeling and Advertising Act to strengthen warning labels and prohibit cigarette advertising on public airwaves. The 1969 act also included a provision stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." This provision severely limited state and local efforts to limit tobacco promotion and advertising by preempting it with federal legislation.

<sup>45</sup> See Surgeon General's Report of 1964. See Smoking and Health: Report of the Advisory Committee of the Surgeon General of the Public Health Service (1964).

<sup>46</sup> See Federal Cigarette Labeling and Advertising Act, 15 U.S.C, Chapter 36, available at <http://uscode.house.gov/download/pls/15C36.txt>

<sup>47</sup> See Public Health Cigarette Smoking Act of 1969.

Date	<u>Federal Legislation/Guidelines/Litigation</u>
1973	The first federal restriction on smoking in public places was enacted as the Civil Aeronautics Board (CAB) required all airlines to create nonsmoking sections.
1981	Congress increased the federal excise tax on cigarettes to sixteen cents per pack, the first increase since 1951.
1984	The FDA approved nicotine gum smoking cessation aid
1986	The Surgeon General's Report, <i>The Health Consequences of Involuntary Smoking, A Report of the Surgeon General</i> , focuses on the dangers of secondhand smoke. Concludes that “[i]nvoluntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.”
1987	Congress banned smoking on domestic flights of less than two hours.
1992	The “Synar Amendment” passed by Congress required states to adopt and enforce restrictions on tobacco sales to minors.
1993	The Environmental Protection Agency (EPA) declares secondhand smoke to be a Class A carcinogen, meaning that there is no safe level of exposure. The tobacco industry files lawsuit challenging findings, but a federal appeals court ultimately rejects challenge.
1994	Congress passed the Pro-Children Act of 1994, prohibiting smoking in public schools and other facilities where federally funded children's services are provided.
1995	The Food and Drug Administration (FDA) declares nicotine to be a drug and cigarettes to be “drug delivery devices” subject to FDA regulation. The FDA proposes regulations governing tobacco promotion, labeling, and distribution. Tobacco companies challenge FDA authority in court. After multi-year court battle, the U.S. Supreme Court rules in <i>FDA v. Brown &amp; Williamson Tobacco Corp.</i> that the FDA lacks authority to regulate cigarettes.
1995	The Journal of the American Medical Association (JAMA) publishes internal documents from Brown & Williamson Tobacco Company showing that the industry had long known about the addictiveness of nicotine and the harm caused by tobacco use.
1997	The Attorneys General and tobacco industry announce proposed a settlement agreement that would require industry to pay \$360 billion over 25 years, use bold health warning on packs, change advertising practices, and face fines if youth smoking did not drop to specified levels. The proposed agreement would also provide the industry with immunity from class action lawsuits. The agreement died when Congress refused to approve the deal.
1997	President Clinton signed an executive order mandating smoke-free government workplaces.
1997	The tobacco industry settled a class action lawsuit brought by flight attendants exposed to secondhand smoke in <i>Broin v. Philip Morris</i> . The Tobacco companies agreed to pay \$300 million to fund research on tobacco-related disease.
1998	Attorneys General of 46 states and 5 territories sign Master Settlement Agreement (MSA) with tobacco companies to settle cost-recovery lawsuits. Cigarette manufacturers agree to pay the states more than \$206 billion over 25 years and to abide by certain advertising and marketing restrictions.
1999	The U.S. Department of Justice sues tobacco industry alleging a decades-long racketeering conspiracy to deceive the public about the harms of smoking and secondhand smoke. <i>US v. Philip Morris</i> . Lawsuit also sought recovery for treatment of tobacco-related diseases, but that portion of the lawsuit was later dismissed.
2006	In the U.S. Department of Justice’s lawsuit against the tobacco industry, Judge Gladys Kessler finds that tobacco companies engaged in decades-long conspiracy to mislead the public, in violation of federal racketeering law.
2009	Congress passes the Family Smoking Prevention and Tobacco Control Act (S. 982), granting the FDA authority to regulate tobacco products. The law allows the Food and Drug Administration to regulate ingredients in tobacco products, ban the marketing of "light" cigarettes, and implement the rules limiting the marketing of tobacco products to youth that the FDA issued in 1996. It also repeals preemption of

<u>Date</u>	<u>Federal Legislation/Guidelines/Litigation</u>
	state and local regulation of tobacco marketing and advertising, and grants states and localities broad rights to regulate or prohibit the sale, distribution, possession, exposure to, access to, or use of tobacco products.

Sources: Campaign for Tobacco-Free Kids, <http://www.tobaccofreekids.org/campaign/federal/>, the Tobacco Institute, <http://www.tobaccoinstitute.com/>, and the Food and Drug Administration Tobacco Products Site, available at <http://www.fda.gov/tobaccoproducts/default.htm>

Along with these federal efforts to legislate, regulate, and litigate the tobacco industry, many states have passed laws to protect against the harms of smoking. The legislatures of California and New York City have been particularly active, while attorneys generals in some of the other states have made strides through litigation. California passed a referendum to raise the cigarette tax by 25 cents in 1988 and dedicated 20 percent of the revenues towards tobacco control. In 1998, California became the first state to enact a smoke-free law that prohibits smoking in all public places including bars. New York City passed a comprehensive smoke-free law in 2002. On the litigation front, in 1994, Mississippi became the first state to sue the tobacco industry to recover costs of treating tobacco-related diseases. In 1997 Florida and Mississippi settled cost-recovery lawsuits against the tobacco industry for total of total of \$14.9 Billion.<sup>48</sup> These efforts at the state level were sporadic and took several decades to achieve. The tobacco industry used state legislation and litigation to bolster its arguments that federal regulation was unnecessary, stalling efforts at federal intervention. In the food industry context, regulators must be wary of this tactic.

At the international level, in 2003, the Framework Convention on Tobacco Control was approved by 192 nations attending the World Health Organization’s World Health Assembly. The Framework Convention is the first international treaty that

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<sup>48</sup> See Tobacco Public Policy Center, available at <http://www.law.capital.edu/Tobacco/documents/timeline.pdf>.



addresses tobacco control efforts.<sup>49</sup> These international treaties to control tobacco are laudable efforts, but do little to stem the influx of tobacco companies into the less regulated developing countries from the more regulated developed world.

The food industry has undergone a similar history of regulation, legislation, and litigation for its possible role in causing the obesity epidemic. Most of these efforts are more recent than tobacco regulation. The regulatory efforts of the past two decades in the food industry bear some resemblance to those in the tobacco industry from the 1950s to the 1970s. Below is a timeline of the recent legislation, litigation, and regulation to counter Big Food’s role in potentially causing obesity. The timeline reveals that most efforts at combating obesity have focused on improved nutrition labeling and marketing standards. Excise taxes on soda and fast foods have not gained much traction, nor have efforts to sue fast food companies for manufacturing and selling products that contribute to obesity. Unlike in the tobacco case, the FDA has not yet been given authority to directly regulate contents or ingredients that expand America’s waistline.

Table 2: Federal Legislation and Litigation Against the Food Industry to Prevent Obesity

<u>Date</u>	<u>Federal Legislation/Guidelines/Litigation</u>
1914	Federal Trade Commission Act passed. Section 5 of the Act provides that “unfair or deceptive acts or practices in or affecting commerce,” are unlawful. <sup>50</sup>
1938	Wheeler-Lea Amendments of 1938 add sections 14 and 15, which expressly prohibit any food advertisement, other than labeling, which is “misleading in a material respect.” <sup>51</sup> The courts have upheld this position. <sup>52</sup>
1969	White House Conference on Food, Nutrition, and Health held, recommending that the FDA place greater emphasis on regulating the nutritional quality of food and label information about the nutritional characteristics of food.
1973	FDA promulgated its first nutrition labeling requirements (37 Fed. Reg. 6493, March 30, 1972).
1977	As part of the Food and Agriculture Act of 1977, Congress established a national food and human nutrition research program in USDA. Congress found that “there is increasing evidence of a relationship between diet

<sup>49</sup> Id.

<sup>50</sup> 15 U.S.C. 45 (2000), 38 Stat. 717 (1914).

<sup>51</sup> 52 Stat. 111 (1938).

<sup>52</sup> See *Fresh Grown Preserve Corp. v. FTC*, 125 F.2d 917 (2d Cir. 1942).

Date	Federal Legislation/Guidelines/Litigation
	and some of the leading causes of death in the United States; that improved nutrition is an integral component of preventive health care; that there is a serious need for research on the chronic effects of diet on degenerative diseases and related disorders.”
1978	FTC proposes to restrict advertising to children of sugared food products. 43 Fed. Reg. 17967 (Apr. 22, 1978). Effort was abandoned.
1980	Congress enacts the Federal Trade Commission Improvements Act of 1980, 94 Stat. 374, 15 U.S.C. 57a(h), prohibiting the FTC from regulating children’s advertising as an “unfair act or practice.”
1984	FTC issues a policy statement, reprinted in 104 F.T.C 839 (1984), whereby the Commission reaffirms the requirement that advertisers must “have a reasonable basis for advertising claims before they are disseminated” and stated that “what constitutes a reasonable basis depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim.” <sup>53</sup> This “reasonable basis” standard for advertising claims is less stringent than FDA’s standard of scientific proof for labeling claims.
1984	The FDA promulgated new regulations governing the sodium labeling of food. Sodium content became a mandatory part of nutrition labeling. FDA defined the terms “sodium free,” “very low sodium,” “low sodium,” and “reduced sodium.” To be labeled as reduced sodium, a food had to achieve a 75 percent reduction.
1987	The FDA adopted four general principles for health claims made for foods: 1. explicit health claims must be based on a consensus of medical and scientific information. Information on the labeling must be truthful and not misleading; 2. explicit health claims must emphasize that good nutrition is a function of total diet; 3. explicit health claims should be reasonably uniform from product to product in order to make it more understandable and less confusing to consumers; 4. Dietary “power races” should be prevented.
1990	National Nutrition Monitoring and Related Research Act of 1990, 104 Stat. 1034, 7 U.S.C 5301, passed, establishing a comprehensive federal interagency approach to nutrition monitoring.
1990	The Nutrition Labeling and Education Act (N, L&E) signed into law by President Bush. The law dealt with six matters related to the FDA’s regulation of the nutrient content of food. Section 403(q) was added to the F, D&C Act to require nutrition labeling for all food products. It also authorized FDA to set standards for serving sizes. Second, FDA was required to define the nutrient descriptors in use throughout the food industry: high fiber, low fat, reduced cholesterol. Third, the FDA was required to review specified disease prevention claims to determine whether they were appropriate for labeling. Fourth, the NL, and E Act contained several new food labeling and food standards provisions. Vegetable and fruit juice beverages were required to bear the percent of each juice on the information panel. All ingredients in standardized food products were required to be included in the label statement of ingredients. Fifth, all of the labeling requirements under the FD&C Act were made subject to national uniformity (federal preemption) except for the general prohibition against false or misleading labeling, health and safety warnings, special dietary food regulation, and such local matters as unit pricing and open date labeling. By requiring national uniformity in nutrient labeling, nutrient descriptors, disease prevention claims, food standards, and the other food labeling provision involved, the NL&E Act removed state and local government from establishing regulatory requirements relating to the nutrient content of food. NLEA explicitly required nutrition labeling to include fat, calories from fat, saturated fat, and cholesterol. <sup>54</sup>
1999	FDA amends nutrition labeling regulations to require that trans fat be labeled separately as part of the nutrition labeling. <sup>55</sup>
2003	Litigation commences against the fast food industry: <i>Pelman v. McDonalds Corp.</i> , 237 F. Supp. 2d 512 (S.D.N.Y 2003).

<sup>53</sup> See Hutt, Merrill, and Grossman.

<sup>54</sup> See Hutt, Merrill, and Grossman, *Food and Drug Law*, Foundation Press (2007).

<sup>55</sup> See 64 Fed. Reg. 62746 (Nov. 17, 1999).

<u>Date</u>	<u>Federal Legislation/Guidelines/Litigation</u>
2005	“Personal Responsibility in Food Consumption Act” considered before Congress. Bill would prohibit new and dismiss pending civil actions by any person against a manufacturer, marketer, distributor, advertiser, or seller of food or a trade association for any injury related to a person's accumulated acts of consumption of food and weight gain, obesity, or any associated health condition.
2005	FDA issues report and related advance notice of proposed rulemaking in 63 Fed. Reg. 17008. The focus is to change nutrition labeling to increase the emphasis on the caloric content and the serving size for packaged food. FDA’s principal regulatory authority over obesity is its control over food labeling.
2008	The FTC released the results of its study of <i>food marketing</i> to adolescents and children. The FTC found that 44 major food and beverage marketers spend \$1.6 billion to promote products to children (defined as children under 12) and adolescents (age 12 to 17). The FTC noted that the ad campaigns tend to be integrated, combining television commercials with packaging , in-store advertising, sweepstakes and Internet advertising. <sup>56</sup>

Sources: Hutt, Merrill, and Grossman (2007), FTC Food Marketing Report

#### **V. Similarities between Big Tobacco and Big Food: More than Meets the Eye**

“Habits formed in childhood *are like instincts. Habits will become a person's nature.*” Confucius

Rogan Kersh and James Morone, two political scientists, indicate that demonizing an industry with labels such as “evil” are necessary to convert the personal epidemics into political priorities.<sup>57</sup> Tobacco is their primary example of an industry that the public demonized. Such demonization often resulted in a defensive posture by Big Tobacco, replete with denials and lobbying to thwart regulation. Although the resulting criminalization and prohibitions can have their downsides, collaborating with industry

<sup>56</sup> See Latham and Watkins website: Advertising and Marketing Regulation: Recent US Developments, available at <http://www.lw.com/practices.aspx?page=amrrecentusdevelopments>. The report did not criticize all food marketing but called on companies to "adopt and adhere to meaningful, nutrition-based standards for marketing their products to children under 12." The report noted that the food and beverage industries have made "significant progress" since 2005 in promoting more nutritious products. It commended 13 of the largest food and beverage companies for adopting the Children's Food and Beverage Advertising Initiative of the Better Business Bureau, which calls on companies not to advertise at all to children under 12 or to limited advertising to this group to products that meet certain nutritional standards. The report also recommended that media and entertainment companies restrict the licensing of their characters to companies that engage in marketing healthier foods and beverages to children. See Congressional legislation, S. Rep. No. 109-88, at 108 (2005), directing the FTC to produce this report. The FTC Food Marketing Report is available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf>.

<sup>57</sup> See Kersh and Morone, How the Personal Becomes Political: Prohibitions, public health and obesity. *Studies in American Political Development*, 2002: 16:162-175.

can result in industry's co-optation of the legislative, regulatory, and litigation processes.<sup>58</sup> The tobacco industry's co-optation of the primary weapons in public health's arsenal offers lessons of caution when collaborating with the food industry to contain the obesity crisis.

The history of tobacco regulation is a long, slow, and tedious one full of attempts at regulation, followed by industry lobbying to prevent any intrusions on its profit-making and pretensions of social responsibility. Ultimately, efforts at tobacco regulation have been somewhat successful in reducing the number of smokers in the United States. These achievements occurred only after a long drawn-out process full of denials that nicotine is addictive and consequent deaths ranging in the millions from lung cancer and other illnesses resulting from smoking. Legislators, regulators, and litigators must be wary of following the same tragic path for obesity regulation.

Understanding the similarities and differences between the food industry and the tobacco industry is essential to discerning lessons from tobacco regulation. The similarities are more than meets the eye, and the differences are exaggerated.

The first difference claimed is that food is a "necessary" product, whereas tobacco can be considered an unnecessary "luxury" item.<sup>59</sup> Given the addictive properties of nicotine, "getting one's fix" makes tobacco a "necessary" product, whereby income and price have little effect on the quantity demanded. The evidence illustrates this proposition: the heaviest smoking rates are concentrated in the lowest income brackets of

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<sup>58</sup> See Brownell and Horgen, *Food Fight*, Contemporary Books (2004).

<sup>59</sup> Economists refer to a "necessary" good as one in which price elasticity of demand is inelastic, such that increases in price do not significantly affect quantity demanded. A luxury good features a much more elastic price elasticity of demand, whereby an increase in price will result in a significant decline in quantity demanded. See Case and Fair, *Principles of Microeconomics*, Pearson Education (2007).

the US population.<sup>60</sup> Smoking rates are highest for those below the poverty level. In addition, despite the increase in excise taxes on cigarettes during the period 1985-2002, the percentage of smokers at “below the poverty” level remained relatively constant.<sup>61</sup>

When discussing “food,” many members of industry and Congress lump all foods into one basket. But food, unlike cigarettes, comes in many shapes and sizes that have widely varying effects on the human body. Unhealthy, or “bad” foods, cause obesity, not healthy or “good” foods. Snack foods like Oreos and Doritos, carbonated beverages like Pepsi and Coke, and fast foods like McDonalds hamburgers and fries, are “bad” or fattening foods. The minimal impact of an increase in price of these “bad” foods on the quantity demanded, even at lower income levels, suggests that these bad foods have some of the same properties as cigarettes.<sup>62</sup> Addictive is perhaps not the most apt description for these foods. “Habit” creates the continued consumption of these foods from childhood well into adulthood. Habits form early, and habits die hard. Snack food, fast food, and carbonated beverage companies, such as Kraft, McDonalds, and Pepsi “get ‘em early,” locking in these customers for life. Consumption of these bad foods is therefore “inelastic,” meaning that consumption would change little with an increase in excise tax.<sup>63</sup> Economists Fletcher, Frisvold, and Tefft found that an increase in the soft drink tax by 55% would decrease the percentage of obese and overweight children by only .7%

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<sup>60</sup> See Centers for Disease Control and Prevention, “Vital Signs: Current Cigarette Smoking Among Adults Aged  $\geq$  18 Years in the United States,” available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5935a3.htm>.

<sup>61</sup> The percentage of smokers at other income levels declined, indicating that factors other than price could be primarily responsible for the overall decline in cigarette purchases during the period. Such factors include education and better warning labels.

<sup>62</sup> See Kitty Kay Chan and Tom Capehart, Health Concerns or Price: Which Takes Credit for Declining Cigarette Consumption in the US? Choices Magazine. 1<sup>st</sup> Quarter, 2004.

<sup>63</sup> See Jason Fletcher, Daniel Frisvold, and Nathan Tefft, *The Effects of Soft Drink Taxes on Child and Adolescent Consumption and Weight Outcomes*, August 2009 Working Paper Series.

points.<sup>64</sup> This finding suggests that like cigarettes, which are regressive and inelastic to prices due to their addictive nature, soda pop drinking habits cannot alter overnight as a result of price changes.

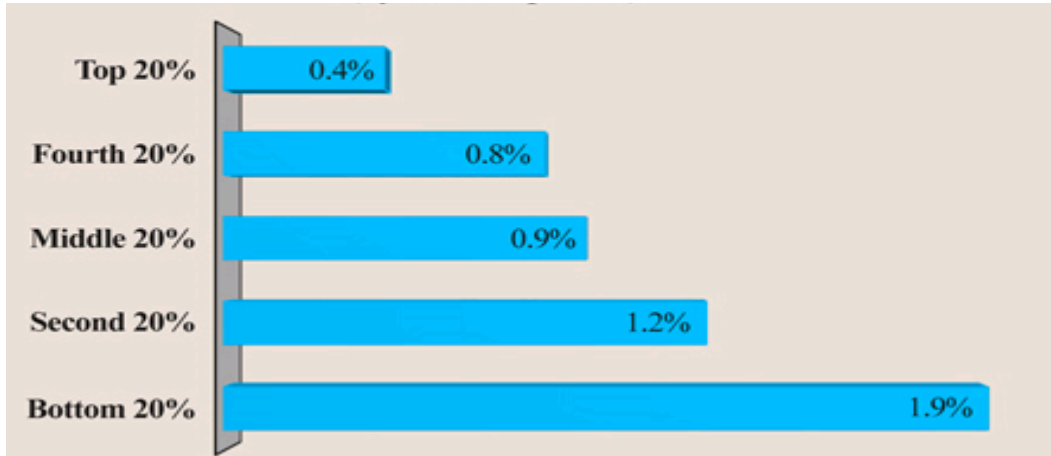
Figure 1 reveals the burden of excise taxes falls disproportionately on the poorest. An excise tax on fast foods or beverages, therefore, may have the most detrimental financial impacts on the lowest income groups, because their consumption of these products is inelastic to price and their consumption of these products exceeds that of any other income demographic. An excise tax at lower levels, however, may help curb the poor's consumption of these products, improving health outcomes.<sup>65</sup>

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<sup>64</sup> Id.

<sup>65</sup> For support of this theory, see Kelly Brownell and Thomas Frieden, *Ounces of Prevention: The Public Policy Case for Taxes on Sugared Beverages*, N Engl J Med 2009; 360:1805-1808.

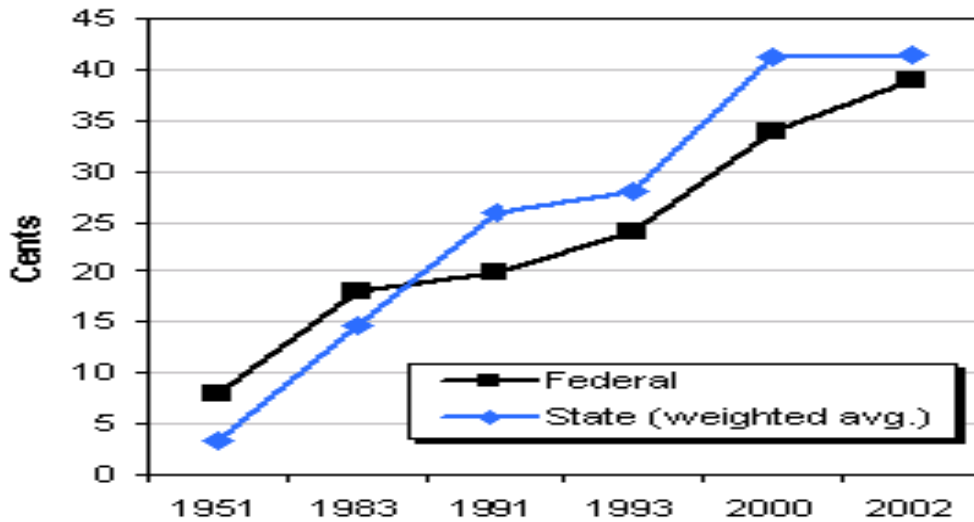
**Figure 1: Percent of Income Paid in Federal Excise Taxes, 2006 by Income Group**



Source: Congressional Budget Office, *Historical Effective Tax Rates: 1979 to 2006*, April 2009

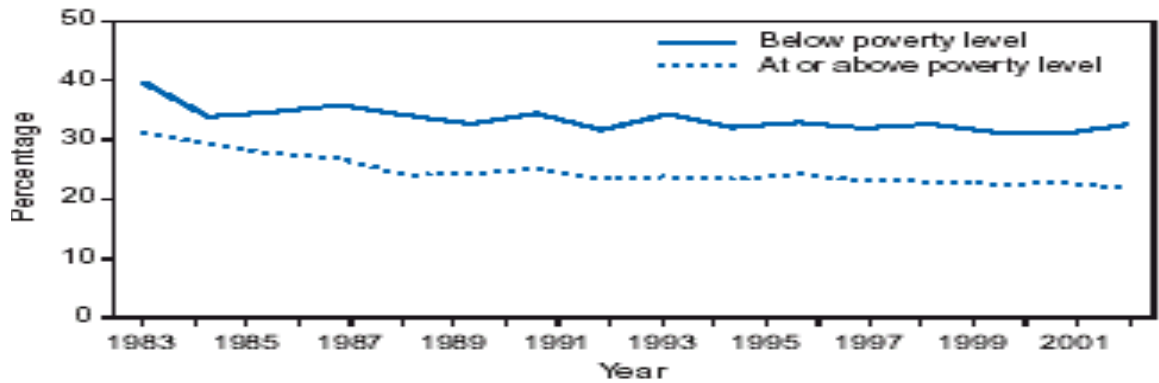
In the tobacco case, an excise tax was successful in curbing smoking rates at the “above poverty levels.” Figures 2 and 3 illustrate that the gradual increase from the total excise tax of 32 cents in 1983 to 83 cents in 2002 corresponded to a concomitant decline in smoking rates at the “above poverty” level from 40% to 30%, and at the “below poverty” level from 30% to 25%. However, the marginal reduction in smoking rates from an increase in excise tax after 1990 appeared to be minimal. The most significant reduction appeared between 1983 and 1990 when the excise tax increased from 32 cents to 46 cents. Therefore, the increase in excise taxes from approximately 46 cents in 1990 to nearly 83 cents in 2002 resulted in a negligible decline in smoking rates. A similar concern arises in the case of obesity. An excise tax larger than a certain amount could result in a negligible impact on obesity rates.

**Figure 2: Federal and State Per-Pack Cigarette Tax Rate (1983-2002)**



Sources: USDA Economic Research Service (2002), Orzechowski & Walker (2001).

**Figure 3: Smoking Rates Among Adults Aged  $\geq 18$  years from 1983 to 2002**



\* Published 2000 poverty thresholds from the U.S. Bureau of the Census were used in these calculations.

Source: US Census Bureau

A second oft-cited difference between tobacco and food is that cigarettes are an adult consumption item, whereas many foods are intended for both children and adults. Joe Camel and his counterparts shatter this myth. Both the food industry and tobacco industry target children, and they attack them with ads intended to strike their



subconscious. Children are the lifelong customers whose habits and addictions form in childhood.<sup>66</sup> They are also the most vulnerable to advertising.<sup>67</sup> The food companies, like the tobacco industry, understand both of these principles and exploit them, often to the detriment of children's health.

Recently-released documents from R.J. Reynolds' tobacco company establish that the company intended to direct their advertising efforts toward children as young as 14: "As this 14-24 age group matures, they will account for a key share of the total cigarette volume for at least the next 25 years. Thus our strategy becomes clear for our established brands: direct advertising appeal to the younger smokers."<sup>68</sup> Another RJ Reynolds executive noted in a memorandum: "Realistically, if our Company is to survive and prosper, over the long term, we must get our share of the youth market. In my opinion, this will require new brands tailored to the youth market."<sup>69</sup> Philip Morris also produced internal documents showing how their profits depended on the youth market: "[T]he success of Marlboro Red during its most rapid growth period was because it became the brand of choice among teenagers who continued to use them when they grew older."<sup>70</sup> "Thus, the ability to attract new smokers and develop them into a young adult franchise is

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<sup>66</sup> See Joy Blakeslee, *Good Eating Habits Formed in Childhood Promote Lifelong Health*, available at [http://www.soyconnection.com/pressroom/press\\_release\\_view.php/Good+Eating+Habits+Formed+in+Childhood+Promote+Lifelong+Health?id=70](http://www.soyconnection.com/pressroom/press_release_view.php/Good+Eating+Habits+Formed+in+Childhood+Promote+Lifelong+Health?id=70): "Eating habits formed in childhood—both good and bad—track into adulthood. Once unhealthy habits are formed, changing behavior is much more difficult...this may make the difference between a healthy lifespan and one with chronic diseases."

<sup>67</sup> Young children are particularly vulnerable to advertising as they are often unable to distinguish advertising from programs. US researchers, Dale Kunkel (University of California at Santa Barbara) and Don Roberts (Stanford University) say that children under age of 5 or 6 do not distinguish effectively between advertisements and the programs they are watching. See Kunkel and Roberts, *Young Minds and Marketplace Values: Issues in Children's Television Advertising*, *Journal of Social Issues* (Vol. 47, Issue 1, pgs. 57-72), Spring 1991.

<sup>68</sup> Quotation from C.A. Tucker, R.J. Reynolds' vice president for marketing, 1974

<sup>69</sup> See Claude Teague, RJR, "Research Planning Memorandum on Some Thoughts About New Brands of Cigarettes for the Youth Market," February 2, 1973.

<sup>70</sup> Special Report, "Young Smokers: Prevalence, Trends, Implications, and Related Demographic Trends," PM Doc. #1000390803/55, March 31, 1981.

key to brand development.”<sup>71</sup> Ninety percent of all young smokers choose the three most heavily advertised brands. Marlboro, the most heavily advertised brand, constitutes almost 60% of the youth market but only 25% of the adult market.<sup>72</sup> A 1993 survey revealed that Marlboro decreased in adolescent popularity by almost 9%, while Camel gained more than 5%, fluctuations directly coinciding with the respective companies' brand-specific advertising expenditures.<sup>73</sup> This shift in preference also coincided with the introduction of Old Joe Camel's cartoon image, which has become widely familiar among young children. Studies have found more than 90% of six-year-olds can match Joe Camel with pictures of a cigarette, making him as well known as Disney's mascot, Mickey Mouse. By comparison, only 67% of adults recognize Joe Camel.<sup>74</sup> The tobacco companies depend on advertisements to youth for a large share of their profits.

The food companies engage in a similar type of advertising to the youth market. Children constitute an estimated 72% of family food and beverage purchases.<sup>75</sup> Children ages 7 to 12 also spend \$2.3 billion of their own money on snacks and beverages each year, while teenagers spend \$13 billion at fast-food restaurants alone. The United States food industry spends \$36 billion a year on advertising, making it the second largest advertiser in the American economy. However, 95% of the 10,000 food commercials children see each year are for foods high in sugar and fat, as total advertising

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<sup>71</sup> Philip Morris Doc. #2044895379/484, 1992

<sup>72</sup> See Centers for Disease Control and Prevention, "Changes in the Cigarette Brand Preference of Adolescent Smokers, U.S., 1989-1993," *Morbidity and Mortality Weekly Report*, August 1994.

<sup>73</sup> See Pierce JP, Choi WS, Gilpin EA, et al. Tobacco industry promotion of cigarettes and adolescent smoking. *JAMA* 1998;279:511–15. See also G. Ferris Wayne, GN Connolly, *How Cigarette Design Can Affect Youth Initiation into Smoking: Camel Cigarettes 1983-1993*.

<sup>74</sup> See Fischer, P. M., Schwartz, M. P., Richards, J. W., Goldstein, A. O., & Rojas, T. H. (1991). Brand logo recognition by children aged 3 to 6 years: Mickey Mouse and Old Joe the Camel. *JAMA*, 3145-3148. See also DiFranza, J. R., Richards, J. W., Jr., Paulman, P. M., Wolf-Gillespie, N., Fletcher, C., Jaffe, R. D., & Murray, D. (1991). RJR Nabisco's cartoon camel promotes Camel cigarettes to children. *JAMA*, 266, 3149-3153.

<sup>75</sup> See Brownell and Horgren, *Food Fight: The Inside Story of the Food Industry, America's Obesity Crisis, and What We Can Do About It*. 2004.

expenditures tend to be highest for convenience food, confectioneries, snacks, and soft drinks.<sup>76</sup> The two things sold to children most on TV are toys and food, and 98 percent of the food advertising is for products children don't have to eat, non-nutritious things.

Big food has long penetrated our television sets, particularly during Saturday morning cartoons where sugary cereals and soft drinks dominate television advertisements. In a report entitled *Food Marketing to Children and Youth: Threat or Opportunity*, the Institute of Medicine of the National Academies concluded that food marketing, especially on television, influenced the diets, preferences, and the requests of children under the age of 12.<sup>77</sup> Food and beverage advertising on television influences children ages to 2–11 years to prefer and purchase high-calorie and low-nutrient foods and beverages.<sup>78</sup> The Institute also found that the food and beverage industries spend \$10 billion a year marketing their products through various channels and the “preponderance of the products introduced and marketed for children and youth have been high in total calories, sugars, salt, fat, and low in nutrients.”<sup>79</sup> Of the more than \$200 billion children and youth collectively spend annually, the top four leading items children ages 8–12 years select, without parental permission, are high-calorie and low-nutrient foods and beverages.<sup>80</sup> Some members of Congress recognize the powerful impacts of food marketing on children’s consumption habits. Senator Tom Harkin stated, “The food

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<sup>76</sup> Id.

<sup>77</sup> See Institute of Medicine of the National Academies, *Food Marketing to Children and Youth: Threat or Opportunity?* December 2005. See also *Food for Thought: Television Food Advertising to Children in the U.S.*, Kaiser Family Foundation, 2007. The Kaiser Family Foundation’s report found that for all commercials directed at children (from a sample of 1600 hours of ads), 34% are for candy and snacks, 28% are for cereal, 10% are for fast food. Only 4% are for dairy products, 1% are for fruit juices, and none are for fruits and vegetables. Food is the most widely advertised product on the networks, as 50% of all ad time is food. Among all the food ads targeting children, only a small proportion depict a physically active lifestyle (15%). There are few countervailing messages. Children under eight see 1 public service ad for every 26 food ads; for tweens, 1 for every 48 food ads, and for teens, 1 for every 130 food ads.

<sup>78</sup> See Institute of Medicine Report.

<sup>79</sup> Id.

<sup>80</sup> Id.

industry doesn't spend \$10 billion a year on ads because they like to waste money. The ads not only work, but they work brilliantly.”<sup>81</sup>

More recently, the major food companies have infiltrated our schools through vending machines and the National School Lunch Program. Coca-Cola, for instance, markets its products in schools to children of all ages, through exclusive “pouring rights” contracts.<sup>82</sup> Oregon school districts get \$12-\$24 per student a year from drink sales. Even though each additional daily serving of a sugar-sweetened beverage is found to be associated with a 60 percentage point increased risk of obesity, the schools are turning a blind eye.<sup>83</sup> Although Coca-Cola refers to its model guidelines that recommend that soda not be sold in elementary school, this policy is voluntary and not enforced.<sup>84</sup> Despite these guidelines, many elementary schools throughout the nation still have vending machines. A 2002 survey of Kentucky schools found that 44 percent of elementary schools had vending machines.<sup>85</sup> Schools receive benefits from these contracts, despite the nefarious health effects for children. On average Kentucky schools made over \$6000 a year in revenue from vending machines. This meager revenue pales in comparison to the total budget allocated to schools and the severe long-term costs on the health of children.

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<sup>81</sup> See Tom Harkin, Speech to the FTC and Letter to the Director of the Children’s Advertising Review Unit (CARU), available at [http://www.votesmart.org/speech\\_detail.php?sc\\_id=184444&keyword=&phrase=&contain=](http://www.votesmart.org/speech_detail.php?sc_id=184444&keyword=&phrase=&contain=).

<sup>82</sup> See Melanie Warner, *Lines are Drawn for Big Suit Over Sodas*. The New York Times. December 7, 2005.

<sup>83</sup> See David Ludwig, et al. Relation between Consumption of Sugar-sweetened Drinks and Childhood Obesity: a Prospective, Observational Analysis.

<sup>84</sup> Michele Simon, *Appetite for Profit: How the Food Industry Undermines our Health and How to Fight Back*. Avalon. 2006. See also, Coca-Cola, “Model Guidelines for School Beverage Partnerships,” available at <http://eps1.asu.edu/ceru/Community%20Corner/CERU-0311-180-RCC.pdf>.

<sup>85</sup> Michele Simon, *Appetite for Profit*. See Report Commissioned by the Coalition on Type 2 Diabetes and Overweight Children. Report noted that 84% of the food sold in school vending machines in Kentucky is “junk food:” soft drinks, candy, fried foods and pastries.

A few lawyers filed a lawsuit against soda makers in Massachusetts, alleging that sales of unhealthy beverages, such as full-calorie sodas, sports drinks, iced tea drinks and juice drinks without much juice, in high schools constitute unfair and deceptive marketing. The suit also cited the ways in which the large illuminated Coke and Pepsi machines lining school halls and cafeterias are an "attractive nuisance."<sup>86</sup> This litigation was eventually dropped as states and school districts throughout the country, including Massachusetts, banned the sale of junk food and sugary drinks in school vending machines and school stores.

A third similarity between Big Food and Big Tobacco is that contrary to popular perception, Big Food does not consist of a diffuse array of food companies, but a few major companies, just as Big Tobacco. Therefore, as in the case of Big Tobacco, it is easy to focus regulatory moves on a few companies responsible for selling unhealthy products, rather than a panoply of food makers. It is also easy to recognize that these few companies have significant political clout and deep pockets that they can use to influence the legislatures. Philip Morris has a fifty percent share of the United States market for cigarettes.<sup>87</sup> Its nearest competitor, RJ Reynolds, has close to a thirty percent market share.<sup>88</sup> Together, these two companies alone comprise eighty percent of the total market for cigarettes. The unhealthy food industry is actually a composite of four segments: fast foods, snack foods, candy including chocolate and gum, and carbonated soft drinks. In the carbonated soft drinks market, Coca Cola has 42.8 percent of the market, Pepsi has

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<sup>86</sup> See Melanie Warner, "Lines are Drawn for Big Suit Over Sodas," *The New York Times*, December 7, 2005. In order to claim that the sales are "unfair and deceptive," the lawyers are arguing that the soda makers are selling to a captive audience that is not able to assess all the health risks, and the soda makers are not informing these consumers about the risks. Many litigators and advisors in the cases against Big Tobacco are litigating and advising on this case against Big Food.

<sup>87</sup> See Tobacco.org, at <http://www.tobacco.org/Resources/mktshr.html>.

<sup>88</sup> *Id.*

31.1 percent of the market.<sup>89</sup> Together, they constitute 73.9 percent of the US market. In the chewing gum market, after its acquisition of Cadbury, Kraft has nearly a thirty percent market share of the global market,<sup>90</sup> with Wrigley a thirty-four percent market share. In the general candy market, Hershey holds a 44.7 percent of the US retail market, and Mars owns a 31.6% share.<sup>91</sup> In snack foods, Kraft has a 26 percent market share.<sup>92</sup> In fast foods, McDonalds owns a 70 percent market share, with its nearest competitor, Burger King at only 20%.<sup>93</sup> The high degree of concentration in the food industry, as in the tobacco industry, makes these companies targets of regulation and litigation. But the oligopolistic nature of these industries also makes the few players extremely powerful as lobbyists on Capitol Hill, advocates for less stringent federal regulations to preempt more severe state laws, easier cooperation to erect high barriers to entry with regulation, and more effective in persuading the courts that regulations against advertising to children violate the industry's right to free speech.

Lobbying Expenditures in the food industry, as in the tobacco industry, have traced important pieces of legislation before Congress that would directly impact the obesity problem or the smoking public health concerns. As the food industry receives greater legislative and regulatory scrutiny for promoting obesity over the past few years, it has dramatically increased its lobbying expenditures. The Labeling Education and Nutrition Act of 2009 recently went to committee in both the House and Senate.<sup>94</sup> If passed, the act would require food service franchises to display calorie counts for all of

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<sup>89</sup> For market share data, see Seeking Alpha website, available at <http://seekingalpha.com/>.

<sup>90</sup> See Seeking Alpha, at <http://seekingalpha.com/article/215695-higher-expected-share-in-gum-market-would-lift-kraft-foods-stock>.

<sup>91</sup> For market share data, see Seeking Alpha website, available at <http://seekingalpha.com/>.

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> See Labeling Education and Nutrition Act of 2009, available at <http://www.opencongress.org/bill/111-s558/show>.

its foods, drastically increasing costs for the fast food industry. To prevent passage of this legislation, McDonald's increased its lobbying expenditures by nearly 100% between 2009 and 2010 from \$480,000 to \$1M.<sup>95</sup> In 2009, Pepsi spent nearly \$10M on lobbying expenditures, nearly a 1000% increase over its normal annual expenditures, to prevent passage of the Food Marketing in Schools Assessment Act (HR 3625) and the Obesity Prevention, Treatment, and Research Act of 2009.<sup>96</sup> Big Tobacco had its own share of heavy lobbying when laws threatened its profits. In 2001, for instance, Philip Morris' lobbying expenditures increased from only \$10K in 2000 to nearly \$320K, a 3000% increase. The Reason: Philip Morris lobbied for increased FDA regulation over smoking advertisements to teens to immunize itself from further litigation and government criticism, thereby erecting greater barriers to entry against its competitors.<sup>97</sup>

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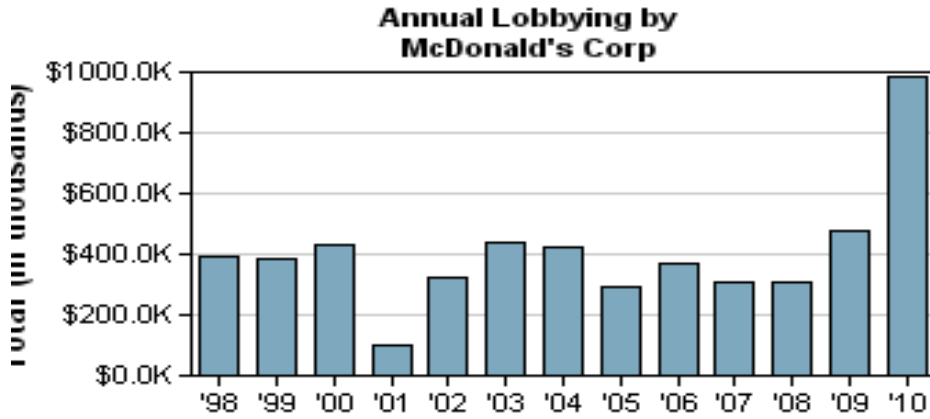
<sup>95</sup> See Open Secrets website, available at <http://www.opensecrets.org/lobby/clientbills.php?year=2009&lname=PepsiCo+Inc&id=>

<sup>96</sup> Id.

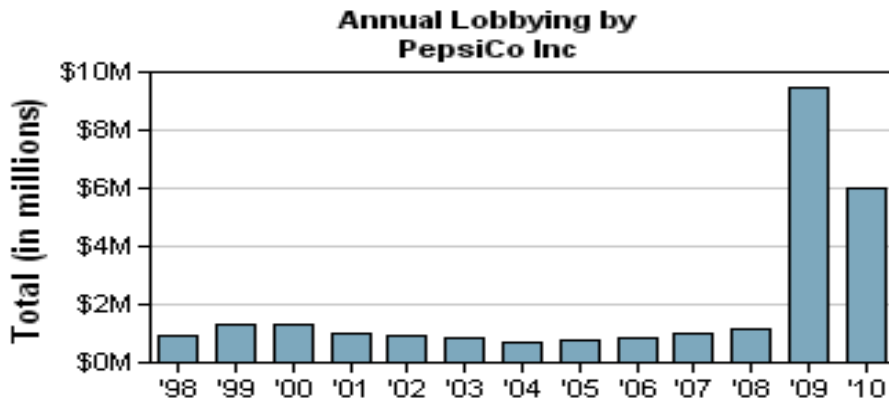
<sup>97</sup> See John Carey, *Commentary: Philip Morris' Latest Smoke Screen*, (July, 2001), available at [http://www.businessweek.com/magazine/content/01\\_29/b3741056.htm](http://www.businessweek.com/magazine/content/01_29/b3741056.htm).

Figure 4: Lobbying Expenditures by Major Food and Tobacco Companies

### McDonald's Corp



### PepsiCo Inc

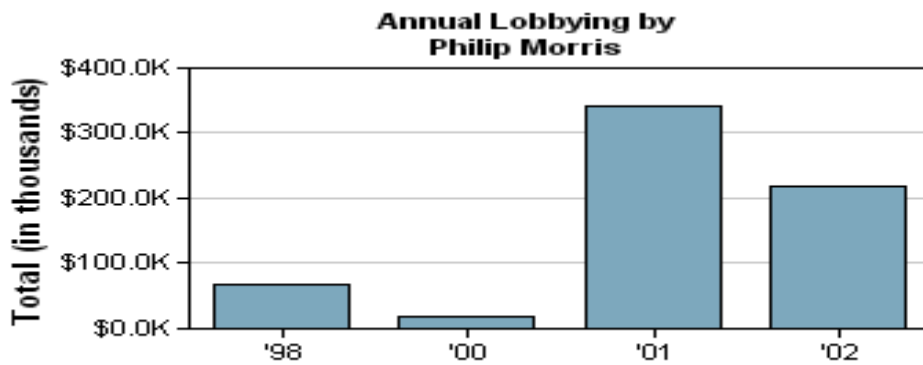


### Kraft Foods



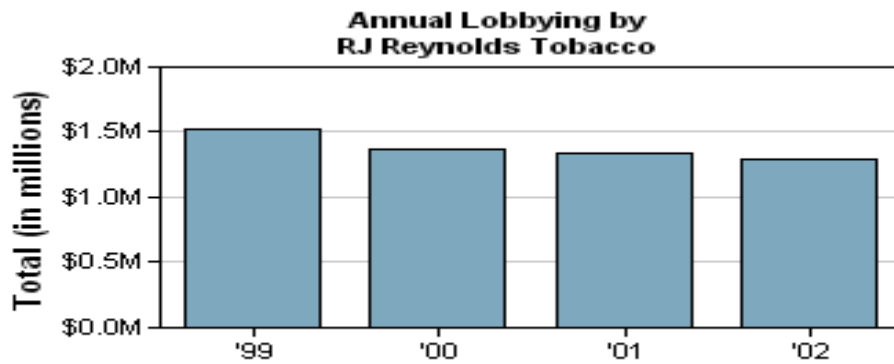


## Philip Morris

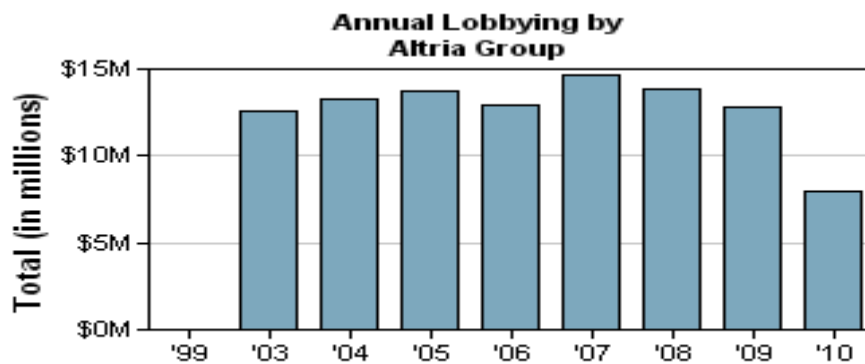


Source: Open Secrets, available at <http://www.opensecrets.org/lobby/clientbills.php?lname=McDonald%27s+Corp&year=2010>.

## RJ Reynolds Tobacco



## Altria Group



## **VI. Case Study of Philip Morris Tobacco: A Lesson for Kraft Foods?**

A Philip Morris research official wrote in 1972, “The cigarette should be conceived not as a product but as a package. The product is nicotine... Think of the cigarette pack as a storage container for a day’s supply of nicotine.”<sup>98</sup> Dr. Victor J. DeNoble, a research official at Philip Morris, conducted a study on rats in 1983 that suggested that nicotine was addictive in humans.<sup>99</sup> Philip Morris withdrew this study from publication in the *Journal of Pharmacology*.<sup>100</sup> This research was concluded five years before the United States Surgeon General declared nicotine to be addictive.<sup>101</sup> Philip Morris depended on the addictive properties of nicotine in order to boost profits at the expense of consumer health.<sup>102</sup>

In order to understand the corporate strategies that the food and tobacco companies apply, we will go behind the curtain and into the conference rooms of two major companies: Kraft and Philip Morris. Kraft is the largest American food company in revenue.<sup>103</sup> Philip Morris is the largest cigarette company in market share.<sup>104</sup> Philip

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<sup>98</sup> See W.L. Dunn, Jr. 1972. 1972 Philip Morris Internal Document, available at <http://tobaccodocuments.org>.

<sup>99</sup> See Victor John DeNoble, II, “Deposition of VICTOR JOHN DENOBLE, II, Ph.D., September 16, 1988, SHIRES v. CELOTEX CORP.,” <http://tobaccodocuments.org/datta/DENOBLEV091688.html>.

<sup>100</sup> Philip J. Hiltz, “Philip Morris Blocked ‘83 Paper Showing Tobacco Is Addictive, Panel Finds,” *New York Times*, April 1, 1994

<sup>101</sup> See “Statement of Everett C. Coop Before Press Conference with Senator Bradley,” September 15, 1988, available at [http://profiles.nlm.nih.gov/QQ/B/C/W/P/\\_/qqbcwp.pdf](http://profiles.nlm.nih.gov/QQ/B/C/W/P/_/qqbcwp.pdf).

<sup>102</sup> See *Williams v. Philip Morris Inc.*, 340 Or 35, 127 P3d 1165 (2006). In this case, the Oregon Supreme Court awarded punitive damages to plaintiff based on the fact that Philip Morris had the desire to make “illicit profits” off of the plaintiff who was addicted to nicotine.

<sup>103</sup> In 2009, Kraft generated \$40.1 billion in revenues. See Kate Robinson, “America’s Biggest Food Companies,” October 28, 2010, available at <http://financialedge.investopedia.com/financial-edge/1010/Americas-Biggest-Food-Companies.aspx>.

<sup>104</sup> In 2009, Philip Morris USA’s market share in the United States was 49.9%. Its Marboro brand, alone, had a market share in the United States of 41.1%. See [http://www.philipmorrisusa.com/en/cms/Company/Market\\_Information/default.aspx](http://www.philipmorrisusa.com/en/cms/Company/Market_Information/default.aspx).

Morris purchased Kraft in 1998.<sup>105</sup> This was not the first mega-merger between Big Food and Big Tobacco. A similar merger between a major tobacco and food company occurred when RJ Reynolds acquired Nabisco only thirteen years earlier in 1985 for \$4.9 billion.<sup>106</sup> RJ Reynolds and Philip Morris are the two most prominent tobacco companies in the United States.<sup>107</sup> Kraft and Nabisco are the two largest snack “junk food” companies in the United States.<sup>108</sup> Companies buy other companies for a variety of reasons, but with the end goal of increasing profits. Big Tobacco recognized in Big Food a target for which they it could employ the same marketing tactics that it had been using for decades to sell cigarettes.<sup>109</sup>

Philip Morris sells a few major products. For the purposes of this section, we will focus on cigarettes. Its major cigarette brands in the United States are Marlboro, Virginia Slims, Benson and Hedges, Merit, and Parliament. Marlboro constitutes 42% of all Philip Morris USA cigarette sales.<sup>110</sup> A cursory examination of Philip Morris’ website makes it appear like a non-profit anti-tobacco institute or even a tobacco regulatory wing of the FDA. The company makes it clear that the site does not sell, market, or advertise

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<sup>105</sup> See Steve Coll, “Kraft Inc. Agrees to Acquisition; Philip Morris to Pay \$13.1 Billion for Huge Food Firm,” *The Washington Post*, October 31, 1988. See also “Case Study: The Philip Morris-Kraft Merger, Why Bigness May Not Matter,” available at <http://www.nytimes.com/1988/10/23/business/case-study-the-philip-morris-kraft-merger-why-bigness-may-not-matter.html?pagewanted=7> Philip Morris recently spun off Kraft. See

<sup>106</sup> See Caslon Analytics, M&A Benchmarks, available at <http://www.caslon.com.au/benchmarknote20.htm>.

<sup>107</sup> RJ Reynolds and Phillip Morris comprise the majority of the market share for cigarettes in the United States. Phillip Morris sells approximately one-half of all cigarettes in the United States. RJ Reynolds sells approximately one-third of the cigarettes in the United States. Together, they sell 80% of all cigarettes in the United States. See Frank Tursi, Susan E. White and Steve McQuilkin, “A Rival Rises,” *Winston-Salem Journal*, available at <http://extras.journalnow.com/lostempire/tob14a.htm>.

<sup>108</sup> Kraft and Nabisco are the largest food companies by market share. Kraft is the largest food company in the United States and acquired Nabisco. See “Inside the Top 10 – Biggest Public Food and Beverage Companies in the US,” available at [http://findarticles.com/p/articles/mi\\_m3289/is\\_n8\\_v165/ai\\_18598412/](http://findarticles.com/p/articles/mi_m3289/is_n8_v165/ai_18598412/)

<sup>109</sup> See Kelly Brownell and Kenneth Warner, “The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?” *Millbank Quarterly*, Vol. 87, No. 1, 2009 (259-294).

<sup>110</sup> See Philip Morris website, available at <http://www.philipmorrisusa.com/en/cms/Home/default.aspx>. Approximately one of every four cigarettes smoked in the United States is a Marlboro.

Philip Morris products. The second line of its mission statement reads: “Align with Society: We will actively participate in resolving societal concerns that are relevant to our business.” In its products section, Philip Morris lists briefly the packaging, advertising, and product regulations with which it is complying. Philip Morris is clear to specify on this website that “This is the corporate website of Philip Morris USA. It does not sell, advertise, or offer promotions for our products.” The website even offers a “QuitAssist” program for people who decide to quit smoking. While such efforts are laudable, deeper inspection into Philip Morris’ practices reveal other insidious practices that must be corrected. These practices are similar to those of the major companies in the food industry and offer some lessons for tackling obesity.

Then how does Philip Morris become profitable? One look at Philip Morris’ annual report directed at shareholders provides detail into how Philip Morris stays competitive and becomes even more profitable in a world of increased regulatory scrutiny. For one, the Altria Corporation masks the difficulties experienced by Philip Morris USA. The Altria Corporation owns Philip Morris USA, but has a well-diversified product group, including wines, smokeless cigarettes, snack foods, and financial services. Although Philip Morris USA’s operating income increased by only 2.2% between 2008 and 2009, the Altria Group’s profits increased by significantly more, approximately 20 percent.<sup>111</sup> The name change to Altria, itself, resulted from the Philip Morris Companies’ deliberate

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<sup>111</sup> See Altria Group’s Annual Report 2009, available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzkzNTN8O2hpbGRJRD0tMXxUeXBIPtM=&t=1>.

decision to avoid the negative connotations associated with the Philip Morris brand in the United States.<sup>112</sup>

Another means by which the Philip Morris companies have grown is through divestiture. Philip Morris' most significant growth areas lie in its international operations. Philip Morris USA's operating income for its cigarettes in 2009 was a mere \$4.5 billion. Philip Morris International's profit in 2009 was much higher at \$10.04 billion and its net profit margin was 10.22%. In 2006, prior to the spin-off, sales at Philip Morris International were more than double those at the U.S. unit, with 2006 revenues at \$48.26 billion compared to Philip Morris USA's \$18.47 billion.<sup>113</sup> To evade the damper of stringent regulation and litigation in the United States, Philip Morris split its domestic division from its international division, creating Philip Morris International and Philip Morris USA in 2004. While Philip Morris USA stayed with Altria, Philip Morris International became its own public traded company (PM) in 2008. However, the shareholders of Altria continued to be the shareholders of Philip Morris International after the spin-off.<sup>114</sup> Altria's spin-off of Philip Morris International appears to have been a well-executed strategy by the Altria board to remove the potential negative liabilities

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<sup>112</sup> See Stuart Eliot, "If Philip Morris becomes Altria, Its Corporate Image may Lose Some of the Odor of Stale Smoke," The New York Times (Nov. 19, 2001), available at <http://www.nytimes.com/2001/11/19/business/media-business-advertising-if-philip-morris-becomes-altria-its-corporate-image.html>. See also SourceWatch, available at [http://www.sourcewatch.org/index.php?title=Altria\\_Group#Name\\_Change\\_to\\_Altria:\\_Escape\\_from\\_Tobacco](http://www.sourcewatch.org/index.php?title=Altria_Group#Name_Change_to_Altria:_Escape_from_Tobacco) ("A corporate marketing strategy document was written by [Landor Associates](#) (a market positioning strategy consulting firm) for Philip Morris (PM) in December, 1993 by an "identity consultant" as part of PM's "Identity Development Program" provides early evidence that PM was attempting to escape the stigma of selling tobacco products by attempting to "re-position" its image in consumers' minds.")

<sup>113</sup> Id.

<sup>114</sup> See Motley Fool, "Altria shareholders of record on 3/19/08 will receive one PM share for every Altria share that they own in a tax-free distribution on 3/28/08," available at <http://caps.fool.com/blogs/details-of-philip-morris/32312>

associated with its international tobacco business, while retaining ownership stakes in a highly profitable business.<sup>115</sup>

A review of the historical development of Philip Morris USA reveals a chain of legislation, regulations, litigation, and corporate voluntary practices that caused it to appear so wary of public health, while at the same time continuing to promote unhealthy products. Philip Morris had a history of massive lobbying campaigns,<sup>116</sup> marketing to youth to capture its customers, and pretending that its products were safe or becoming “safer” at every turn of the regulatory corner.

*1. Philip Morris’ Strategic Reactions to Litigation, Regulation, and Legislation:*

Philip Morris is, will be, and has always been in the business of generating profits. They are in the business of generating profits to increase shareholder value, not stakeholder value.

Tobacco companies, such as Phillip Morris, have joined hands with the food industry in a lobbying group called the Center for Consumer Freedom, headed by Richard Berman, a tobacco lobbyist. This group is a lobby for the restaurant, food, beverage, alcohol, and tobacco industries. Philip Morris has provided it a grant of \$3,000,000.<sup>117</sup>

a. Philip Morris’ Strategic Reactions to Litigation:

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<sup>115</sup> See “Altria to Spin Off Philip Morris: Company Seeks to Insulate Tobacco Business from U.S. Litigation,” available at [http://www.msnbc.msn.com/id/20494757/ns/business-world\\_business/](http://www.msnbc.msn.com/id/20494757/ns/business-world_business/).

<sup>116</sup> According to the Center for Public Integrity, Altria spent around \$101 million on lobbying the United States government between 1998 and 2004, making it second only to the United States Chamber of Commerce as the most active lobbying organization in the nation. It was the number one lobbying company in the United States between 1998 and 2004. See Center for Public Integrity, available at <http://projects.publicintegrity.org/lobby/top.aspx?act=topcompanies>.

<sup>117</sup> See Michele Simon, Appetite for Profit.

There have been several lawsuits against Philip Morris alleging that its cigarettes were a proximate cause for lung cancer. A recent case, Boeken v. Philip Morris USA Inc. involved a lawsuit against Philip Morris for misleading in its advertisements for light cigarettes. A Los Angeles jury had awarded the plaintiffs \$3 billion in punitive damages and \$5.5 million in back pay to Boeken.<sup>118</sup> This case lasted for over a decade and wound itself all the way to the Supreme Court after multiple appeals by Philip Morris. The product here was light cigarettes that Philip Morris claimed had less nicotine per puff. However, the court found that most smokers compensated for the limited amount of nicotine per puff by taking more puffs. Philip Morris denied such assertions in court, another example of how the company feigned to be taking socially responsible measures, but the ultimate change was minimal.

In fact, marketing these cigarettes as light cigarettes may have exacerbated the problem because smokers who were otherwise trying to quit smoking would smoke the light cigarettes, believing that doing so would lower their risks for cancer and other diseases. They may have also believed that this was an interim approach towards quitting. But in reality, light cigarettes did not curtail the dangers of smoking, but may have actually exacerbated them. In making a few of these arguments, the Appeals Court for the Second District of California upheld the jury verdict, except for the punitive damages amount, which it reduced to \$50 million because the initial ratio of punitive damages to compensatory damages appeared exorbitant.<sup>119</sup> The Supreme Court denied certiorari.

Another argument brought by the plaintiffs in *Boeken* was the particular susceptibility of youth to Philip Morris' cigarettes, especially the Marlboro brand. The

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<sup>118</sup> See "A Big Money Decision Against Big Tobacco," Time Magazine, June 17, 2001, available at <http://www.time.com/time/health/article/0,8599,129687,00.html>

<sup>119</sup> See *Boeken v. Philip Morris*, Court of Appeal of California, 2<sup>nd</sup> Appellate, Div. 4 (4/1/05).

plaintiff Boeken started smoking when he was ten. Marvin Goldberg, Boeken's marketing, advertising, and consumer behavior expert, described the significant impact that cigarettes ads had on adolescent boys and concluded that Philip Morris intended to target its advertisement to young male "starters" from 10 to 18 years old, beginning in 1955.<sup>120</sup> The cigarette advertisements influenced Boeken's desire to smoke at a young age, hooking him to the addictive effects of nicotine. This story provides yet another example of the tobacco industry's intent to capture customers by targeting them at early ages, when they are most impressionable and when they start developing lifelong habits.

Since *Boeken*, Philip Morris split into Philip Morris USA and Philip Morris International.<sup>121</sup> Philip Morris USA and Philip Morris International were both divisions of the Altria Group until the recent spinoff of Philip Morris International. Philip Morris International generated the vast majority of the Altria Group's profits in cigarettes, whereas Philip Morris provided a much smaller percentage. Philip Morris' response to extensive litigation in the late 1990's and early 2000's was to break up the company. One division would be the US money-loser, the public relations face of the company in the face of increased governmental regulatory scrutiny. The other division was the international gold mine that could generate heaps of income off the lungs of people around the world unprotected by their governments' policies.

#### b. Philip Morris' Strategies in Response to the Regulators

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<sup>120</sup> See *Boeken v. Philip Morris, Id.* "Associative learning is particularly effective with children. The Surgeon General's reports of 1994 and 1996 concluded that advertising encourages youth smoking. Studies have shown that the more children are exposed to cigarette advertising, the more they overestimate the number of smokers, and are persuaded that smoking is the norm. Such a belief among children is one of the highest risk factors for youthful smoking. They smoke because 'it's the thing to do'." See also *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 219.

<sup>121</sup> The split occurred in 2004.



Since the 1950's, the FDA and the FTC have tried to regulate Big Tobacco, particularly Philip Morris and RJ Reynolds. In 1997, the FTC filed a lawsuit against RJ Reynolds to ban Joe Camel from most RJ Reynolds advertisements because they tended to affect children.<sup>122</sup> In 1999, the FTC dismissed its complaint because the Master Settlement between the State Attorneys General and RJ Reynolds resolved the Joe Camel issue.<sup>123</sup> The FTC was less successful in banning the Marlboro man from Philip Morris advertisements. The FTC also banned advertisements for tobacco on television. The FTC argued that these advertisements affected consumers' consumption of products that were dangerous to their health. The FTC found that Joe Camel, unlike the Marlboro man, had a particularly pernicious effect on children by luring children into becoming consumers at an early age, thereby locking them into the "cancer sticks" for life.

The FDA, on the other hand, was much less successful in regulating tobacco. In fact, tobacco did not come under the FDA's regulatory jurisdiction for decades until just recently in the 2009.<sup>124</sup> Therefore, the government did not have regulatory authority over the content or substance of what Philip Morris made. Philip Morris could continue to deny the addictive effects of nicotine, meanwhile continuing to produce cigarettes with high nicotine doses.

The government was able to regulate the advertising, but not the actual substance of the product. This restriction on the government's ability to regulate communication but not content relates to an aversion in American society for government's involvement

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<sup>122</sup> See Ira Teinowitz and Judann Pollack, "FTC SET TO BANISH JOE CAMEL: VOTE WILL SEEK TO REMOVE RJR'S CARTOON CHARACTER FROM MOST ADS," *Advertising Age*, May 16, 2007, at [http://adage.com/article?article\\_id=68100](http://adage.com/article?article_id=68100).

<sup>123</sup> See "Federal Trade Commission Dismisses Joe Camel Complaint," (Jan. 27, 1999), available at <http://www.ftc.gov/opa/1999/01/joeorder.shtm>.

<sup>124</sup> See Family Smoking Prevention and Tobacco Control Act of 2009, S. 982, HR. 1256, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00982>.

in a business' product unless that product is known to have adverse effects. The burden of proof for the government or plaintiff to show deleterious impacts is often extremely high, rising to the level of "beyond a reasonable doubt" or "by a preponderance of the evidence."<sup>125</sup>

In the case of advertising, regulation rather than litigation is a primary weapon of choice. Regulation of advertising collides with free speech concerns under the First Amendment. However, a regulation on advertising can overcome First Amendment concerns if it passes the Central Hudson test, which provides that regulations that restrict advertising that is deceptive or that is for an illegal product or service is constitutional. If the advertising is neither deceptive nor for an illegal product or service, the test requires that the government show that the regulation directly advance a substantial interest and is narrowly tailored to advancing that interest.<sup>126</sup>

Philip Morris sometimes resorted to litigation against the regulators themselves in order to continue advertising. The company, in addition to many other large tobacco industry players, would invoke the Central Hudson test in order to claim that regulations restricting its advertisements violated the US Constitution. Along with Lorillard Tobacco Company, Brown and Williamson Tobacco, and RJ Reynolds, Philip Morris filed a lawsuit against the Massachusetts Attorney General on February 1, 2000. In this case, *Lorillard et al. v. Reilly*, Philip Morris and the other major tobacco companies succeeded in convincing the Supreme Court that Massachusetts regulations governing the

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<sup>125</sup> In the American justice system, in a criminal case, it is necessary to prove that an individual or corporation committed a crime "beyond a reasonable doubt." In a civil case, "preponderance of the evidence" is the plaintiff's burden of proof.

<sup>126</sup> See *Central Hudson v. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of NY*, 447 US 557, regulating commercial speech, available at [http://scholar.google.com/scholar\\_case?case=1962482840967580827&q=447+U.S.+557&hl=en&as\\_sdt=2002](http://scholar.google.com/scholar_case?case=1962482840967580827&q=447+U.S.+557&hl=en&as_sdt=2002).

advertisements of their tobacco products violated the First Amendment of the Constitution and failed the Central Hudson Test.<sup>127</sup> The regulations issued by the Massachusetts Attorney General banned cigarette advertisements within 1,000 feet of playgrounds or schools and indoor point-of-sale advertisements lower than 5 feet high.<sup>128</sup> The purpose of these regulations was to curtail the negative effects of advertisements on children. The Supreme Court, in a 5-4 decision, held in favor of Philip Morris and the other cigarette *plaintiffs* that the regulations restricting outdoor and indoor point-of-sale advertisement violated the First Amendment of the Constitution. Applying the Central Hudson Test, Justice O'Connor held that the Massachusetts regulations were more extensive than necessary to advance the substantial State interest of preventing underage smoking. Philip Morris and the tobacco companies succeeded in their constitutional claims against the strongest tool in state governments' regulatory arsenal against tobacco, regulations against advertisements to children.

Philip Morris usually had a perfectly timed response to laws and regulations on its products or advertising. It also helped craft laws affecting its business. For instance, Philip Morris supported federal laws that benefited the corporation by preempting more stringent state laws. In 1964, the FTC issued its first regulations on labeling, the Trade Regulation Rule on Cigarette Labeling and Advertising.<sup>129</sup> The Trade Regulation Rule would have required that cigarette packages state the amount of tar and nicotine in the smoke of the cigarette which the package contains and that cigarette packages and

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<sup>127</sup> See *Lorillard v. Reilly*, 533 US 525 (2001).

<sup>128</sup> *Id.*, also available at [http://www.oyez.org/cases/2000-2009/2000/2000\\_00\\_596](http://www.oyez.org/cases/2000-2009/2000/2000_00_596).

<sup>129</sup> The Trade Regulation Rule on Cigarette Labeling and Advertising was significantly more stringent than the rule that was ultimately adopted. The Trade Regulation Rule would have required that cigarette packages state the amount of tar and nicotine in the smoke of the cigarette which the package contains and that cigarette packages and cigarette advertising carry a statement such as: "Caution: Cigarette 'Smoking is Dangerous to Health. It May Cause Death from Cancer and Other Diseases.'" See "History of Tobacco Regulation," available at [http://www.druglibrary.org/schaffer/library/studies/nc/nc2b\\_8.htm](http://www.druglibrary.org/schaffer/library/studies/nc/nc2b_8.htm).

cigarette advertising carry a statement such as: "Caution: Cigarette 'Smoking is Dangerous to Health. It May Cause Death from Cancer and Other Diseases." Philip Morris lobbied Congress to create a more moderate rule.<sup>130</sup> Philip Morris' lobbying resulted in a more moderate law, the Federal Cigarette Labeling and Advertising Act (FCLAA) that required the tobacco companies to only issue warnings that "smoking may be hazardous to your health."<sup>131</sup> The FCLAA also preempted agency action.

After years of the FTC's and State Attorney Generals' battles against Big Tobacco's advertising, the FDA entered the ring. Philip Morris ironically cheered for the FDA, another tactic Philip Morris used to continue generating profits. In the days leading up to the bill giving the FDA authority to regulate tobacco in 2009, Philip Morris pushed for the legislation because it preempted state laws, many of which were more stringent than the FDA law. Until 2009, FDA's claimed it had no authority to regulate cigarettes unless they bore claims that they could prevent or relieve disease.<sup>132</sup> Only if the petitioners have presented evidence that manufacturers of cigarettes "intended that they affect the structure or any function of the body of man" could FDA regulate them.<sup>133</sup> Evidence to this effect was not demonstrated.<sup>134</sup>

Since the FDA could regulate cigarettes if it demonstrated that manufacturers "intended to affect the structure or function of the body of man," FDA published a notice of proposed rulemaking in which it claimed jurisdiction over cigarettes as a "device" for

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<sup>130</sup> Lobbying by Philip Morris created the more moderate rule on labeling and advertising. See Elizabeth Brenner Drew, "The Quiet Victory of the Cigarette Lobby: How It Found the Best Filter Yet—Congress," *The Atlantic Monthly* (September, 1965), available at <http://www.theatlantic.com/past/docs/unbound/flashbks/smoking/drewf.htm>.

<sup>131</sup> See FCLAA. 15 U.S.C.A. §§ 1331 et seq. [2000]

<sup>132</sup> See Peter Hutt, Richard Merrill, and Lewis Grossman, *Food and Drug Law*, Foundation Press (2007), at 77-78.

<sup>133</sup> *Id.*

<sup>134</sup> 21 U.S.C. § 321 (g)(1)(C).

delivering the “drug” nicotine.<sup>135</sup> The rulemaking would make cigarettes difficult for young people to obtain and included outright bans on some forms of cigarette promotions.<sup>136</sup>

The cigarette manufacturers brought suit, arguing that the FDA’s proposed curbs on promotion violated the First Amendment. In *Coyne Beahm, Inc. v. U.S. Food and Drug Administration*,<sup>137</sup> the United States District Court for the Middle District of North Carolina ruled that the FDA had shown that manufacturers “intended” for cigarettes to affect the body by delivering nicotine. Judge Osteen of the District Court held that the Food, Drug and Cosmetic Act provides that intent may be shown by circumstances surrounding the sale of the article and need not rely only on evidence of manufacturer’s express representations of intended use.

The Fourth Circuit of Appeals overturned this verdict in *Brown and Williamson Tobacco Corporation v. Food and Drug Administration*.<sup>138</sup> The Supreme Court granted certiorari, Justice O’Connor wrote the majority opinion, holding that the FDA’s claim to regulatory jurisdiction over tobacco products violates the clear intent of Congress. Her reasoning was that had Congress intended for the FDA to regulate tobacco, it would not have considered and rejected bills granting such jurisdiction even after the dangers of tobacco use had become well known. Moreover, if the FDA were given authority to regulate cigarettes as drugs or devices, it would ban cigarettes because they are “dangerous.” Justice Breyer dissented, arguing that nicotine is a drug properly subject to the jurisdiction of the FDA because nicotine affects the structure and function of the body,

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<sup>135</sup> 60 Fed. Reg. 41314 (Aug. 11, 1995). See also Hutt, Food and Drug Law, supra note 128. (2007).

<sup>136</sup> Id.

<sup>137</sup> 966 F. Supp. 1374 (M.D.N.C. 1997)

<sup>138</sup> 153 F.3d 155 (4<sup>th</sup> Cir. 1999)

and the FDA is not required to prove express claims by the manufacturer in order to prove intent. The relevant intent can be shown not only by a manufacturer's "expressions," but also by the "circumstances surrounding the article's distribution."<sup>139</sup>

Not only were the regulators subject to lobbying capture by the cigarette manufacturers, such as Philip Morris, but the tobacco industry was also likely to file lawsuits against the regulations questioning the constitutionality and legality of its rules. Philip Morris favored federal preemption of state regulations because they were more lenient and applied across all states. Philip Morris could also craft a more targeted lobbying strategy if the federal government would preempt the patchwork of state legislation.

#### c. Kraft's Strategies in Response to Litigation, Regulation, and Legislation

Where Philip Morris often failed in evading the litigation and public relations nightmares, Kraft has attempted to succeed. Its attempts have focused on marketing itself as "part of the solution" to obesity. Michele Simon, a professor of law at UC Hastings and public health lawyer, writes in *Appetite for Profit*: "When it comes to spinning itself as a responsible corporate citizen where kids are concerned, Kraft Foods wins the prize hands down."<sup>140</sup> Philip Morris, struggling from years of lawsuits and scarlet letters on its reputation, saw Kraft as an opportunity to apply improve its corporate image.

In 1998, Philip Morris acquired Kraft foods in an acquisition valued at \$13.1 billion, the second-largest corporate merger in US history. Between 1998 and 2000,

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<sup>139</sup> 21 CFR § 801.4.

<sup>140</sup> See Simon, *Appetite for Profit* (2006).

Kraft helped Philip Morris increase its advertising to improve its corporate image by 1712%.<sup>141</sup> With the merger, the combined company became worth \$37.6 billion, the largest consumer goods company in the world. Philip Morris did not stop there, but went on a shopping spree at the grocery store by acquiring Nabisco in 2000, another strategic move to burnish its reputation and draw on similar marketing talents and distributional channels as Big Food.

Kraft has made conscious efforts to avoid the protracted legal fights that Philip Morris endured. A major reason that Philip Morris acquired Kraft in the first place was to be seen as more socially responsible and distance itself from the negative image associated with tobacco.<sup>142</sup> It is therefore, no coincidence, then that Kraft's "voluntary" initiatives have happened to coincide with imminent litigation, legislation, or regulation to curtail the obesity crisis.<sup>143</sup> For example, Kraft's promise to scale back ads to children came on the same day that the federal government released its updated 2005 Dietary Guidelines for Americans.<sup>144</sup> It also came only two weeks before the company's presentation for the Institute of Medicine (IOM) committee on food marketing to children. But Kraft did not define how it would scale back the ads, to what extent it would scale back the ads, and at what cost.<sup>145</sup> This pledge has still not been executed to fruition.

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<sup>141</sup> <http://www.corpwatch.org/article.php?id=2535>. Gates foundation urged to keep Philip Morris out of nutrition initiative.

<sup>142</sup> See Philip Morris internal documents.

<sup>143</sup> As part of these initiatives, Kraft has attempted to make many of its products, such as Kool-Aid, Oreo cookies, Fruity Pebbles cereal, Macaroni and Cheese, appear healthier by replacing some ingredients, such as sugar, with others, such as aspartame which are even less healthy. See Simon, *Appetite for Profit*.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*, at 128. "Besides the nutritional dubiousness, what gets lost in most press accounts is that Kraft doesn't plan to reduce overall advertising expenditures for marketing aimed at kids; rather, it will simply change the way these funds are allocated...In other words, Kraft will simply shift some of its budget for advertising unhealthy, 'general-audience' products (e.g., Oreos) over to marketing slightly less unhealthy products (e.g., "1/2 the Sugar" Fruity Pebbles) directly to kids, in certain media."

## VII. Proposals for the FDA Nutritional Guidelines in Countering the Obesity Epidemic

Although the food industry has in many cases captured the legislative process through lobbying or “self-regulation,” some hope rests with regulatory agencies, such as the FDA. The FDA has limited to no authority in regulating the contents of fattening foods that contribute to the obesity epidemic, but it has power in its labeling guidelines. The current food nutrition guidelines from the FDA are woefully inadequate in combating the obesity crisis. For instance, the nutrition labels on foods are not prominent on the packaging. They are on the side of the box, in small font. It would be better for them to be on the front of the box in large font. Visuals are often helpful as well. Listing the fat content with its percentage of daily recommended allowance may not be enough to deter eaters. It would be more useful to indicate whether the content of each ingredient is “high,” “medium,” or “low.” A color alert system would also benefit consumers.

Another critical problem with FDA’s food labeling guidelines is that in the nutrition facts, it does not require a listing of the amounts of each ingredient or the percentages of ingredients in the product. For instance, in a bag of presumably healthier brand French Onion Sun Chips, a consumer can only see a list of ingredients in small font underneath the nutrition facts: whole corn, sunflower oil, whole wheat, sour cream, mozzarella cheese, sugar. But what percentage of each ingredient does the bag contain? Does sour cream constitute 20 percent of the ingredients? The FDA should require that food companies create a pie chart displaying the percentage of each major ingredient with their respective quantities. A mere listing of grams of fat, or grams of carbohydrate does not convey to a consumer exactly what he or she is eating because the consumer cannot see, feel, touch, taste a gram of fat or a gram of cholesterol, or a gram of protein. But a



consumer can feel, see, touch, taste a gram of sour cream or a spoonful of sugar, and they know how each makes them feel afterwards. Cooking advocates often argue: “Eating at home is much healthier because you know exactly what you’re putting in your food.” If the FDA required food companies and possibly restaurants to label the quantities of each ingredient, purchasing these snack foods or going to restaurants would be significantly healthier as people would be fully aware of what they are eating.

### **Conclusion:**

The fight against big tobacco offers several lessons for countering big food in helping solve the obesity crisis among our nation’s youth. The question in the obesity crisis is whether we should consider this to be a fight or a collaborative activity. Should the strategy for regulators be one of collaboration or warfare? The solution lies in a mixed strategy, depending on how the food industry acts. This paper has shown that the food industry has begun to *appear* to play nice. But appearances are often deceiving. The key for regulators will be to distinguish between appearances and reality, and act accordingly. But this crisis should not be seen as a regulator vs. industry battle. The war against tobacco often featured an endless game of cat and mouse, where regulators kept pointing the finger at industry and industry denied the accusations. Meanwhile, the public suffered.

Time and again, as with the tobacco industry, the food industry has demonstrated that it has the funds, the power, and the wherewithal to capture the legislative process. Therefore, it is critical to work with industry in addressing this obesity crisis and industry should be able to find the right incentives to promote healthy solutions. Healthy

solutions can feed the profit motive. At the same time, however, there will be times when the profit motive will be so strong as to conflict with the healthy choice. In such instances, the regulators, whether through legislation, regulation, or litigation, must encourage industry to provide healthy solutions or issue injunctions to prevent them from providing the unhealthy options.

The case against Big Tobacco was a long, protracted one, where only after several decades of costly, litigious, and regulatory warfare, did the federal government decide that nicotine is addictive and contributes to lung cancer. It was costly for industry, taxpayers, and our children. The United States cannot afford to do this with the obesity crisis. The crisis is too severe and is rapidly reaching epidemic proportions. We cannot afford to wait and draw out this struggle. Although proving that some substances like high fructose corn syrup cause addiction and obesity is difficult, government must educate children in the interim on healthy choices and curtail the advertisements of these products on television and in schools. In addition, the federal government should tax sodas and “junk” foods at a rate that has a significant impact on decreasing consumption of these products while not overly burdening the poor. The taxes on tobacco proved effective up to a certain amount and then seemed excessive. Moreover, we must prevent the insidious collaboration of big food with big tobacco in the form of mergers and acquisitions. Now that the major tobacco companies have lost significant market share in the United States due to more stringent regulations, the tobacco companies have adopted a two-pronged corporate strategy: 1. Sell cigarettes in countries where there are lax regulations; and 2. Acquire major food companies that currently have less regulatory scrutiny and leverage their advertising prowess to selling unhealthy “junk” foods. Philip

Morris' recent acquisition of Kraft is a case in point. RJ Reynolds' acquisition of Nabisco in the 1980's was another example. The two major tobacco companies acquired the two most significant junk food companies.

The nation cannot afford for the same tobacco companies that played war games with our children's respiratory health to continue to do so with foods that contribute to childhood and adult obesity. It is critical for the government and litigators to understand the strategic motivations of the tobacco companies historically so that they can better understand their new motivations as they acquire the food companies. We as a nation must be on our guard, but at the same time, not so hostile to these companies that we limit ourselves from providing industry with the proper incentives to make our nation healthy.