Legal Strategies in Childhood Obesity Prevention: Workshop Summary

ISBN
978-0-309-21019-5

104 pages
6 x 9
PAPERBACK (2011)

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LEGAL STRATEGIES IN CHILDHOOD OBESITY PREVENTION

Workshop Summary

Lynn Parker, Matthew Spear, Nicole Ferring Holovach, and Stephen Olson, *Rapporteurs*

Standing Committee on Childhood Obesity Prevention

Food and Nutrition Board

INSTITUTE OF MEDICINE
OF THE NATIONAL ACADEMIES

THE NATIONAL ACADEMIES PRESS
Washington, D.C.
www.nap.edu

THE NATIONAL ACADEMIES PRESS 500 Fifth Street, N.W. Washington, DC 20001

This study was supported by Grant No. 61747 between the National Academy of Sciences and The Robert Wood Johnson Foundation. Any opinions, findings, conclusions, or recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the view of the organizations or agencies that provided support for this project.

International Standard Book Number-13: 978-0-309-21019-5
International Standard Book Number-10: 0-309-21019-4

Additional copies of this report are available from the National Academies Press, 500 Fifth Street, N.W., Lockbox 285, Washington, DC 20055; (800) 624-6242 or (202) 334-3313 (in the Washington metropolitan area); Internet, http://www.nap.edu.

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Printed in the United States of America

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Suggested citation: IOM (Institute of Medicine). 2011. *Legal Strategies in Childhood Obesity Prevention: Workshop Summary*. Washington, DC: The National Academies Press.

"Knowing is not enough; we must apply.
Willing is not enough; we must do."
—Goethe

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*Institute of Medicine planning committees are solely responsible for organizing the workshop, identifying topics, and choosing speakers. The responsibility for the published workshop summary rests with the workshop rapporteurs and the institution.

Reviewers

This report has been reviewed in draft form by individuals chosen for their diverse perspectives and technical expertise, in accordance with procedures approved by the National Research Council's Report Review Committee. The purpose of this independent review is to provide candid and critical comments that will assist the institution in making its published report as sound as possible and to ensure that the report meets institutional standards for objectivity, evidence, and responsiveness to the study charge. The review comments and draft manuscript remain confidential to protect the integrity of the process. We wish to thank the following individuals for their review of this report:

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RUSSELL PATE, University of South Carolina
STEPHEN SUGARMAN, University of California, Berkeley

Although the reviewers listed above have provided many constructive comments and suggestions, they did not see the final draft of the report before its release. The review of this report was overseen by **HUGH TILSON,** University of North Carolina, Chapel Hill. Appointed by the Institute of Medicine, he was responsible for making certain that an independent examination of this report was carried out in accordance with institutional procedures and that all review comments were carefully considered. Responsibility for the final content of this report rests entirely with the workshop rapporteur and the institution.

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Introduction

Key Presenter Messages

- Increasing levels of obesity among children threaten to increase future disease rates among adults.
- The involvement of legal authorities can greatly accelerate change in obesity-related policies and practices.
- A wide range of change agents can pursue legal approaches to obesity prevention.

Since 1980, childhood obesity rates have more than tripled in the United States. Recent data show that almost one-third of children over 2 years of age are already overweight or obese (Ogden et al., 2010). While the prevalence of childhood obesity appears to have plateaued in recent years, the magnitude of the problem remains unsustainably high and represents an enormous public health concern. All options for addressing the childhood obesity epidemic must therefore be explored. In the United States, legal approaches have successfully reduced other threats to public health, such as the lack of passive restraints in automobiles and the use of tobacco. The question then arises of whether laws, regulations, and litigation can likewise be used to change practices and policies that contribute to obesity.

This question was the subject of a workshop held on October 21, 2010, in Washington, DC. Hosted by the Institute of Medicine's (IOM's) Food and Nutrition Board, the workshop was overseen by the Standing Committee on Childhood Obesity Prevention, which was formed in 2007 to stay abreast of new developments in the field, decide what topics in the field need additional focus, and recommend workshops and consensus studies to address those topics. In keeping with its mandate to cast a wide net for solutions to the obesity problem, the committee decided that an examination of legal strategies was warranted.[1]

More than 100 people attended the workshop, which also was webcast for those who could not attend in person. Speakers examined:

- current legal strategies at the national, state, and local levels and their outcomes;
- other public health initiatives that have used legal strategies to elicit changes in society and industry;
- the challenges involved in implementing such initiatives;
- circumstances in which legal strategies are needed and effective; and
- opportunities for coordinating existing and future legal strategies and sharing information on successes.

Legal terms used by speakers in these presentations are defined in Box 1-1.

THE POTENTIAL OF LEGAL STRATEGIES

Obese children and adolescents are at increased risk for a variety of adverse health outcomes and far more likely to become obese adults, observed Kelly Brownell, director, Rudd Center for Food Policy and Obesity, Yale University, in his opening remarks at the workshop. As a result, they will be more likely as adults to struggle with cardiovascular disease, diabetes, or other health challenges. Rising obesity rates have already contributed significantly to the growth in health care costs; according to a recent estimate,

[1] The members of the planning committee for the workshop included Kelly Brownell of Yale University, William Dietz of the Centers for Disease Control and Prevention, Robert Garcia of The City Project in Los Angeles, Mary Story of the University of Minnesota, Stephen Teret of the Johns Hopkins Bloomberg School of Public Health, and Joseph Thompson of the Robert Wood Johnson Center to Prevent Childhood Obesity. The planning committee's role was limited to planning the workshop and did not include the preparation of this summary; this summary was prepared by a rapporteur, in collaboration with IOM staff, as a factual account of the presentations and discussions that took place at the workshop. Lynn Parker, Nicole Ferring Holovach, and Matthew Spear from the IOM were instrumental in organizing and running the workshop.

BOX 1-1
Legal Terms Used in This Report

Class action. A lawsuit brought on behalf of a group of people with a common interest.

Commercial speech. The exact boundaries are ill defined, but the U.S. Supreme Court has described commercial speech as speech that proposes a lawful commercial transaction and as expression related solely to the economic interests of the speaker and its audience.

Excise tax. A duty or impost levied upon the manufacture, sale, or consumption of commodities.

Expressive conduct. Conduct with a communicative element.

Immaterial. Not relevant and important to a particular case.

Injunction. A court order requiring an individual to do or to stop doing something.

Lawsuit. A court proceeding, generally civil rather than criminal, intended to resolve a dispute between the parties to the proceeding.

Legislation. Law enacted by Congress, a state legislature, or a local legislative body.

Litigation. A lawsuit brought in court.

Material. Relevant and important to a particular case.

Police power. The authority conferred upon the states by the Tenth Amendment to the U.S. Constitution, which the states can delegate to local authorities, to enact measures to preserve and protect the safety, health, welfare, and morals of the community.

Preemption. Refers to the ability of a higher level of government to prohibit certain actions by a lower level of government. The U.S. Constitution's Supremacy Clause explains that federal law is the supreme law of the land, which means that federal legislation or regulation can preempt state or local law. Likewise, state-level legislation or regulation can preempt local laws.

Public forum. Places, such as streets and parks, that by tradition or government fiat have been devoted to assembly and debate for use by the public.

Regulations. Rules and administrative codes issued by government agencies that have the full force and effect of law.

annual direct health care costs in the United States total $168 billion (Cawley and Meyerhoefer, 2010).

Although legal approaches alone will be insufficient to stem the childhood obesity epidemic, such approaches hold promise for greatly accelerating progress, said Brownell. He cited two examples.

In the Smart Choices program, a group of people from within and outside the food industry established criteria for certain nutrients in foods. Any food that met those criteria could use the Smart Choices symbol on its product packaging. However, foods that met the criteria included Cookie Crisp cereal, Froot Loops cereal, and Hellmann's mayonnaise, which evoked what Brownell called "an interesting response." A critical article on September 4, 2009, in *The New York Times* questioned the criteria and asked whether the food industry had set such lax standards that foods most people would not consider healthy could use the label. On October 14, the Connecticut attorney general launched an investigation into whether the Smart Choices program was misleading and deceptive to Connecticut residents. Other attorneys general were said to be poised to follow Connecticut's example.

On October 20, the commissioner of the Food and Drug Administration held a conference call in which she expressed concern over the Smart Choices program, and that call received considerable attention. On October 23 the program was shut down, just 7 weeks after the critical article in the *Times* appeared. "Could any amount of science have created that rapid a change?" asked Brownell. He suggested that the science was helpful in the action taken, but the science alone would not have produced this outcome. It was the involvement of legal and regulatory officials that yielded this rapid result.

Another example involves the Cocoa and Rice Krispies cereal line, whose labels announced during the 2009 H1N1 influenza pandemic that it "now helps support your child's immunity." After San Francisco city attorneys pursued Kellogg's for its labeling, with accompanying protests from various nongovernmental organizations and public health officials, the company changed its labeling.

According to Brownell, these two examples demonstrate that the involvement of legal authorities creates the potential for rapid change on prominent policy issues. To tap this potential, it is important to identify the change agents who can both pursue and respond to a legal strategy, whether regulatory officials, public health officials, elected leaders, or others. Partnerships formed to pursue legal strategies can be critical as well.

ORGANIZATION OF THIS SUMMARY

This summary presents the main observations and conclusions of the workshop speakers; it also describes the discussions engendered by the presentations. All of the observations and conclusions described in this summary, some of which are highlighted in boxes at the beginning of each chapter, are those of the workshop participants and should not be interpreted as positions of the IOM.

Following this introductory chapter, Chapter 2 examines the successes legal approaches have had in two other areas: passive restraints in auto-

mobiles and firearm safety. Chapter 3 describes actions to prevent obesity taken by two government agencies—the Federal Trade Commission and the Food and Drug Administration—while Chapter 4 offers a complementary discussion of industry perspectives on obesity prevention. Chapter 5 explores the possible use of regulations and taxes to change food consumption patterns, and Chapter 6 looks at how the law can be used to increase physical activity. Chapter 7 addresses litigation and its role in changing the practices and policies of organizations in the private and public sectors. Chapter 8 describes other steps that state and local officials can take to combat the obesity epidemic. Finally, Chapter 9 briefly recaps the main themes of the workshop.

It should be noted that the workshop was intended to explore the boundaries of potential legal approaches to address childhood obesity, not to arrive at recommendations for the use of such approaches. Some of the ideas discussed at the workshop may be workable; some may not. The aim was to be as creative as possible in examining the obesity-related practices of the food and food service industries, food marketers, the media, governments at all levels, and consumers.

As the chair of the Standing Committee has written elsewhere (Kumanyika, 2007), the problem of childhood obesity is as inescapable as our image in a mirror. These issues affect everyone, whether overweight or not. The trajectory and reach of the childhood obesity epidemic reflect changes in the society in which we live, and solving the problem will require similarly pervasive societal changes. Legal strategies are one approach, but they must be complemented by a wide range of other carefully considered interventions.

2

Legal Approaches in Other Areas

Key Presenter Messages

- The combined use of legislation, regulation, and litigation was necessary to force the inclusion of air bags in automobiles.
- A "life span of the gun" perspective has been useful in improving firearms injury prevention, with legislation, regulation, and litigation focusing on the manufacture, design, marketing, sale, possession, and use of guns.
- Unlike automobiles and firearms, food is essential to life, but legislation, regulation, and litigation still can be applied to the manufacture, marketing, sale, and consumption of food to help prevent childhood obesity.

As noted in Chapter 1, legal approaches have reduced the incidence and severity of injury and disease in areas other than childhood obesity prevention. Stephen Teret, professor and associate dean, Department of Health and Policy Management, Johns Hopkins Bloomberg School of Public Health, and director, Center for Law and the Public's Health, reviewed experiences in two of these areas: the use of air bags in automobiles and prevention of gun violence. Although food is a quite different commodity

from either cars or guns, the progress and obstacles in these other areas offer important lessons for obesity prevention.

AIR BAGS IN AUTOMOBILES

Motor vehicle crashes cause more than 33,000 deaths and hundreds of thousands of injuries in the United States each year, noted Teret. They are the most common cause of death for Americans aged 4 to 34 and are the third leading cause of years of life lost prematurely, behind cancer and heart disease (NHTSA, 2008).

A major change in recent decades that has reduced the number of automobile-related deaths and injuries is the use of seatbelts and the presence of air bags in cars. Federal legislation created the agency that would become known as the National Highway Traffic Safety Administration, and federal regulation then required the installation of seatbelts in cars. But establishing this requirement was not enough. For years after seatbelts were installed in cars, the percentage of drivers and passengers who used them hovered around 10 or 15 percent, said Teret. The question then became how to employ the law to make people use their seatbelts.

Eventually, the states began to pass laws that mandated the use of seatbelts. The percentage of people using seatbelts rose, but still not enough to prevent many injuries. Furthermore, in crashes involving severe deceleration, seatbelts did not provide enough protection to prevent all injuries.

A campaign to install air bags in cars was therefore initiated, but not without controversy. Regulations for the installation of air bags were promulgated by the National Highway Traffic Safety Administration but were subsequently revoked because of the politics of the time. The courts became involved in addressing the legal propriety of rescinding the regulations, and in a landmark case in 1983, the U.S. Supreme Court ruled that the regulations requiring automatic restraints, which include air bags, were valid.

Even after that ruling, it often was impossible to buy a car equipped with air bags. Advocates therefore turned to litigation in state courts. The first such case brought in the United States involved a woman who had been rendered a quadriplegic in an automobile crash. The lawsuit stated that the defendant in the case, Ford Motor Company, should be held liable for not offering an air bag as an option in her car. The first patent for an air bag had been issued in 1953, but the automobile companies were not using this life-saving technology. The lawsuit stated that if cars had been offered with air bags, either as standard equipment or as an option, perhaps this injured woman and many thousands of others would not have suffered severe and disabling injuries.

Ten days into the trial, Ford Motor Company settled the case through a payment of $1.8 million. The trial generated a great deal of press coverage,

which led to many similar lawsuits against the automobile companies for failing to offer air bags in cars. In 1985, when Ford Motor Company filed required papers with the Securities and Exchange Commission, it said that for that year, it had more than $1 billion in pending litigation claims related to air bags. This was also the year that Ford decided to offer air bags as an option in its cars, Teret said. It was thus a combination of regulation and litigation that led to enhanced automobile safety.

Automobiles are an important and necessary product in our society, Teret observed, and the same can be said of food. Although automobiles are not as necessary as food, they are important enough that it was desirable to change their design to protect the public's health.

Those who use the law to improve public health sometimes encounter roadblocks. After the initial air bag cases were decided, the U.S. Supreme Court ruled that personal injury lawsuits against car makers for failure to install air bags could no longer be successfully brought because they are preempted by existing federal regulations. Preemption is an important consideration in the use of the law to protect public health, Teret noted. For example, Congress can preempt states or localities from legislating in particular areas, or federal laws or regulations can preempt product liability litigation.

FIREARMS INJURY PREVENTION

Deaths caused by firearms in the United States have distinct epidemiological characteristics, said Teret. Certain people, places, products, and circumstances are at higher risk for gun violence. How can the law be used to reduce the tremendous human suffering from gun violence?

Legal approaches generally can be divided into legislation, regulation, and litigation, each of which occurs at three different levels—federal, state, and local. Products such as guns can be seen as having a life span. They are designed and manufactured, marketed and sold, and ultimately used. The question then becomes which combination of legal approaches at which level yields the greatest payoff at different stages of a product's life, whether the product is a gun, an automobile, or food.

With guns, safety messages often focus on their use. People are trained to be careful with them and to use them safely. They are told to store guns in places where they cannot be easily accessed, although many people do not observe these precautions.

Another option is to put a legal focus on an earlier stage in the life of a gun. For example, some people are legally prohibited from purchasing guns, and gun sales are subject to various restrictions. Legal approaches also can focus on the marketing of guns. Teret recalled being involved in a petition before the Federal Trade Commission regarding the advertising of guns in

magazines, including *Ladies' Home Journal*. One advertisement showed a picture of a little girl lying in bed with her Raggedy Ann doll. The room was dark, and a window revealed that it was nighttime. The caption suggested that those wishing to protect their family should acquire a semiautomatic pistol and keep it in the home. Yet epidemiological data clearly showed that having a gun in the home was more perilous than protective for those living in the home. According to Teret, "We thought that this was unfair and deceptive advertising." After the petition was filed, the gun industry decided to stop using such advertisements

An even more effective approach, Teret said, may be to look at the design and manufacturing of a product. If guns were designed with safeguards that have existed for more than a century—such as trigger locks, indicators that a bullet is in the chamber, or magazine disconnect devices that disable the gun when a bullet clip is removed—fewer deaths from firearms would occur in the United States each year.

Teret suggested that focusing legal and regulatory efforts at the early rather than later stages of the life of a gun would likely be more effective in reducing the incidence of gun violence. This point is illustrated in Figure 2-1.

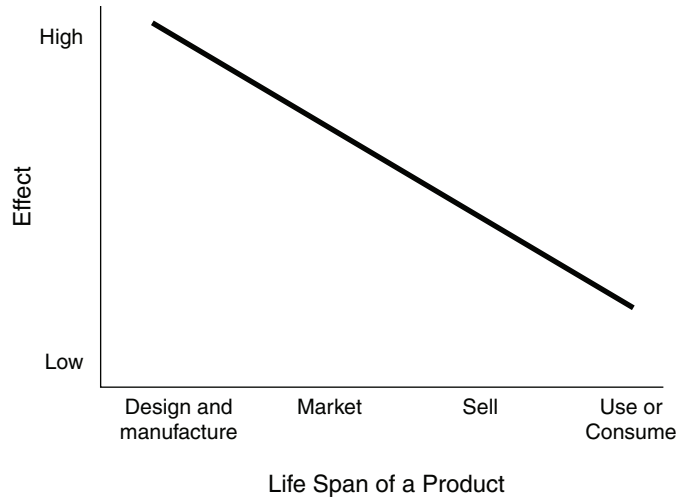

FIGURE 2-1 Graphical representation of the suggested effectiveness of the law throughout the life span of a product that may be harmful to health.
SOURCE: Adapted from Teret, 2010.

THE CONNECTION TO FOOD

The history of legal actions in the areas of automobile and gun safety suggests many potential ways to intervene in the childhood obesity epidemic, Teret said. For example, a life span perspective could be a useful way of conceptualizing legal approaches to food. Laws or regulations could be applied to the consumption of food, as with limits on restaurant portion sizes (although this type of measure would admittedly be controversial). Or legal approaches could focus on the sale of food, as with regulations affecting the food sold in schools. The sale of some food products to minors in places other than schools also could be regulated, or the sale of food could be influenced through taxes, as with the taxation of sugar-sweetened beverages or calorie-dense foods

Legal approaches that affect marketing focus on an even earlier stage of the life span of food and would likely be more effective in reducing obesity. Teret suggested that legislation, regulations, and litigation at the federal, state, and local levels need to do a better job of controlling the marketing of foods so that unfair or deceptive claims about certain foods being healthy are disallowed. The law also can intervene to provide information to consumers that will help them make reasonable choices.

Marketing to children raises special considerations. Commercial free speech (discussed in Chapter 5) is valued in the United States, but Teret identified marketing to children as a rich area for exploration with respect to legal intervention in the childhood obesity epidemic.

Legal approaches can even be applied to food at the design and manufacturing stage, said Teret. Perhaps these approaches could influence the caloric density of foods or their potentially addictive qualities, especially for children. Teret suggested that opportunities to use legislation, regulation, and litigation to address childhood obesity are underexplored.

3

Actions by Federal Agencies: A Focus on Foods and Beverages

Key Presenter Messages

- The Federal Trade Commission has been examining the self-regulation of marketing practices by the food industry and is working on nutritional standards for food marketed to children and adolescents.
- The Food and Drug Administration has been implementing the federal menu labeling law, updating the Nutrition Facts label, defining dietary guidance statements, and considering a front-of-package labeling system.
- Although their reach and budgets are limited, federal agencies have many potential ways to help prevent childhood obesity.

Three speakers at the workshop described actions taken by the Federal Trade Commission (FTC) and the Food and Drug Administration (FDA) to alter some of the factors that contribute to childhood obesity in the United States. Although there are limits on the authority of federal agencies to regulate the manufacture, marketing, and consumption of foods and beverages, legislation also gives them unique leverage points for combating the obesity epidemic.

INITIATIVES BY THE FEDERAL TRADE COMMISSION

The FTC is involved in helping to prevent childhood obesity in several ways, including public education and the enforcement of regulations, said David Vladeck, director of the FTC's Bureau of Consumer Protection. In his presentation, Vladeck focused on two major initiatives—one directed at food marketing and the other at nutritional standards.

In 2008 the FTC released a groundbreaking report on food and beverage marketing to children based on 2006 data (FTC, 2008). Previously, no government agency had been able to document as thoroughly and precisely the dollars spent on the wide array of marketing techniques being used to promote foods and beverages to children. By using its powers of compulsory process, which give the agency the legal authority to compel the provision of certain kinds of information, the FTC was able to amass an unprecedented data set on these techniques. Based on these data, the FTC made several key recommendations:

- All food and beverage companies should adopt and adhere to meaningful nutrition-based standards for marketing their products to children under 12.
- These nutrition-based standards should not apply just to television, radio, print, and Internet advertising but cover the full range of marketing activities directed at children, including packaging and in-store promotions.
- All companies should cease in-school marketing and promotion of foods and beverages that fail to meet meaningful nutritional standards.
- Media and entertainment companies should institute their own self-regulatory programs.

In its study, the FTC did not address the question of whether there is a link between food marketing to children and childhood obesity rates. However, in a comprehensive survey of the then-available research on the relationship between food advertising on television and requests for, preferences for, and consumption of the advertised products by children and adolescents, the Institute of Medicine (IOM) concluded that there is strong evidence that television advertising influences food and beverage requests, preferences, and short-term consumption by children aged 2 to 11 (IOM, 2006). The evidence with respect to adolescents and to a relationship with long-term consumption patterns was not as strong. The IOM study did not draw a conclusion about the causal relationship between television advertising and adiposity in children and adolescents, although the two are clearly associated, said Vladeck. He noted that additional research has occurred

in this area since 2006 and that updating this literature is warranted if not already under way.

In its 2008 report, the FTC also committed to conducting a follow-up study a few years later. That follow-up study has now begun. On August 23, 2010, the FTC sent a second round of compulsory process orders to 48 companies, including most of the original 44 companies. These orders sought similar but expanded information about marketing activities and expenditures for calendar year 2009, as well as nutritional information on the foods marketed to children.

The timing of this follow-up study is propitious, said Vladeck. In 2006, efforts by the industry to self-regulate its activities in this area were in their formative stages. By the close of 2009, the industry had 3 years of experience with self-regulation. In its forthcoming report, the FTC will be able to document not only the dollars spent on marketing but also the nutritional properties of the advertised products. In this way, it will be able to measure the extent to which self-regulation has achieved its stated goal of changing the nutritional landscape of food marketing to children.

The second initiative Vladeck described is a joint undertaking of the FTC, the FDA, the Centers for Disease Control and Prevention, and the U.S. Department of Agriculture. The Congress has charged an interagency working group with recommending nutritional standards for foods to be marketed to children and adolescents. The group has been preparing a notice proposing a set of nutritional standards—a large and complex task, according to Vladeck. When the proposal is published, the group will seek public comment, "and the more comment the better," he said, since "we have struggled with some of these issues."

The proposed standards will not be regulations, Vladeck emphasized. Rather, the voluntary cooperation of the food industry will be sought in using the standards to raise the nutritional bar for foods marketed to children and bring greater uniformity to the standards companies follow. Regulators and Congress "have made the decision to give self-regulation a chance," said Vladeck.

INITIATIVES BY THE FOOD AND DRUG ADMINISTRATION

As the agency responsible for regulating the labeling of most food products on the market, the FDA is involved in many activities with a connection to childhood obesity. Barbara Schneeman, director, Office of Nutrition, Labeling, and Dietary Supplements, Center for Food Safety and Applied Nutrition, FDA, described four specific initiatives: implementing the federal menu labeling law, updating the Nutrition Facts label, defining dietary guidance statements, and considering a front-of-package labeling system or systems.

Federal menu labeling law: The Affordable Care Act of 2010 created a requirement for nutrition information on menus, menu boards, and vending machines. This requirement applies to chain restaurants with 20 or more locations and similar retail food establishments. They must disclose calorie content on menus and menu boards, make additional nutrition information available upon request, and provide a statement on the menu or menu board about the availability of that additional information. They also must provide calorie information for most self-service items and foods on display. The law applies as well to vending machine companies that own or operate 20 or more vending machines. If the Nutrition Facts information for products in the machines is not readily available to consumers, the calorie information for those products must be disclosed. Since Americans on average now consume about a third of their total calories outside the home, Schneeman said, labeling of these foods has become an increasingly important issue. In July 2010 the FDA issued a *Federal Register* notice seeking research and expert opinion on menu labeling, in response to which it received 873 comments. In that same month, the agency published a *Federal Register* notice regarding restaurants that may not be covered by the federal law but are covered by state or local requirements and could choose to be covered by the federal law. In August the FDA published a guidance document explaining the preemptive effect of the new law, along with draft guidance on the provisions of the law that were effective immediately. At the time of the workshop, the agency was working to finalize its implementation guidance for the new law, with a statutory deadline of March 23, 2011, for publishing the proposed regulations.

Nutrition Facts label: The FDA has been working to update the Nutrition Facts label that since 1994 has been mandated to appear on most packaged food in the United States. The label includes information on serving size, calories, and nutritional content based on daily values. The agency plans to issue proposed regulations regarding the prominence of the calorie information, updated daily value information, and updated serving size information for certain products. Additional issues on which the FDA is working involve the declaration for carbohydrates, the utility of the footnote that appears on the label, and the inclusion of nutrients of public health value.

Dietary guidance statements: The FDA is working on the dietary guidance statements used in food labeling, which relate to general dietary patterns and practices that promote health. An example is: "Substitute higher fat snacks with fruits and vegetables for a quick alternative." The use of these statements by manufacturers is voluntary, but the FDA wants to provide guidance on conditions under which it is appropriate to use such statements on food products, Schneeman said. The FDA also believes that it would be beneficial to define these types of statements more clearly.

Front-of-package labeling: Finally, the FDA wants to develop a front-of-package labeling system or systems that consumers will notice, understand, and use to make healthier food choices. This labeling also should encourage consumers to make more use of the Nutrition Facts label. Front-of-package labeling can be divided roughly into two categories: information based on nutrients, and numeric or symbolic summary symbols. The latter might include a logo; a numeric or symbolic rating (such as multiple stars); or a system based on red, yellow, and green highlighting. An example of what has been studied is a shorter version of Nutrition Facts, which the FDA has termed Nutrition Tips. The agency also has tested the provision of nutritional information through a rating on the front of the package or through the use of a term such as "healthy." The IOM has been studying front-of-package labeling, and Schneeman said the FDA is following this work carefully to learn how such labeling can be most effective. At the time of the workshop, the Office of the Assistant Secretary for Planning and Evaluation also was carrying out a study on labeling that would help inform the FDA's actions. According to Schneeman, the FDA wants "to make sure that we have the right information, so as we move forward with guidance, we are coming up with something that we know will be of value to consumers."

In addition to the above initiatives, the FDA is involved in food labeling in other ways. For example, in February 2010 it sent warning letters to 17 companies about misleading claims on the front of packages. The agency also is actively involved with other agencies in the development of the Dietary Guidelines for Americans and in efforts addressing the marketing of foods to children.

Michael Landa, acting director, Center for Food Safety and Applied Nutrition, FDA, spoke more broadly about the FDA's role in preventing childhood obesity. The agency issues and enforces regulations requiring various types of label disclosure. It enforces a general prohibition against labeling that is false or misleading. Also, it engages in some educational activities, although its budget for such activities is limited.

The FDA's underlying goal, Landa said, is to determine how to motivate people to follow healthful diets. How can labels be designed and applied so that people will understand, pay attention to, and use them? "Most of our efforts are geared to providing information to help consumers construct and follow healthful diets," he said. "You have to get that right. You have to get it in language that people understand, but also in language that they can and will use."

The FDA also oversees the way industry uses health claims. For example, the agency authorizes by regulation a particular kind of health claim. "The paradigm is, 'consumption of X may help reduce Y,'" said Landa. "Those [claims] are pretty tightly controlled." In contrast, the FDA is still

involved in litigation involving health claims not supported by "significant scientific agreement," a statutory standard based on publicly available data of a certain quality. Courts have ruled against the FDA's attempts to ban such claims and have asked whether they could be qualified through the use of a disclaimer. The FDA has objected to the use of such qualified health claims, but the courts have ruled that the First Amendment does not allow the agency to ban the formulation and use of at least some such claims by companies. "Much of the litigation has been over what that formulation is," said Landa.

Finally, Landa expressed the opinion that one of the primary reasons for the increased use of seatbelts was education of elementary school children. "At least when my son was in elementary school, heaven help the driver or passenger in a car if he did not have his seatbelt on." To prevent childhood obesity, Landa said, the government will need to devote "a good deal of energy, time, money, and thought to education."

DISCUSSION

During the discussion period, Bruce Silverglade, Center for Science in the Public Interest, asked Landa about a different kind of health claim, which takes the form of "consumption of X helps maintain a healthy Y." Landa replied that the FDA has no premarket control over these so-called structure–function claims; the law does not require that companies notify the FDA before such claims are made. The regulatory tool available to the FDA in these cases is the statute barring interstate commerce in food products that bear false or misleading labeling. The law states that companies should have substantiation to support structure–function claims. But the FDA, unlike the FTC, does not have compulsory process power to force a company to submit the evidence it has. The FDA can search the published literature to see whether it contains evidence supporting the claim, but even if it does not, this does not mean that data supporting the claim do not exist.

Silverglade also asked Vladeck whether the FTC needs evidence concerning causation to make a claim that a product's labeling is deceptive. Vladeck replied that the FTC does not take the position that causality or materiality is a necessary element of a claim. It remains a point of contention whether a company can defend against a claim by proving that no one was affected—that is, that the claim is immaterial. As an example, Vladeck noted that the FTC sent letters to companies about their use of omega-3 fatty acids in marketing claims, and many of the companies changed the claims. "If there were litigation over any of those claims," he said, "we could have established that these claims were material to purchasing decisions."

Several workshop participants discussed the extent to which legal strategies should differ for products that are not necessary to life, such as tobacco, and those that are necessary to life, such as food. Teret pointed out that some people in the advocacy and legal communities believe that the ultimate goal should be to eliminate the manufacture and smoking of cigarettes, whereas no one would make that claim about food or the use of motor vehicles. Thus legal strategies and legal goals must be appropriate to the type of product, he suggested. A finer-grained analysis could consider particular kinds of foods, such as calorie-dense foods, he said.

Vladeck emphasized that just because a product is necessary does not mean that the law cannot be used to effect change. He noted that many successful public health initiatives have involved necessary products. The introduction of the air bag (discussed in Chapter 2) is a good example. No one was going to argue that we should eliminate all motor vehicles. . . . The argument is that you needed to effect change."

Schneeman pointed out that those who formulated the 2005 Dietary Guidelines struggled with the issue of necessary and unnecessary consumption. One way to analyze food consumption is to calculate how many "discretionary calories" a person can consume without gaining weight, although some object to this term. A person who engages in low to moderate levels of physical activity has a relatively limited number of calories from which to gain necessary nutrients without becoming obese, and thus must consume nutrient-dense foods. Yet many Americans consume more calories than they can burn without meeting their nutrient needs. "That is part of the dilemma of how we think of food. Yes, it is necessary, but how should we be thinking of it in terms of meeting our nutrient needs?" The advisory committee working on revising the Dietary Guidelines has been examining the concept of nutrient-dense foods, Schneeman said.

Scott Faber of the Grocery Manufacturers Association (whose presentation at the workshop is summarized in the next chapter) observed that a glass of 2 percent milk is not an inherently dangerous product like a gun. The regulatory approach taken toward milk therefore should be different from that taken toward certain other commercial products. Moreover, applying the same regulatory approach to all foods is problematic because it is difficult to draw the line between necessary and unnecessary calories. For example, one person's list of discretionary foods would be different from another's. Furthermore, such distinctions would be difficult to implement given the many thousands of food items in the marketplace. Thus, said Faber, setting limits on manufacturers is a complex undertaking that may not be the best approach to the problem.

In response to a question about preventing childhood obesity in communities of color, specifically in Hispanic communities, Vladeck noted that the FTC is an antifraud agency and not a public health agency. However,

it does carefully monitor Spanish-language media for misleading claims directed to Hispanic communities. Schneeman pointed out that the FDA has provisions for the dual labeling of food products in Spanish and English. The agency also has outreach and education programs for Hispanic communities. For example, the Spot the Block program has a component aimed at getting Spanish-speaking communities to make greater use of the Nutrition Facts label. Similarly, Landa said that the front-of-package labeling initiative will include a public education campaign focused on particular groups and using multiple languages. "We understand that there are different communities that will use these labels differently, and we need to structure our public education campaign accordingly," he said.

In response to a question about how the FDA can enforce the menu labeling provisions for companies that fail to comply, Landa suggested that the enforcement tools available to the agency are not a good fit with the regulations. The agency can seize products, issue injunctions for failures to comply, or prosecute, but it lacks the authority to seek civil monetary penalties. If states issue laws that are identical to federal requirements, the state laws will not be preempted, and the states can then use whatever enforcement mechanisms are available to them. "My own view," said Landa, "is that the enforcement mechanism that would work in this circumstance is a fine, under some minimal administrative process that met the requirements of constitutional due process. But we don't have that authority."

Joseph Thompson, a member of the IOM's Standing Committee on Childhood Obesity Prevention, asked whether federal agencies view childhood obesity as an epidemic and therefore deserving of special treatment, or as a new issue that should be tackled through regular processes. For example, the outbreak of H1N1 influenza was treated as an epidemic and led to the expenditure of hundreds of millions of dollars to buy vaccines of uncertain efficacy. Vladeck responded that labeling childhood obesity an epidemic would not necessarily be crucial to the FTC's actions. The agency already views the situation as critical and is devoting "extraordinary resources" to address it. In its most recent study of food marketing, for example, the FTC asked 48 companies for enormous amounts of data involving many hundreds of products. "This is a massive undertaking," said Vladeck.

Landa said that the increasing prevalence of childhood obesity has not changed how the FDA uses its statutory tools but has created a strong sense of urgency. For example, the agency has issued three guidance documents on menu labeling in the past 8 months, each of which represents considerable effort since the statutes are not necessarily clear, and the process for issuing such documents can be cumbersome. Schneeman observed that the FDA has entered into an increasing number of partnerships with other federal agencies to accelerate progress on the issue.

4

Perspectives from the Food Industry

Key Presenter Messages

- The food industry is reformulating foods, modifying labels, changing marketing practices, and taking other steps to address the obesity epidemic.
- The restaurant industry is reformulating meals for children, providing nutrition information on menus, developing educational programs, and otherwise making changes to prevent childhood obesity.
- Food manufacturers and the restaurant industry have identified a demand for healthier products and have responded to this demand with new or modified products.
- Both industries place a high value on giving the consumer a range of options and on the importance of consumer choice.

Representatives of the grocery and restaurant industries provided a valuable look at how industry views the problem of childhood obesity and how the problem can best be addressed. The food industry supports many of the initiatives that have been undertaken to prevent childhood obesity, and industry associations have taken important steps to help by changing the manufacturing and marketing of foods and beverages. However,

industry associations tend to oppose legally imposed limitations on consumer choice or, in many settings, restrictions on food and beverage offerings. Industry representatives who spoke at the workshop emphasized that understanding the perspective of industry will be essential in formulating workable solutions to the obesity epidemic.

THE PERSPECTIVE OF THE GROCERY INDUSTRY

The Grocery Manufacturers Association (GMA), which represents more than 300 food, beverage, and consumer product manufacturers and retailers, strongly supports First Lady Michelle Obama's goal of eliminating childhood obesity within a generation, said Scott Faber, the GMA's vice president for federal affairs. "As the First Lady has said," he noted, "this is not a disease where we are still waiting for a cure to be discovered. We know the cure for this. We have everything we need right now to help our kids lead healthy lives."

Everyone, including industry, has a role to play in helping Americans build healthy diets and lead active lifestyles, Faber said. In recent years, the food industry has changed the recipes and sizes of more than 20,000 products to reduce sugars, fats, calories, and sodium. In particular, food manufacturers have reduced or eliminated saturated fat in more than 6,600 products, reduced or eliminated trans fat in more than 10,000 products, reduced calories in more than 3,500 products, and reduced sodium in more than 3,100 products. Food manufacturers are continuing to reformulate their products to make further reductions in sugars, fats, calories, and sodium—"to go faster and farther, in the First Lady's words," as Faber put it. Food companies recently pledged through the Healthy Weight Commitment Foundation to reduce calories in the marketplace by 1.5 trillion by the end of 2015, with an interim goal of a 1 trillion calorie reduction by 2012. The companies are reporting annually to the Partnership for a Healthier America on the progress they are making toward this commitment, and the Robert Wood Johnson Foundation is supporting an independent evaluation of this effort.

The food industry also must help consumers make healthy choices by providing more information about its products, Faber said. The GMA is working with the Food and Drug Administration (FDA) and others to develop a science-based front-of-package nutrition labeling system that will make it easier for consumers to make informed decisions at the point of purchase (see also Chapter 3). This system could be broadly adopted by many if not all food companies. The goal announced by the FDA for the front-of-package labeling system is to increase the proportion of consumers who readily notice, understand, and use nutrition information to make more nutritious choices for themselves and their families. In addition, the

GMA supports the guiding principles developed by the Institute of Medicine (IOM) Committee on Examination of Front-of-Package Rating Systems and Symbols (IOM, 2010), Faber said. As spelled out by the committee, these systems should include nutrients that are most strongly associated with the diet-related health risks affecting the greatest number of Americans, the information provided should be consistent with the Nutrition Facts panel, and front-of-package systems should apply to as many foods as possible. The front-of-package labels should be used by as many consumers as possible and should motivate consumers to use the Nutrition Facts panel. And the labels should be consistent with the Dietary Guidelines for Americans, which identify nutrients both to limit and to emphasize.

The industry also is developing a public education campaign to promote consumer understanding of the nutrition information included on labels. The industry plans to measure awareness, comprehension, and use of the front-of-package system so that it can continually make adjustments to its public education efforts.

Beyond the use of labels, the industry is changing the way it markets its products, especially to children, Faber said. Working with the Council of Better Business Bureaus, food and beverage companies have launched the Children's Food and Beverage Advertising Initiative (CFBAI) to help promote healthier dietary choices and lifestyles among children under age 12. The initiative was designed to shift the mix of advertising focused on children to include healthier products based on the Dietary Guidelines for Americans and FDA standards. The result has been "a significant reduction in the amount of food and beverage advertising viewed by children and, more importantly, a significant shift in the composition of advertisements to feature more and more healthy products," according to Faber. Between 2004 and 2008, children viewed 31 percent fewer food, beverage, and restaurant advertisements in children's programming. Advertising increased for foods with fewer calories and more nutrients, such as soups, while declining for other foods, such as soft drinks, snack bars, and frozen pizza.

A recent survey found that 83 percent of the advertisements produced by CFBAI members were for products, such as milk, fruits, and vegetables, that provide nutrients currently lacking in many children's diets (CFBAI, 2009). In addition, more than 100 products regularly consumed by children have been reformulated to meet CFBAI nutrition standards. In particular, significant changes have been made to breakfast cereals to reduce sugars, fats, and sodium and to increase beneficial nutrients. All CFBAI cereals now contain no more than 12 grams of sugar per serving. More than half contain less than 10 grams of sugar per serving, and all provide essential vitamins and minerals. Many contain whole grains, and several are a good source of fiber. Virtually all meet the FDA definition of healthy, Faber said.

Recent changes made as part of the CFBAI also have expanded limits

on the use of licensed characters in advertising to children. Nutrition standards have been applied to new and emerging media platforms as well as to traditional media. Faber added that the CFBAI will conduct a nutrition science review in 2011 to address changes in the Dietary Guidelines for Americans.

Faber observed that the messages delivered through advertising are an opportunity to promote healthy diets and active lifestyles. At the same time, he said, the link between advertising and childhood obesity is not yet clear. While there is an established connection between sedentary behaviors such as television viewing and obesity, the IOM concluded in its report *Food Marketing to Children: Threat or Opportunity?* that the evidence is insufficient to support a conclusion about a causal relationship between television advertising and adiposity (IOM, 2006). More recent studies have corroborated the report's conclusions. In an analysis of the link between television advertising and obesity conducted for the GMA, George Washington University Professor Howard Beales found that recent studies do not distinguish successfully between the effects of advertising and the impacts of other factors associated with television viewing. These studies underscore that many aspects of people's lifestyles are associated with obesity, not just advertising.

Government also has an important role to play in combating obesity, Faber observed. The Affordable Care Act of 2010 includes several significant tools to that end, including childhood obesity demonstration grants; other grant programs to support healthy diets and lifestyles, such as the Community Transformation Grants being made available by the Centers for Disease Control and Prevention; and new menu labeling requirements (see Chapter 3). In addition, the American Recovery and Reinvestment Act of 2009 included a $1 billion prevention wellness fund, which has provided significant new resources for combating obesity.

Government could do much more to support healthy diets and lifestyles, especially among children, Faber argued. It could set standards for physical activity in schools, as proposed in H.R. 4557. It could integrate physical activity throughout the school day, as proposed in S. 651. It could track levels of physical activity on a state-by-state basis, as proposed in H.R. 1585. It could expand funding for physical education program grants, as proposed in several bills. And it could establish national standards or a core curriculum for physical education, as proposed in H.R. 5209.

Government also could do much more to promote physical activity before and after school, Faber said. For example, government could expand the Safe Routes to School program, as proposed in H.R. 4021; expand programs that support sports in low-income communities, such as the National Youth Sports program; support after-school programs that provide opportunities for physical activity; or provide new resources to

build sidewalks, parks, and trails, as proposed in H.R. 5209. The upcoming reauthorization of both education and transportation legislation provides a rare opportunity to build physical activities into the lives of children before, during, and after school.

In addition, government could do much more to provide healthy eating choices in schools, suggested Faber. The GMA strongly supports efforts to pass a stronger Child Nutrition Act. Legislation should provide the U.S. Department of Agriculture with more resources and give it clear authority to set standards for all food sold to students during the school day, including á la carte and through vending machines. The GMA also strongly supports current efforts to improve the nutritional quality of food offered through the reimbursable meal program. All food sold at school should meet science-based standards, said Faber. In addition, the GMA strongly supports a proposal to expand meals served after school and during the summer months.

Government could do more to support healthy choices at home as well. For example, government could promote greater access to healthy foods by bringing grocery stores to underserved areas, as has been proposed by the White House Task Force on Childhood Obesity and in H.R. 6258. As indicated by a recent report from the U.S. Department of Agriculture (USDA, 2009), more than 20 million Americans living in low-income neighborhoods lack access to a grocery store, and therefore lack access to healthy food choices.

Policies that support healthy diets and lifestyles enjoy broad public support and broad bipartisan support among policy makers. A recent poll found that eight in ten Americans believe childhood obesity is a serious problem, and roughly seven in ten believe preventing childhood obesity is an important priority for government. Given the breadth and depth of concern about the problem, said Faber, it is not surprising that a wide range of organizations and both Democrats and Republicans support bills that have been proposed to prevent childhood obesity.

Finally, Faber addressed the GMA's position regarding proposed legislation that would limit the foods that can be purchased with food stamps. Solutions to childhood obesity that provide more opportunities for physical education and more healthy choices at school and in the grocery aisle are solutions that trust Americans, he said, rather than telling them to make good choices. Government should work to make the healthy choice the easy choice, not to limit choice. For that reason, government should not limit the choices made by the recipients of food stamps at a time when many Americans are struggling to feed their families. Limiting the choices of food stamp recipients would be discriminatory, suggested Faber, would be difficult to implement, and would discourage program participation. Furthermore, such limits will not work, he argued. If choice is limited,

food stamp recipients will use cash to purchase prohibited items. Moreover, there is no evidence that food stamp recipients are more likely than other Americans to be overweight or obese. In fact, studies have shown that children in low-income households have a lower risk of being overweight if they participate in certain federal feeding programs. A better course, Faber suggested, might be to provide food stamp recipients with discounts for fruits and vegetables. Research suggests that a 10 percent discount on the price of fruits and vegetables would increase purchases of those products by 6 to 7 percent, increasing consumption from 1.95 cups to 2.08 cups; a 20 percent reduction in price would raise consumption to about 2.2 cups.

Faber closed by quoting the First Lady: childhood obesity is not the kind of problem that can be solved overnight, but with everyone working together, it can be solved.

THE PERSPECTIVE OF THE RESTAURANT INDUSTRY

"The restaurant industry is concerned about the health of customers and is increasingly putting nutrition at the center of the plate," said Joan McGlockton, vice president of industry affairs and food policy, National Restaurant Association. McGlockton described several overlapping initiatives designed to reduce obesity in children.

One significant accomplishment has been to bring together a group of contracted school lunch providers—Aramark, Chartwells, and Sodexo—with White House and agency staff to develop a groundbreaking agreement, unveiled by the First Lady in February 2010, on foods offered in the National School Lunch Program. McGlockton explained that these providers pledged to support the goals of the administration's Healthier U.S. Schools Challenge by including more fruits, juices, vegetables, whole grains, and low-fat milk in reimbursable lunches. They also have pledged to meet the IOM's recommendations for fat, sugar, and whole grains over the next 5 years and for sodium over the next 10 years, to double the use of produce in schools over the next 10 years, and to provide nutrition information for parents and students in schools.

Another initiative McGlockton described is a 5-year strategic plan that the National Restaurant Association adopted 2 years ago. The strategy centers on four imperatives, one of which is to promote healthy living. As part of this initiative, the industry supported the menu labeling provisions enacted into law in 2010, which call for calorie information to be included on menus and for nutrition information to be available to restaurant customers upon request. "In fact, we pushed for that legislation," said McGlockton. She noted that the industry has joined forces with more than 70 public health stakeholder groups to advocate for a federal standard

for clear, easy-to-use information at the point of ordering, presented in a standardized way nationwide.

The restaurant industry is very customer focused, McGlockton said, and its customers are saying that they want more nutritionally balanced meals. In particular, a recent survey revealed that customers are seeking nutritionally balanced meals for their children. Healthy children's meals are the most important 2010 food trend in the quick-serve segment of the industry, cited by nearly three in four quick-serve operators surveyed by the association. Nearly two-thirds of the quick-serve operators surveyed said they offer more healthful choices for children than they did 2 years ago. About half of family dining operators, two in five casual dining operators, and one in three fine dining operators reported that they offer more healthy choices. According to a recent study, menu items labeled as healthy increased by 65 percent between the second quarter of 2009 and 2010. "In some instances, healthy side dishes are becoming the default," said McGlockton. "Low-fat milk or fruit juices are being offered instead of sodas, and we are increasingly seeing restaurants offer low-calorie meals for kids with all the corresponding nutritional information for the meal right on the menu."

Providing more information and menu options does not automatically translate to consumption of healthier foods, McGlockton acknowledged. Even though consumers say they want more nutritionally balanced meals, they do not always purchase what they say they want. Anecdotal evidence from earlier attempts to provide healthier products indicates that labeling food as healthy in restaurants can backfire, resulting in a decline in sales of those meals identified as healthier. "We need to do a better job to understand what messages resonate with what audiences as we go forward with menu labeling and with education," said McGlockton.

As consumers become more accustomed to seeing calorie information on menus, they will better appreciate the difference between a 500- and a 1,500-calorie meal, McGlockton suggested. At the same time, the public health community needs to expand efforts to push for nutrition education in all segments of society. Every student, especially those in health care, should be required to take a nutrition class. McGlockton expressed the belief that a national strategy is needed to ensure that all Americans receive nutrition education.

The industry is eager to participate in that endeavor, said McGlockton. It is currently partnering with the American Dietetic Association to develop a curriculum for a course that will train dietitians in menu labeling. The industry also is partnering with the Dietary Guidelines Alliance, a partnership among leading health organizations and government and food industry organizations dedicated to providing consumers with concrete, practical advice on how to apply the Dietary Guidelines to their lives.

The National Restaurant Association is a founding partner of HealthyDiningFinder.com, which was developed with partial funding from the Centers for Disease Control and Prevention. HealthyDiningFinder.com is a free resource for the dining public that helps identify healthy choices on restaurant menus. The Healthy Dining Finder website, which features more than 70,000 participating restaurant locations, enables customers to search by restaurant name, location, price range, and takeout availability to find dietitian-approved dishes that emphasize lean protein, fruits, vegetables, and whole grains.

These are all steps in the right direction, said McGlockton, but taste remains the top influence on purchasing decisions. Healthy foods need to be desirable foods, which is why continued sensory research is vital. Healthy Dining Finder has received a small business grant through the Centers for Disease Control and Prevention to test the feasibility of modifying standard restaurant recipes to reduce oil, cheese, mayonnaise, and the like to a degree that is not detected or is acceptable to restaurant customers. McGlockton suggested that more grant dollars should be available for studies to explore how restaurants can deliver reformulated menus in a cost-effective manner. This type of research can help the industry formulate and modify recipes for healthier consumption and customer acceptability.

The National Restaurant Association, the Produce Marketing Association, and the International Foodservice Distributors Association have together pledged to double the amount of produce in the schools they serve over the next 10 years. This partnership is bringing together farmers, suppliers, distributors, chefs, and retailers to conduct the research needed to learn about effective approaches to enhancing taste and finding ways to make produce more fun and desirable. The National Restaurant Association is also an advisory member of the Culinary Institute of America's healthy menus research and development collaborative. McGlockton explained that the idea behind the collaborative is to bring together a small group of industry leaders in food service to focus on opportunities for collaboration on health-promoting culinary strategies. The first phase of this collaboration will emphasize reducing sodium and increasing the use of produce in food service. In addition, the Culinary Institute of America and the National Restaurant Association are in the planning phases for a conference to be held in May 2011, focused exclusively on healthy flavors and healthy foods for children.

McGlockton noted that, as a lawyer speaking at a workshop on legal strategies to prevent childhood obesity, she would be remiss if she did not describe the association's position on legal activity that has the effect of restricting the growth of restaurants or their offerings. Reemphasizing that the industry is very sensitive to customer tastes, she noted that restaurants that fail to respond well to customer demands tend not to survive. "The

industry inherently does not think that a legal course of action is desirable," she said, "as it will only drive resources on both sides of whatever legal battles one thinks should be enjoined, and there is no conclusive evidence that it will fundamentally change consumer behavior."

Resources that might otherwise be deployed toward legal action should be deployed first and foremost to education, McGlockton suggested. Changes in eating habits are accomplished not by legal battles but by education and the internal motivation for change, she said.

The restaurant industry is as diverse as the nation and what families put on their plates every day, noted McGlockton. While the industry does have large-scale brands, the vast majority of restaurant owners in the United States own one or a small number of restaurants. Even the largest brands generally consist of franchises owned by small businesses. The restaurant industry provides about a third of Americans with their first jobs, said McGlockton, and "we are a vital part of the communities across the nation, every day trying to deliver enjoyable eating experiences." Most restaurants have a low profit margin per unit sold. Successful restaurant owners and operators are generally willing to take risks and to fight for every penny that flows to their bottom line. "I'm not sharing this with you in any way to imply that what I have described absolves us somehow of our concern for our nation's health," said McGlockton. "But I do think it helps in finding common ground [with] independently minded folks challenged by an elusive bottom line. [They] generally are not inclined to welcome anything that might increase the cost of operating their businesses, . . . whether in the form of taxes, mandates, regulations, or otherwise."

In a September 2010 speech to the board of directors of the National Restaurant Association and industry leaders regarding childhood obesity, Mrs. Obama applauded the restaurant industry for its achievements in promoting healthy living, but she urged the industry to make the healthy food the easy food and to make changes more quickly. "No one wants an obese America, and no one wants the chronic diseases associated with that," McGlockton concluded. "We stand ready to do our part in addressing the health of Americans."

DISCUSSION

During the discussion period, James Krieger of the Seattle-King County Public Health Department suggested that education is a fairly weak intervention to change what people purchase in restaurants. More effective interventions would include changing the items on menus, removing unhealthy foods, and changing the relative prices of foods. Krieger also suggested that the National Restaurant Association backed the menu labeling provision in

the Affordable Care Act because it feared a proliferation of nonstandardized menu labeling requirements across the country.

McGlockton responded that the association is trying to bring the food supply chain together to work on providing different options to consumers and producing healthier foods that cost less. With respect to removing unhealthy foods, she reiterated the point that restaurants are very consumer driven. "We give our consumers what they ask for. Consumers are asking for healthier foods, and we are putting those healthier foods out there. But consumers are still asking for some of the old mainstays and some of the indulgent foods as well." As long as consumers demand such foods, the industry will supply them, she explained. At the same time, the industry is looking at ways of reformulating unhealthy foods to make them healthier.

Mark Gottlieb, Public Health Advocacy Institute, Northeastern University School of Law, Boston (whose presentation is summarized in Chapter 7), asked McGlockton about indulgent menu items geared toward children, who may not be as responsive as adults to countervailing messages. McGlockton replied that significant changes are occurring in this area. More and more restaurants are offering healthier side items for children—for example, carrot sticks and apple fries instead of french fries. Meals of 600 calories or less are being designed for children, with all the nutrition information provided on menus. Another idea is to incentivize children to order from special healthier menus by donating a percentage of the sales of those items to fitness and nutrition programs in their schools.

Patricia Crawford, a member of the IOM's Standing Committee on Childhood Obesity Prevention, said she was pleased to find so much health information on the websites of restaurants, but noted that "health" is defined in many different ways on those sites, even in ways that can be misleading. McGlockton observed that the National Restaurant Association is looking forward to the release of the new Dietary Guidelines, which restaurants will use to present their foods and define what is healthy and what is not. Also, the association is working with its members and the public health community to arrive at a common definition of healthy, particularly with respect to children's meals.

Schneeman added that the FDA defines "healthy" according to specific criteria for nutrient content. When a restaurant makes a claim that a particular food is healthy, that claim is subject to those criteria.

James Marks, senior vice president and director of the Health Group at the Robert Wood Johnson Foundation, asked whether restaurants and researchers will be able to track the reduction in calories consumed in restaurants as menu labeling becomes widespread. Portion sizes and prices also could be tracked and benchmarked, he suggested, much as mileage standards are used in the automobile industry. McGlockton responded that the industry has discussed such a system but has not yet figured out how

to implement it. Also, she added, the industry is not monolithic, and one chain or restaurant may be able to do such tracking while another cannot.

In response to a question about whether eliminating childhood obesity in a generation will have an effect on food companies, Faber pointed out that many of the companies that sell foods have existed for more than a century, and during that time have continually innovated to meet the changing demands of consumers. Consumers today are demanding more low-fat, low-sodium, and low-calorie options, and the food industry is meeting those demands. "I can reassure you that when we do end childhood obesity in our lifetimes and within a generation, our companies will be doing just fine," he said.

Faber also observed that the kinds of choices available in supermarkets today are dramatically different than they were even a decade ago. "It is easier to make a healthy choice," he said, "and it will continue to be easier and easier for people to find low-fat, low-sodium, low-sugar options that are provided in a variety of sizes so that people who want to make the healthy choice can make the healthy choice." In addition, the industry has tried to use labels to communicate more nutrition information about what is inside the packaging. He stressed that the industry understands the urgency of the issue.

Vladeck observed that the companies that have joined the CFBAI have generally fulfilled their pledges, according to independent research. The problem is that in some instances the bar was set too low, and there has been a lack of consistency across the pledges. Also, the pledges do not cover all media, such as packaging and in-store promotions. Recent announcements by the initiative have pointed to possibilities for improvement, he said.

5

Using Regulations and Taxes to Prevent Obesity

Key Presenter Messages

- Regulations on the sale and advertising of foods can be tailored in a variety of ways so as not to constitute unlawful restrictions on free speech.
- Increasing the price of a product, limiting per capita purchases, banning or limiting harmful products or ingredients, and instituting age limits on the sale of a product have all yielded benefits with other products and could be applied to foods.
- Changing prices, taxes and subsidies can affect the consumption of foods and beverages.
- As states and localities impose various taxes on foods and beverages, changes in consumption can be used as natural experiments to gauge the effects of such taxes on obesity.

Regulations on the sale and advertising of foods and beverages and taxes on particular foods and beverages have the potential to promote healthy eating. Two speakers at the workshop examined these broad approaches to childhood obesity prevention. Although regulations and taxes are inevitably subject to limitations, these policy options can be applied in a surprisingly

large number of ways to change the foods and beverages people purchase and consume.

THE USE OF REGULATIONS TO CHANGE FOOD AND BEVERAGE CONSUMPTION

In the United States today, the easy choice is not the healthy choice, said Jennifer Pomeranz, director of legal initiatives, Yale University's Rudd Center for Food Policy and Obesity. In supermarkets, for example, shoppers generally must pass through the store to reach the necessities located toward the back. Food marketers refer to end-of-aisle bulk displays as ground zero for in-store decision making because shoppers must pass by them to enter an aisle. Moreover, checkout aisles are lined with unhealthy food products that shoppers are encouraged to purchase on impulse while waiting to check out. According to a report from the Grocery Manufacturers Association (GMA), 73 percent of shoppers make impulse purchases in grocery stores, most often of candy, cookies, and chips (GMA Sales Committee, 2009). A retail report suggests that shoppers can avoid consuming thousands of calories a year by going through self-checkout aisles that lack displays of candy and other items (Schuman, 2006).

Shelf position is also big business in the retail environment. Companies pay large sums of money to have their products in certain locations. A study from the University of Chicago Graduate School of Business showed that shelves in the vertical center, which is the natural resting eye position for adult shoppers, are best for default purchases (Dreze et al., 1994). When products—whether canned tuna, cereal, or toilet paper—were moved to different shelf locations, the items on the vertically central shelves were purchased the most. One former retailer described product location as "eye level equals buy level." High shelves, in contrast, are reserved for slow-moving products and products sought by destination shoppers (Cardello, 2009).

Retail outlets also rely heavily on point-of-purchase and package promotions using spokespeople, licensed characters, celebrities, games, graphics, premiums, and movie tie-ins. According to a Federal Trade Commission (FTC) study, expenditures on these promotions are second only to those on television advertising (FTC, 2006). Furthermore, Pomeranz noted that a Yale study conducted from 2006 to 2008 found that 79 percent of all such food promotions are targeted to children under the age of 12 (Harris et al., 2009). More than 80 percent of the food promoted was found to be unhealthy, and over the 3 years of the study, the nutritional quality of the promoted foods declined, despite pledges made by the food and beverage industries as part of the Children's Food and Beverage Advertising Initiative (described in Chapter 4).

Another study of "fun food" packaging, which excluded snack items,

found that 89 percent of food in supermarkets packaged in such a way was unhealthy (Elliot, 2008). In its study of food marketing, the Institute of Medicine (IOM) (2006) found that children as young as 2 to 3 years of age recognize food packaging. Children prefer the taste of food that has recognizable characters on the packaging, even when the food is identical to samples without that packaging.

Pomeranz spent much of her talk analyzing what is legally permitted and not permitted in food and beverage sales and marketing. The First Amendment to the U.S. Constitution protects speech. The U.S. Supreme Court has applied the First Amendment to commercial speech, defined as speech, such as advertising, that promotes a commercial transaction. The First Amendment also protects expressive conduct, which consists of action that has a communicative component; an example is flag burning to protest war. Pure conduct (lacking a communicative component) is not protected by the First Amendment.

The 2002 case *Lorillard v. Reilly* involved a Massachusetts regulation that banned advertisements for tobacco within 1,000 feet of schools and playgrounds on billboards and less than 5 feet from the floor inside stores. The state also banned self-service displays of tobacco, requiring that tobacco products be held behind the counter so that only salespersons could access them. The Supreme Court struck down the first two advertising restrictions, ruling that they were unconstitutional under the legal standard applied to commercial speech restriction, called the Central Hudson test.[1]

However, the Supreme Court upheld the ban on self-service displays of tobacco. This regulation was analyzed under a different standard, known as the O'Brien test, which is the test for expressive conduct.[2] The lesson learned from this case, said Pomeranz, "is that regulating conduct—and, in this context, sales practices—is achievable, and [often] is preferable."

The O'Brien test asks whether a restriction is within the constitutional

[1] Originating in the 1980 U.S. Supreme Court case *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, the Central Hudson test is used by courts to determine whether government restrictions on commercial speech are constitutional. The court first must determine whether the expression is protected by the First Amendment, meaning it must concern lawful activity and not be misleading or deceptive. Second, the court must ask whether the asserted government interest is substantial. Third, the court must determine whether the restriction directly advances the government interest asserted, and fourth, it must determine whether the restriction is more extensive than is necessary to serve that interest.

[2] Originating in the 1968 U.S. Supreme Court case *United States v. O'Brien*, the O'Brien test is used to determine whether a government restriction on expressive conduct is constitutional. This test asks whether the government restriction is within the constitutional power of the government, whether it furthers an important or substantial governmental interest, whether that interest is unrelated to the suppression of free expression, and whether the incidental restriction of alleged First Amendment freedoms is no greater than is essential to further that interest.

powers of the government, and states and localities have great leeway to impose regulations for public health and safety purposes, Pomeranz observed. The O'Brien test also asks whether a regulation furthers a substantial interest, and the Supreme Court has ruled that governments must have leeway to experiment with solutions that can further such interests. Regulations cannot target expression, but in the case of foods, they can target the nutritional profile of a product. "We know that the foods marketed to children are so unhealthy that all we have to do is target [their] very poor nutritional profiles . . . and we will be addressing a big problem within our retail environment," Pomeranz suggested. Also, any incidental restriction on speech caused by a regulation cannot be beyond what is essential to further the substantial government interest, but this will not be a problem if calorie-dense and nutrient-poor food products are targeted, Pomeranz said.

In the past, the Supreme Court has struck down restrictions on speech aimed at protecting the public from harmful products, such as tobacco and alcohol. But the Supreme Court also has offered many ideas regarding what the government can do to regulate conduct. These ideas include increasing the price of a product, limiting per capita purchases of a product, banning or limiting harmful products or ingredients, and imposing an age limit on the sale of a product. In practice, all of these actions have yielded important benefits, Pomeranz observed. Taxes on cigarettes have made people less likely to purchase tobacco. Limiting per capita purchases of ephedrine-containing products has reduced illicit uses of these products. Placing tobacco and ephedrine-containing products behind the counter, which many states have done, has helped control consumption. And minors are not allowed to buy alcohol or tobacco or enter gaming institutions.

Pomeranz described how these approaches might be taken with sugar-sweetened beverages. Tax increases (discussed in the next section of this chapter) could be used to limit purchases and consumption. Access could be restricted, as has occurred in schools with the removal of products from vending machines. Access also could be restricted near schools or in other locations. Age limits could be imposed on the purchase, possession, or use of sugar-sweetened beverages.

Such approaches could work in the retail environment as well. Junk-food-free checkout aisles could reduce impulse purchases. Specially marked aisles could contain all of the unhealthy foods in the market, so that parents could avoid those aisles. End-of-aisle displays and vertically central shelves could contain healthy rather than unhealthy foods to make the default choice the healthy choice. Location criteria could be based on nutritional requirements rather than industry payments, with unhealthy items being located at the tops of shelves. Food samples to minors could be banned. Pomeranz observed that practices that make unhealthy foods attractive to children not only affect public health and nutrition, but also raise safety

and allergy concerns. Finally, inclusion of foods in vending machines could be based on nutritional criteria.

The pledges made by the Children's Food and Beverage Advertising Initiative do not cover in-store promotions, and almost no pledges cover front-of-package labeling. The failure of self-regulation in these areas argues for government involvement, Pomeranz argued. "I have analyzed all these [potential regulations for retail environments] under the O'Brien test, and they passed," she said. "I would encourage governments around the country to institute them."

THE USE OF TAXES TO INFLUENCE FOOD AND BEVERAGE PURCHASES

Individuals respond, to varying degrees, to economic incentives. Therefore, the use of taxes to increase prices can affect the consumption of foods and beverages, which may translate into changes in weight.

Lisa Powell, senior research scientist, Institute for Health Research and Policy, and research professor, Department of Economics, University of Illinois at Chicago, described her research on the effects of taxes on food consumption and some of the policy implications of that research. Using a variety of national data sets, Powell and her colleagues have been examining the associations among state-level soda taxes, consumption, and weight outcomes. These taxes vary by state and change over time. The group has looked at adolescents in particular, since their consumption of soda and sugar-sweetened beverages has greatly increased. "These calories account for up to 10 percent of their total calories per day, so that is a lot of extra discretionary calories," Powell said.

The group has used both cross-sectional and longitudinal models to analyze the effects of tax rates, and it has analyzed both the absolute rate of soda taxes and the soda tax rate compared with the general food tax rate. Soda consumption and weight outcomes depend on many different factors, and analysts must control as many of these factors as possible to measure the effects of taxes. Powell and colleagues' analysis showed that a 1 percentage point increase in the soda tax rate would reduce household consumption over 3 months by only about 9 ounces. That amount sounds small, said Powell, but it is also in response to a small change in taxes. Today taxes on soda average about 4.36 percent. If the tax rate were increased in all states to 7 percent, household soda purchases would be an estimated 3.6 percent lower.

Powell and her colleagues also estimated the effects of a new 20 percent tax on soda, assuming that the effects of tax increases can be extrapolated from small to large increases. In that case, household regular soda purchases would be an estimated 33 percent lower. The extent to which this reduction would apply to all soda purchases depends on whether soda consumed out-

side the home is similarly responsive to tax increases. For example, people would perhaps be willing to spend more in restaurants than in supermarkets.

Translating changes in consumption to changes in weight outcomes is a "large leap," Powell acknowledged, and depends on many factors. For example, if all people substituted water for soda in response to tax increases, weight reductions would be likely, but this is not a realistic scenario. Rather, people would probably substitute other drinks for soda. For example, they might drink milk, although they would be unlikely to drink 20 or more ounces of milk to quench their thirst. More likely, they would substitute drinks such as sugared iced tea or high-sugar fruit drinks, which is why it is important for taxes to cover all sugar-sweetened beverages, not just soda.

In data comparing soda consumption, school soda purchases, and weight change from third to fifth grade, Powell and colleagues found associations that varied by group. While a higher soda tax did not affect total consumption for the entire sample, it did have an effect on total consumption for low-income students. Higher taxes also reduced school consumption for low-income students, African American students, and heavy television watchers. With respect to weight, higher soda taxes had a small positive effect on the change in body mass index from third to fifth grade, but taxes had a stronger positive effect on children who were at risk of becoming overweight. Powell recounted how, in a simulation of the effects of an 18 percent sales tax using these data, she and her colleagues found that such an increase would correspond to about a 20 percent reduction in excess weight gain from third to fifth grade.

In a study of the link between soda taxes and weight among adolescents, the associations found were for the most part very small. Higher tax rates had the greatest effect on youth who were already at risk of becoming overweight. The same effect was found in a study of fast food pricing. This makes sense, said Powell, because youth at the upper end of the weight distribution may be consuming more calorie-dense foods. This is an important finding, she suggested, because it means that a tax would have more of an effect on people at the upper end of the weight distribution. "From a public health point of view, that is exactly the group whose behavior and weight outcomes you are trying to change," she said.

Food taxes are regressive in that they disproportionately affect lower-income individuals. But lower-income individuals also are more responsive to price. Those who respond to higher prices by changing their behavior therefore will achieve a greater health benefit than those who do not. Also, one way to offset the regressive effect of such tax increases would be to use the revenue to subsidize the purchase of fruits and vegetables for low-income individuals. These findings already have implications for tax policy, said Powell. For example, Supplemental Nutrition Assistance Program (SNAP) recipients do not pay taxes on their food items, so taxes on sugar-sweetened

beverages would exclude this group. From a strictly public health perspective, it may therefore be necessary to think about applying these taxes to SNAP purchases so that there is no group exempted from this policy.

Food taxes generally have not been introduced with the aim of modifying consumption behavior as has been the case in other public health areas such as tobacco use, Powell noted. Where taxes have been imposed on selected categories of foods, such as soft drinks, candy, and snacks in grocery stores and vending machines, the tax rates have been quite low. In those states that do tax soda, rates are generally between 5 and 7 percent. As some jurisdictions adopt higher taxes, the greater variation among states will enable further work on the relationships among taxes, consumption, and weight.

Powell also commented on the importance of tax policy design, noting that excise taxes included in the shelf price of a product may be more effective than sales taxes. A sales tax is applied at the checkout counter, so consumers may be unaware of what taxes are being applied to which products. Also, taxes applied on the basis of liquid volume would be more effective than those applied as a percentage of the sales price since supersizing a drink usually costs relatively little, but the per unit tax would persist on the larger quantity.

DISCUSSION

In response to a question about the possibility of subsidizing healthy foods, Powell observed that such subsidies are less likely than taxes to raise political opposition. The problem is that most governments do not have the money to implement subsidies. A politically palatable option, noted above, may be to use tax revenues on unhealthy foods to subsidize healthy foods. Powell's research indicates that such subsidies would increase the consumption of fruits and vegetables among low-income families. However, the subsidies probably would have to be limited to low-income families to be affordable.

Russell Pate, a member of the IOM's Standing Committee on Childhood Obesity Prevention, asked Powell about building the political will to increase taxes on certain foods. Powell responded that, according to the polls she has seen, people are more likely to accept a tax if the money is dedicated to a specific purpose, particularly to reducing childhood obesity, rather than going into the general fund.

In response to a question about how the issues surrounding expressive conduct apply in schools, Pomeranz observed that schools have the ability to regulate speech and are also a nonpublic forum, which means they could be more heavily regulated than traditional public venues. That they are not

more heavily regulated probably has to do more with political than legal considerations, she said.

Pomeranz also addressed a question about the incentives for restaurants to offer smaller portion sizes, not just different types or categories of food. She replied that such incentives would constitute regulation of conduct similar to the other examples she had mentioned.

6

Using the Law to Increase Physical Activity

Key Presenter Messages

- Policy options that can increase physical activity among children include comprehensive plans with health-related components, "complete" streets, safe routes to school, and joint-use agreements.
- Local governments have the authority to, and are expected to, intervene rationally in constituents' lives to protect their health, safety, and welfare, especially in the context of public health problems.
- Racial and ethnic disparities in obesity rates raise the possibility of using civil rights law to overcome these disparities.
- Civil rights arguments have helped create parks and playing fields, expand physical education, and foster more equitable transportation systems.

Two speakers at the workshop considered how legal approaches could be used to help increase physical activity among children and adolescents. One strategy is to use legal and policy tools to affect state and local laws, regulations, and agreements; for example, land use, transportation, and education policies all can influence physical activity. Another strategy is to

use civil rights law to promote the construction of parks and playgrounds and enforce physical education standards in schools.

LEGAL APPROACHES TO INCREASE PHYSICAL ACTIVITY IN COMMUNITIES

Public Health Law and Policy is a nonprofit organization that works to improve community health by building the capacity of public health leaders to use legal and policy tools in their everyday practice. The organization consists of a multidisciplinary team of lawyers, urban planners, and policy analysts, many of whom also have advanced training in public health. "We are very much a behind-the-scenes group, doing legal analysis and policy development," said Marice Ashe, the organization's executive director. "We then train local leaders, whether they are public health leaders, elected officials, or municipal attorneys, so that they can take these materials and adapt them to the best use in their communities."

Ashe focused on the organization's work on physical activity, although it also addresses many other topics. Increasing the amount of physical activity among children is a complex and difficult task, she said. It depends on such varied policy dimensions as land use zoning, transportation planning, and educational initiatives. For example, the zoning of local communities has a marked influence on the foods that are available to residents. Research shows that low-income communities have four times more access to unhealthy than to healthy food options. Food outlets that lack access to fresh foods such as fruits and vegetables are abundant in low-income communities and communities of color, said Ashe, where the childhood obesity epidemic is most prevalent.

Transportation offerings also can influence health. Investing in freeways rather than biking and walking trails and mass transit is likely to contribute significantly to obesity. These are political decisions that are made at the highest levels of government and flow down to the regional and local levels, said Ashe.

Finally, the use of public spaces can have an influence on health. For example, in many communities, playgrounds are locked up once school ends, even though playgrounds often are the safest place to play in those communities. Ashe argued that these are public resources that school officials have decided to close off to community use, and this is a situation that can be changed. Already, said Ashe, more than half of children do not meet the national standard of 60 minutes of moderate to vigorous physical activity per day, and a growing body of evidence indicates that this lack of physical activity affects cognition and academic performance as well as obesity. Schools have instituted standards for academic performance, but many have dropped recess and provide much less physical education so they can devote more

time to reading and other academic pursuits. Yet children need to engage in physical activity to focus in the classroom, Ashe said.

State and local governments have the authority to create policy through what is called "police power." This power does not refer to police officers or traditional law enforcement, but to the authorities given state and local governments to protect the health, safety, and welfare of the community. The police power allows governments to regulate private rights as necessary and constitutional to promote and protect the public interest. A classic use of police power is a regulation that permits the government to quarantine an individual with an infectious disease to keep that person from infecting others. Such laws can create a tension that needs to be balanced between the rights of individuals and the public good, said Ashe. Other examples of the police power in the context of chronic disease prevention include banning cigarette giveaways near schools, creating farmers' markets through zoning provisions, and instituting menu labeling requirements.

As broad as police power is to protect the public health, it is subject to constitutional limits. First, laws cannot be arbitrary and oppressive; rather, they must be rationally related to the public health protections they seek to effect. Further, they must be reasonably designed to correct a condition adversely affecting the public health. Finally, they cannot violate state and federal constitutions. Ashe discussed four local strategies based on police power designed to increase physical activity in communities: comprehensive plans, "complete" streets, safe routes to school, and joint-use agreements.

Comprehensive Plans

Comprehensive plans are land use planning tools that serve as the blueprint for future development, laying out how land can be used. They are broadly stated, long-term policy guides for the physical, economic, and environmental use of an area. These plans can be powerful, said Ashe, because changes to the use of land must comply with them. However, they do not necessarily change current uses. Instead, licenses may not be renewed over a long term, or a business may not be able to expand or change hands. Because the current uses of land have taken a long time to develop, changes in those uses also will take a long time. The comprehensive plan is the starting point for change, said Ashe.

In California, for example, comprehensive plans traditionally have been required to include a "health and safety element." Ironically, that element has had nothing to do with public health outcomes under the purview of a local health department, but rather involved the deployment of police, fire, and ambulance services. Within the past decade, local health departments have been becoming involved in the writing of comprehensive plans and have been inserting outcomes related to the prevention of com-

municable and chronic diseases, as well as access to medical care. These health-oriented concepts provide a foundation for later policies, plans, and implementation strategies. For example, if access to fresh fruits and vegetables is an outcome sought by a local health department, the comprehensive plan can promote this goal by setting standards for commercial retail establishments, community gardens, and farmers' markets in or near residential centers.

Ashe emphasized the importance of using specific, quantifiable terms when crafting language for comprehensive plans intended to improve health. An example of language that could be incorporated into a plan is: "Promote opportunities for regular physical activity by locating residential developments near services." An even better example, said Ashe, would be: "Set a walkability standard (for example, ¼ to ½ mile) for residents' access to daily retail needs and nearest transit stops." Another example is: "Encourage the development of community gardens to increase residents' access to healthy foods." Excellent language that has been incorporated into the planning of Seattle is: "Establish one community garden for every 2,500 households in an urban village and urban center."

Strong health-oriented elements of a comprehensive plan reflect a community vision, are based on locally relevant health data, can be implemented, provide a means of gauging the success of the policy, and make progress toward eliminating health disparities. With regard to implementation, for example, Ashe cited physical education standards in California, which specify how much physical education should occur in schools each day at the elementary, middle, and high school levels. But because the standards are not enforced, more than half of schools ignore them without consequence.

Complete Streets

A "complete" street is a street that is safe, comfortable, and convenient for all users—pedestrians, bicyclists, public transportation riders, people with disabilities, and people of all ages. It includes such features as traffic calming devices, the use of mass transit as well as cars, curb cuts for elderly and disabled pedestrians, and mixed-use development. "You can contrast this with your typical strip mall, [which has] no sidewalks and no housing. You have to drive to get there, and it is a visual nightmare, and a public health nightmare, too," said Ashe.

The complete streets approach is flexible and forward looking. No one solution fits all communities, and not all streets need to look the same to meet the needs of their users. New communities can be designed using this approach from the beginning, but most communities are already in place and must be retrofitted to make them more bikeable, walkable, accessible, and useful for mass transportation.

Many local factors must be considered in moving toward complete streets, which is why communities need technical assistance and why top-down, federal edicts are insufficient. As an example, Ashe noted that fire departments want streets wide enough to turn ladder trucks around, but wide streets are not as safe, as bikeable, or as walkable as narrower streets. Funds spent on transportation, economic development, and community redevelopment all have an influence on street design. Ashe emphasized that land use decisions are essentially local, and "local land use decisions are some of the most controversial . . . decisions [made in] local communities."

Safe Routes to Schools

The Safe Routes to School program, created in 2005 as part of the *Safe, Accountable, Flexible, Efficient Transportation Equity Act,* enables and encourages children, including those with disabilities, to walk and bike to school, thereby promoting an active and healthy lifestyle from an early age. It is a myth, said Ashe, that walking or biking to school is dangerous. The reality is that children are much more likely to be injured or killed when riding in a car than when walking. It also is a myth that schools are responsible for students from the door of their home to the door of their school. The reality is that districts generally are not responsible for this travel, although they may have authority over misbehavior on the route to and from school. It is the job of parents and the community to make it safe for students to walk or bike to school.

In the case of the Safe Routes to School program, there is no known case of a school having been sued. Under federal law, the Volunteer Protection Act, which applies in all states other than New Hampshire, protects volunteers from liability in activities involved in walking or taking the bus to school, and some states go further. The idea of the Safe Routes to School program is to identify and mitigate risks. "If you behave reasonably, you do volunteer training, you mitigate the known risks, which are the essence of a Safe Routes to School program, then the liability is extremely low," said Ashe.

Joint-Use Agreements

A joint-use agreement is a legally binding contract between two entities laying out the terms and conditions for shared use of public property or facilities. The concept applies much more broadly than just to schools. For example, the Civic Center Act in California encourages any government resource to be used for multiple purposes. Cities benefit through increased recreational capacity, the potential for more programming, and community cohesion, while facilities benefit by sharing costs of maintenance, security,

wear and tear, repairs, and improvements. Shared use represents smart government in an era of dwindling fiscal resources, said Ashe.

There are many types of joint-use agreements. Applied to schools, they may simply open up playgrounds for people to use. They may also allow boys and girls clubs, YMCAs, sports leagues, ballet classes, and the like to use school facilities. Costs are shared by the community, the parks and recreation department, or an appropriate entity.

The greatest institutional barrier to the joint use of schools is the fear of liability, but as with the Safe Routes to School program, the liability risks are greatly exaggerated, said Ashe. "Fear of liability ought not to be an issue [for] anything that we are talking about, but it comes up repeatedly . . . as a major barrier to increasing physical activity." Based on a 50-state analysis done by Public Health Law and Policy, the risk of tort liability is no greater for after-school use of school facilities than during the school day. There are limits on the amount of damages that school districts and other governments can pay. Furthermore, schools can minimize risks by identifying and mitigating them—sharing the liability risks when possible, understanding the government immunity statutes, and recognizing the volunteer protection statutes that exist in almost every state.

PHYSICAL ACTIVITY AS A CIVIL RIGHTS ISSUE

The Civil Rights Act of 1964 and its regulations prohibited intentional discrimination and discriminatory impacts based on race, color, or national origin and guaranteed equal access to public resources funded with taxpayers' dollars. Yet the obesity epidemic exhibits clear racial and ethnic disparities, said Robert Garcia, executive director and counsel of The City Project in Los Angeles. For Latino males aged 6 to 19, the obesity level is 27 percent, compared with 18 percent for non-Hispanic males. For black females aged 6 to 19, it is 26 percent, compared with 16 percent for non-Hispanic white females. "As civil rights attorneys, we live, eat, and breathe equal justice," said Garcia. "When we see disparities like that, we right away start investigating why those racial disparities and ethnic disparities [are] there, and how [to] overcome them."

One reason these disparities exist is because children of color and low-income children often have no place to play in schools and parks. In a survey called A Child's Day, the Census Bureau found that 87 percent of non-Hispanics feel that there are safe places for children to play in their neighborhoods, compared with only 68 percent of Hispanics. Garcia explained that in inner-city areas, 48 percent of Hispanics under 18 are kept inside as much as possible because there is no safe place to play in their neighborhood, compared with just 25 percent of non-Hispanic white children. Non-Hispanic white children also are most likely to take part in

sports after school, while Hispanic children and children in poverty are least likely to do so.

Through its work in parks and schools, the goal of The City Project is to help students move more, eat well, stay healthy, and do their best in school and in life. One way the project pursues this goal in schools is by advocating for playing fields. Before 2005, no new high school had been built in Los Angeles in 30 years. Since then, billions of dollars have gone toward school construction and modernization, yet the lack of enforcement of physical education requirements has constrained the installation of playing fields in those schools. Los Angeles law requires 20 minutes of physical education per day on average in elementary school and 40 minutes per day in middle and high school. Yet without enforcement of those laws, many new schools are being built without playing fields. At the same time, children of color living in poverty with no access to a car have the worst access to parks and the worst access to schools with five acres or more of playing fields among all children in California, and they suffer from the highest levels of childhood obesity. "That is a civil rights violation, pure and simple," said Garcia.

To address this issue, The City Project has worked with teachers, students, and parents to emphasize the importance of physical education. It filed an administrative complaint with the Los Angeles Unified Schools District, a procedure that is not litigation but a way of informing schools that a problem exists and needs to be fixed. The project helped pass a school board resolution requiring the school district to enforce both physical education and civil rights laws because of unfair disparities based on race, color, and national origin. Garcia further explained how the project worked with school officials to develop an implementation plan with the district to enforce these laws. The project is now monitoring compliance and evaluating the success of that campaign.

With regard to parks, The City Project, working with the Green Info Network, has mapped the entire state of California at the census tract level for areas that are park poor, income poor, and disproportionately populated by people of color. The bottom line, said Garcia, is that there are virtually no parks where low-income people of color live, and where there are parks there are virtually no low-income people of color.

The City Project believes there is a civil rights solution to this disparity. The project worked on state legislation that defines "park poor" as less than 3 acres of parks per 1,000 residents and "income poor" as below $47,331 in median household income. That legislation is important not just in California but throughout the United States because it establishes standards against which to measure progress and equity and to hold public officials accountable. "Before when we used to say there are not enough parks in low-income communities of color, you could quibble about what is

enough parks and what is low income and what are communities of color. Now we have measurable numerical standards," said Garcia.

The City Project also has sought to create parks in low-income communities. An example is the Los Angeles State Historic Park at the Cornfield. At a 32-acre site in downtown Los Angeles—and in one of the most park poor and income poor communities of color in the state—a wealthy developer wanted to build 32 acres of warehouses. The project organized a campaign to persuade the state to buy the land for a park, a success the *Los Angeles Times* called "a heroic monument" and "a symbol of hope," Garcia recalled. The project has since extended this success to additional parks in Los Angeles.

Finally, The City Project has been working on transportation justice. As an example, it recently stopped the building of a toll road with federal funding that would have destroyed San Onofre State Beach in San Diego and the Native American sacred site of Panhe that is located there. The mainstream environmental community had been focusing on such issues as endangered species and polluted water runoff. Representatives of The City Project talked to local members of the Native American community who told them about a 9,000-year-old village, burial ground, and current ceremonial site. The loss of that site is a civil rights issue, Garcia said, and the arguments from the Native American community were decisive in stopping construction of the road.

Another example in the area of transportation involves the Obama Administration's plans to support high-speed rail projects. Such projects threaten parks throughout California, including the Los Angeles State Historic Park at the Cornfield. The City Project has worked against these plans through a combination of community organizing; media campaigns; advocacy; and multidisciplinary research on obesity, race, ethnicity, income, and the history of discrimination. The project also has pursued its cause through civil rights laws, but Garcia said, "We don't call it litigation; instead, we call it access to justice through the courts."

During the 1990s, Garcia worked on a Los Angeles County Metropolitan Transportation Authority (MTA) case that resulted in $2.5 billion being invested to improve the bus system in Los Angeles. At the time, there were separate and unequal bus and rail systems that discriminated against low-income people of color because the MTA overinvested in rail that disproportionately served white riders while systematically underfunding the bus system. After 2 years, mediation resulted in an agreement under which the MTA ultimately invested more than $2.5 billion to improve bus service and keep fares low, resulting in a 12 percent increase in transit ridership and the creation of green jobs and green buses. As soon as the 10-year term of the consent decree expired, however, the MTA raised fares and cut routes as transit ridership dropped. There remains a great need to invest

in bus service rather than building toll roads and high-speed rail through state parks, Garcia stated.

Physical education in schools, access to parks, and transportation all involve equal access to public resources, said Garcia. Lessons drawn from tobacco and firearms legislation may be applicable to the regulation of food, but they are less applicable to questions of equal access to public resources. Better paradigms are *Brown v. Board of Education* and the environmental justice movement. Communities of color and low-income communities suffer disproportionately from environmental degradation; they lack public goods, such as parks and school playing fields; they lack information about the impact of decisions on their lives; and they are systematically denied full and fair public participation in the decision-making process.

Garcia concluded by saying that working on parks and school playing fields for low-income children is the most difficult work he has ever done "because there is no support for children of color living in poverty, suffering from childhood obesity. There is no funding for it. We represent unpopular people and unpopular causes." Each of the issues he works on is not just an issue of public health, poverty, or land use. "It is front and center an equal justice issue," he said.

DISCUSSION

During the discussion period, a workshop participant observed that restricting sedentary activity such as television watching, videogame playing, and use of the computer is more effective than promoting physical activity in preventing and treating obesity. The question thus arises of whether legal action should focus on decreasing sedentary activity by, for example, raising taxes on cable companies or limiting television use in schools or other public places.

A lack of public places to play is one reason why promoting physical activity has less effect than desired, said Ashe. But legal policies such as taxing cable television or removing televisions from schools are "absolutely possible," she said. Schools, in particular, have the authority to take actions that will further their educational mission. In contrast, behavior in homes is more difficult to regulate. "If parents want their kids to watch TV rather than jump rope outside, the government doesn't have the wherewithal to regulate that," said Ashe.

Shiriki Kumanyika of the IOM Standing Committee on Childhood Obesity Prevention observed that civil rights arguments may not work as well for food because many food companies established relationships with communities of color in response to a demand for fair treatment in the marketplace. Garcia pointed out that civil rights laws take effect whenever federal or state financial assistance is involved, which is not the case with

the establishment of a restaurant or supermarket. Nevertheless, there are policy arguments to make to city councils and state legislators regarding zoning and general plan requirements that, for example, limit how many fast food restaurants can exist in a community. An example is the move to limit liquor stores in South Central Los Angeles two decades ago, which spawned a community coalition that had a significant impact.

In response to a question about whether the community involved in obesity issues has worked with the architecture and design communities responsible for the Leadership in Energy and Environmental Design (LEED) program, Ashe observed that the 2009 strategic plan for the Department of Housing and Urban Development referred specifically to "healthy housing" that would, for example, reduce the occurrence of asthma and injuries. A new frontier is to move public health standards into the home in creating an environmentally sustainable community.

Russell Pate, who moderated the session on physical activity as a member of the Standing Committee on Childhood Obesity Prevention, said that the failure of schools and districts to comply with state mandates on physical education is a national phenomenon. It is difficult to monitor both the quantity and quality of physical education, and even schools that emphasize physical education can fall short by, for example, releasing students for advanced placement courses.

Garcia observed that one reason schools give short shrift to physical education is that they are drilling students to perform well on mandated tests. One response would be to mandate and enforce physical education standards. For example, physical education could be a standard that schools would have to meet to receive federal funding. Garcia's group also is analyzing data from 200 schools that have been audited in the past 5 years, 100 of which do not enforce physical education requirements, looking for patterns of noncompliance and racial discrimination. In addition, if the federal government were to help enforce physical education standards in the worst schools, there would be a trickle-up effect, Garcia said, as other schools realized that physically fit students do better academically.

Kelly Brownell of the Standing Committee on Childhood Obesity Prevention, asked whether data exist showing that physical activity increases as people have greater access to open space, which would buttress the civil rights argument. Garcia responded that The Robert Wood Johnson Foundation released a report in April 2010 on access to parks and increases in physical activity. Guidelines issued by the Centers for Disease Control and Prevention and the IOM provide additional information on the links among healthy food, physical activity, and obesity prevention.

7

Using Litigation to Change Policies and Practices

Key Presenter Messages

- Litigation can raise public awareness of an issue and result in the disclosure of important documents.
- A lawsuit accusing a business of consumer deception may be more successful than a lawsuit accusing a business of personal harm.
- Legislation and regulation are much more direct and flexible ways of changing policies and practices than litigation, which can be narrow and idiosyncratic.
- Government can be sued for delays in responding to petitions or implementing regulations.

Litigation and the threat of litigation can be powerful forces in changing policies and practices that affect obesity. Two speakers at the workshop discussed the advantages and disadvantages of litigation, while a third warned of its risks and discussed its shortcomings in enacting policy change. Speakers pointed out that litigation and the threat of litigation can have positive consequences even if a case never goes to trial. But they also indicated that litigation may not be the best means of arriving at broadly

applicable public policies, which generally are more appropriately determined by the legislative and executive branches of government.

LEGAL STRATEGIES FOR OBESITY PREVENTION

The use of litigation to reduce smoking demonstrates both the disadvantages and advantages of this approach, said Mark Gottlieb, executive director, Public Health Advocacy Institute, Northeastern Law School. Litigation can take a long time to succeed. In the case of tobacco, it began in the 1950s, but the first verdict to be upheld and result in payment by industry did not occur until 2000. In the meantime, however, good things can happen. Litigation can raise awareness among the public or policy makers about a problem or the occurrence of misconduct. The discovery process, in which litigants exchange documents and other evidence to prove or disprove claims, can shed light on industry practices. Litigation can increase prices or costs for manufacturers, which can reduce consumption. Whistleblowers may emerge from within companies to tell their stories in public. And all of these consequences can cause the media and legislators to take a hard look at an industry. Hearings on tobacco in the 1990s, for example, made a deep public impression and damaged the industry even before any cases had been won.

Nevertheless, "litigation is a blunt tool for policy change," said Gottlieb. Regulatory rulemaking and legislation are much more direct and conventional means of achieving specific public health policy goals. This was not happening with tobacco, noted Gottlieb, which is why litigation became a "last resort." But the situation is somewhat different with food. Progress is being made on various fronts, although perhaps not as rapidly as people would like. In the case of food, litigation may be a valuable complement to rather than a replacement for legislation, regulation, and industry change.

The first obesity cases were filed in the early 2000s as people became more aware of the obesity problem. The first was a case on behalf of a man named Barbar, who sued a number of fast food companies. That case was quickly dismissed, but a subsequent case, *Pelman v. McDonald's*, had more impact. Gottlieb recounted that the case was based partly on consumer protection grounds but also on traditional product liability approaches around negligence and failure to warn, as might be the case in a lawsuit against cigarette manufacturers.

In response, a group called the Center for Consumer Freedom helped spearhead a round of state tort reform initiatives that eliminated individuals' rights to sue for reasons related to obesity in many states. The campaign against obesity-related litigation dwelled on some of the differences between tobacco and food. Cigarettes cannot be healthy, whereas foods can. Also, there are so many foods and so many food manufacturers and distributors

that the causation required in a traditional product liability case can be virtually impossible to prove, according to Gottlieb.

The use of consumer protection laws to prevent obesity can be much more effective, suggested Gottlieb. "State consumer protection laws offer a real opportunity to change practices around misleading, deceptive, and unfair marketing practices [for] food and beverages, particularly as they affect children," he said. Such laws complement the authority of the Federal Trade Commission (FTC) by giving state attorneys general and, often, private parties rights of action to prevent unfair and deceptive practices in sales and marketing at the state level. In some cases and in some states, class actions are also available, so many consumers who were deceived can bring a single case.

Every state prohibits deceptive practices, and some also use language such as "unfair" or "unconscionable" practices. There are differences among the 50 states' consumer protection laws that usually hinge on courts' interpretation of what is deceptive, whether a victim relied on a particular misrepresentation, and what sorts of damages are available. Despite these differences, Gottlieb explained, all states prohibit representations that may mislead or deceive consumers.

Several recently decided cases in California used consumer protection laws in an effort to protect child health. In 2008, the case *McKinniss v. General Mills* targeted the makers of Trix Yogurt, Sunny Delight, and Froot Loops for deceptively implying the presence of fruit in their products. However, the court ruled that a reasonable consumer would never expect real fruit to be in these products. In 2008, the case *Williams v. Gerber* produced the same result, but the decision was reversed on appeal when the Ninth Circuit Court ruled that a consumer should not have to check the Food and Drug Administration (FDA)-mandated Nutrition Facts panel to verify front-of-package representations. If the McKinniss case had been appealed to the Ninth Circuit Court, said Gottlieb, that earlier decision might also have been overturned, suggesting that further cases of this type could be successful.

Food companies market both to parents and to children. Children can pressure their parents to buy something and also are the direct target of advertising. They spend billions of dollars on their own each year, and their primary spending category is sweets, snacks, and beverages. Adolescents spend almost $100 a week, although not all on food. "Marketing directly to youth is a very powerful tool for the industry, because so much money is getting spent directly by youth," said Gottlieb. He noted that consumer protection laws protect the target of the marketing, whether children or parents.

The use of state consumer protection law requires understanding whether the purchaser was misled or deceived. Parents are adults and are held to a "reasonable consumer" standard—that is, they should act as a reasonably prudent consumer would act under similar circumstances. Children, on the

other hand, may be subjected to a lower standard because they are more vulnerable. Thus, the threshold may be easier to meet for children than for adults.

An argument can be made that any kind of marketing to younger children is inherently unfair because they are unable to distinguish advertising from content. For example, one lunch product contains messages for parents on the front of the package that the product is good for children, and the back of the package is dominated by cartoon characters. Yet the Nutrition Facts label on the side of the package notes that the product contains 700 milligrams of sodium and 20 grams of sugar. Similarly, a container of sweetened whipped cream boasts that a serving contains just 15 calories, whereas children are trained on the product's website to fill up a clown's mouth with whipped cream. "You might be getting a little more than the '15 fun calories' that way," said Gottlieb.

In 1980, Congress removed the FTC's authority to regulate advertising to children on the grounds that such advertising is unfair. State consumer protection laws may be able to fill that regulatory gap by helping to protect children from unfair marketing practices. State consumer protection litigation is currently underused, said Gottlieb. It can change practices, educate the public, and engage regulators and policy makers. Attorneys general in every state are empowered under state consumer protection law to investigate and enforce laws, and private groups can act to push back against unfair marketing practices in states with strong consumer protection statutes. To further this work, the Public Health Advocacy Institute (2011) is publishing on its website a 50-state map explaining the differences among the states' consumer protection laws and how those laws might apply to deceptive marketing aimed at children.

USING LITIGATION AND THE THREAT OF LITIGATION TO LEVERAGE CHANGE

The use of litigation to prevent childhood obesity has helped demonstrate just how difficult and complex the obesity problem is, said Michael Jacobson, co-founder and executive director, Center for Science in the Public Interest (CSPI). Obesity has many potential causes beyond overeating and lack of exercise. Viruses, endocrine disruptors in the environment, or maternal obesity may contribute to childhood obesity, for example, and the physical infrastructure of society makes it difficult to walk and easy to drive. Reducing obesity will require many steps, including improving maternal health, eliminating chemicals from the environment, removing junk foods from schools, changing advertising, and enhancing education.

Jacobson observed that litigation has many limitations. Lawsuits generally target just one company at a time and require considerable resources.

They often involve novel legal strategies or arguments, which can be a barrier to success. "Litigators have exaggerated the potential gains from litigation on diet-related health issues, including obesity," Jacobson said. At the same time, litigation does have a role. A lawsuit can reverberate elsewhere. For example, if one company is sued with a successful outcome, other companies may change their practices to avoid future lawsuits.

CSPI began using litigation several years ago after hiring a director of consumer protection who worked in state attorney general offices in Texas and New York. It has brought or threatened lawsuits involving unsafe ingredients, deceptive labeling, and information not provided to consumers that is material to their choices in the marketplace. Some of these lawsuits were related to obesity, although usually in an indirect way.

In 2006, CSPI approached the Coca-Cola Company and PepsiCo about unfair marketing practices in selling soft drinks in public schools. "It is literally selling liquid candy to kids, and it just wasn't appropriate," said Jacobson. Meetings continued for about 6 months to address such issues as diet drinks, after-school purchases, and vending machines near gymnasiums. Finally, CSPI set a 2-week deadline for reaching a final agreement on the parameters of a settlement. Jacobson recounted that this precipitated a swift reaction from the beverage companies. "They, without telling us, signed an agreement with President Clinton and the Heart Association to get many of the soft drinks, [although] not sports drinks, out of schools in this country. It is hard to know how much the litigation was a factor in their decision, . . . but I suspect that they would rather have been at a press conference with President Clinton than with CSPI."

Another lawsuit involved marketing unhealthy foods to children. A CSPI survey found that many of the foods marketed to children on Saturday morning television were high in sugar, sodium, and fat. CSPI held a press conference and announced that it was giving Kellogg's 30 days' notice to change its practices or it would file a lawsuit. The announcement generated considerable publicity and eventually a settlement. The agreement was not entirely satisfactory to either side, Jacobson said. It limited trans fat, sodium, and sugar, but 12 grams of sugar per serving was still allowed, and Kellogg's would not agree to a whole grain requirement. Jacobson noted that CSPI was even willing to allow more sugar if whole grains were used, but the company would not agree to this compromise.

According to Jacobson, the agreement with Kellogg's helped convince food manufacturers to join the Children's Food and Beverage Advertising Initiative (described in Chapter 4). Currently, about 15 companies have joined the initiative, he said, which has been "an impetus to move toward healthier foods." But many problems remain, such as a proliferation of foods containing artificial colors and flavors and refined carbohydrates.

A third threatened lawsuit was against McDonald's for including toys

in their meals. Featuring cartoon or movie characters in ads on Saturday morning television is designed to get children to pester their parents to take them to McDonald's, Jacobson said. "The kids generally don't care very much about the hamburgers . . . but they want the toy." But McDonald's has not negotiated with CSPI over a threatened lawsuit regarding these toys, so, said Jacobson, it will be up to the courts to decide.

Government is also a potential target of litigation, although Jacobson noted that it is difficult to prevail against the government. It is easier to sue the government for delays in responding to petitions or implementing regulations. For example, 5 years ago CSPI petitioned the FDA to require health notices on such products as cigarettes and sugar-sweetened beverages. After 5 years the FDA has not responded to this petition. "We could sue over that," said Jacobson. "Generally the government will go to court and say, 'Judge, it is only 5 years, we are studying the matter,' . . . and the judge [will] probably dismiss the case. But that is another gambit in the litigation area."

Litigation is not a magic bullet, Jacobson concluded. But it can be useful in making progress on specific issues in the battle against obesity or other health problems.

THE DISADVANTAGES OF LITIGATION

Joseph Price, senior partner in the law firm Faegre & Benson, argued that the childhood obesity problem cannot be solved through litigation. Coercion does not yield good public policy, he suggested, and it does not build the consensus needed to make lasting policy changes. Courts generally adjudicate a single dispute based on the evidence presented by the parties in that case. As a result, litigation is narrow and case-specific and may give a distorted view of the larger issues involved. Litigation generally revolves around monetary damages, not around policy considerations, and it may not be able to effect broader change. Litigation also may lead to a result that suffices for the specific dispute but not as public policy. In that case, society at large may have to deal with the ramifications of an inadequate or slanted case presentation or resolution. An attorney has an ethical duty to the client he or she represents in a specific case, and that ethical duty may not be consistent with the duty to create public policy at a broader level. Also, because the laws in every state are different, different results may follow from the same facts in different jurisdictions. For example, said Price, the Senate recently passed the Childhood Nutrition Act. "There is no way that a piece of legislation like that would have ever been generated by litigation," he stated. "Litigation is uncertain, [and] it is unpredictable."

Litigation can depend on lay juries that make idiosyncratic decisions. Those selected as jurors are expected to know nothing about the case or

about the subject to which it pertains, and then to learn all about the scientific issues involved within a few weeks. Then they are supposed to be able to answer questions to which science and medicine do not have the answers.

Furthermore, decisions made at the trial level are not binding because they can be appealed. National class action lawsuits often cost millions of dollars to prosecute and to defend, and if policy issues are involved, costly appeals are almost always going to occur. If these costs are passed on to consumers, higher prices may reduce the use of an unhealthy product. However, Price cited the example of cigarettes, noting that even though they are extremely expensive today compared with what they cost in the past, people still buy them.

Tobacco litigation took 40 years to yield the first productive results, and if and when damage payments are made, they usually go to the parties involved, not to policy or educational initiatives. Furthermore, there are no guarantees that classes will be certified in these cases. The courts have been certifying classes less frequently than in the past, and Price suggested that these cases are worthless to pursue without class action, because the problem is defined by its scale.

Legal defenses against these cases can be very strong, suggested Price, and preemption also can be an issue. Moreover, defense lawyers, who Price said will be diligent and creative in their efforts, can challenge the validity of the scientific evidence. They often rely on the concept of personal responsibility to defend against lawsuits, an idea that resonates with juries, said Price.

Litigation designed to prevent obesity differs in many ways from tobacco litigation. Tobacco in any form and any amount can be harmful to health, whereas food is not only good for health but essential. Addiction to tobacco is not the same as addiction to food, since without food no one could live. There is no question that tobacco can cause disease, but it is much more difficult to establish that obesity causes disease. Showing connections among food, obesity, and disease raises many other issues. Are working families responsible for obesity because there is less time to cook at home? Do food stamps used to buy soda cause obesity? Does obesity result from the failure to have good grocery stores in low-income neighborhoods? What is the role of exercise and physical activity? Youth aged 8 to 18 now average 7½ hours of media use during the day, so do computers, videogames, and movies cause obesity? Also, which foods are responsible for obesity? Should Kellogg's be sued, or Coca-Cola? "Are you sure it wasn't the pizza or the ice cream or the chips or something else that caused [obesity], or a combination of all, so are you going to sue everybody?" asked Price. How does one know what people ate? What if obesity is linked to a virus or an environmental toxin? Given the widespread nature of the obesity problem, proving causation becomes exceedingly difficult.

Even if food causes obesity, obesity must be linked to disease. But researchers do not know exactly what causes diabetes or heart disease. These diseases occur in thin people as well as those who are overweight, and many people eat poorly and do not get sick. "If science can't answer these questions, lay juries certainly cannot," suggested Price.

After the first wave of obesity-related litigation failed to make much progress, plaintiffs began to consider consumer fraud cases. But the vast majority of consumer fraud cases have nothing to do with obesity; rather, they are related to labeling and deception. Consumer fraud cases eliminate the causal factor behind obesity, but that makes them somewhat disingenuous, Price argued. They are an attempt to do indirectly what cannot be done directly. For example, CSPI objected to Ben and Jerry's use of the term "natural" on a label, and the company decided to change the label. But "you can't make ice cream a health food," said Price. "It is what it is."

Finally, the influence of attorneys' fees may affect decisions on trials, settlements, and appeals. Price suggested that class action lawsuits that appear to have the intent of furthering obesity prevention may more likely be intended to profit the prosecuting attorneys. When Kellogg's recently settled a class action lawsuit, the members of the class got up to three boxes of cereal, while the lawyers got $2 million in fees and expenses.

The legislative and executive branches are better equipped to achieve broad policy goals because they can obtain input from a wide range of interests, not just the parties to a lawsuit. It also is advisable, said Price, to suppress the automatic reflex of believing that all of society's ills can be resolved by litigation. Price cautioned that industry, if on the defensive, "will fight." However, he suggested, the food and beverage industries have been taking positive steps, and he encouraged a cooperative approach as opposed to costly and time-consuming litigation that often benefits only the lawyers involved.

DISCUSSION

During the discussion period, Stephen Sugarman, University of California, Berkeley School of Law, who moderated the session on litigation, asked whether litigation can be particularly effective with food companies because they do not want to be stigmatized as has the tobacco industry. Price agreed that the food industry is concerned about its image. He suggested that many of the industry actions described by speakers (Chapter 4) would not have been taken otherwise. Still, he said, these companies also have a responsibility to their shareholders and investors to sell products.

Jacobson responded to Price's suggestion that a cooperative approach would be more effective by joking "much of this gray hair is due to trying

the cooperative approach." CSPI has sent companies many letters and held many discussions with companies and trade associations regarding what the institute considers unfair and deceptive marketing practices. According to Jacobson, industry representatives participate in these discussions and are polite, but then say they will go back to their offices and study the complaint. For example, Ben and Jerry's received its letter from CSPI years ago, but only when CSPI hired a litigator and demanded a response within 30 days did the company respond. Jacobson also pointed out that even without a designated class, it is possible to obtain injunctive relief. "If we can get McDonald's not to sell toys . . . that is a relief," he said.

Shirley Schantz, National Association of School Nurses, asked about the deception apparent in claims that products are made with "real sugar" as opposed to high fructose corn syrup, implying that consumption of sugar will reduce obesity. Gottlieb responded that there is no proven health benefit from using such a claim as an incentive to buy, so an argument exists that it is a misleading claim.

In response to a question about where the obesity epidemic is headed, Gottlieb speculated that if no action is taken, health care costs may become unsustainable because of illnesses caused by obesity. Jacobson, however, speculated that Americans may have reached the limit of weight gain, given its leveling off among some groups in the past few years. Perhaps, he suggested, those who are susceptible to becoming overweight have done so. Another possibility is that there will be a cultural shift, including changes within industry, that will stem the epidemic. There is no way to predict, said Jacobson. Sugarman pointed out that at the time of the Surgeon General's 1964 report on smoking, the adult smoking rate was more than 40 percent, whereas now the rate is about 20 percent. He speculated that the drop from more than 40 percent to 27 percent might have been the result of changing cultural tastes, whereas the drop from 27 percent to 20 percent might have occurred because of tobacco control policy. Still, in the case of tobacco, that drop represents tens of thousands of lives saved each year.

When asked which litigation he viewed as wasteful, Price specified that he was talking about personal injury cases involving claims that food caused people to become obese and suffer from disease. But he agreed that there has been very little such litigation since its difficulty was demonstrated by the initial lawsuits of this type. He said that "consumer fraud cases appropriately brought are appropriate." However, not many of these cases have been directed at obesity. Arguing whether high fructose corn syrup is natural or whether ice cream contains natural ingredients fails to get at the heart of the issue, he suggested, and he reiterated his view that litigation is not the way to control obesity.

Gottlieb argued that consumer protection cases nevertheless chip away at the problem. And Bruce Silverglade of CSPI observed that the courts are

taking consumer fraud cases seriously. "Sugary candy masquerading as fruit and Vitamin Water containing more calories than vitamins do contribute to the obesity crisis," he argued. "That has been the focus of our most recent actions." The public health perspective on obesity differs from industry's perspective, generating an inevitable conflict, Sugarman observed.

8

Other State and Local Obesity Prevention Strategies

Key Presenter Messages

- State and local public health agencies can use such measures as menu labeling, land use planning, and the promotion of physical activity to influence obesity-related behaviors.
- Agencies may need to have comprehensive strategies in place to take advantage of political opportunities.
- Attorneys general can take action to protect the general welfare and well-being of the public, and an increasing number are becoming interested in obesity issues.
- State and local child care regulations can help prevent obesity in a particularly vulnerable population.

A final panel at the workshop examined a variety of legal strategies that states and localities can use to prevent obesity in addition to those discussed in earlier sessions, ranging from menu labeling, to programs for small employers, to child care guidelines. These strategies can be undertaken by a variety of actors—the presenters on this panel were a local public health agency official, an attorney general, and a child care researcher. Initiatives at the state and local levels need to take advantage of political

opportunities, and extended campaigns may be necessary to effect change, the panelists said.

ACTIONS BY LOCAL PUBLIC HEALTH AGENCIES

Local public health agencies have both the authority and the tools to change the built, social, and food environments, said James Krieger, chief, Chronic Disease and Injury Prevention Section, Seattle-King County Public Health Department. "We are just now beginning to understand the potential of applying these tools in the realm of obesity prevention," he noted.

However, the influence of local public health agencies extends beyond their legal powers. Public health officials have important relationships with many sectors and stakeholders that have influence over the policies and systems that affect obesity rates. They have connections with the executive branch for which they work; the legislative branch, such as county and city councils; and local policy-making bodies, such as planning agencies, school districts, and housing authorities. They can serve as a nexus for bringing these groups together to forge consensus and move policy forward.

Public health is currently at a watershed point, Krieger said. It is transitioning to an emphasis on policy systems and environmental change, expanding its activities beyond its past emphasis on health education and direct services. Local public health agencies have expertise in assessments, communications, legislative affairs, and constituent mobilization, and thus can make significant contributions to driving a policy and a legal agenda at the local level. Krieger discussed three specific examples of this new influence: menu labeling, land use planning, and the promotion of physical activity.

Menu Labeling

In March 2008, King County, which includes Seattle and surrounding areas, became the second jurisdiction in the nation to pass a menu labeling regulation, following New York City. The county chose menu labeling as an initiative for several reasons: the obesity issue has high visibility; the leadership of the local board of health decided to take a more activist stance on the problem; a political consensus to take action was forming; menu labeling is an easier step to take than many others; and it avoids the "nanny state" criticism, since it simply provides customers with information they may need to make their own choices. Also, evidence available at the time justified the choice, although the evidence still is not conclusive. Some models indicate that menu labeling may prevent weight gain, and experiments in cafeterias and workplaces have shown that it may change choices and caloric intake. But no studies are currently available to dem-

onstrate the effects of menu labeling in chain restaurants (the focus of such labeling) or on weight.

A 3-year period of organizing in the community led to a consensus first, that obesity is a problem and second, that consumption of excess calories is the main driver of obesity. From that process emerged a 10-point overweight prevention initiative, which was adopted by the board of health in October 2005 and included menu labeling and reduction of caloric intake among its planks. A new director arrived at the health department who was supportive of menu labeling, and the county council adopted a board of health resolution supporting policies to promote healthy eating and active living. An ad hoc committee of the board of health was thereby empowered to advise the board to adopt a menu labeling regulation, which was passed in July 2007.

Krieger recounted that at this point, the food industry began to take action, working to introduce bills in the state legislature that would explicitly preempt local jurisdictions from enacting menu labeling. Negotiations under the auspices of the state legislature led to a compromise, which modified some parts of the original regulation but left most of the important parts intact. Industry then dropped its opposition to the amended regulation, adopting the position that it was better to cooperate than to further oppose labeling. Krieger noted that a stakeholder working group was able to work out the details of implementation, the rules, and the rulemaking process for the regulation.

More recently, the national health care reform movement has created the possibility of preemption from the federal rather than the state level. King County has amended its regulation to conform with the menu labeling provisions of the Affordable Care Act while awaiting the results of the Food and Drug Administration's (FDA's) rulemaking process. Krieger said that public health officials at the state and local levels generally were not aware that negotiations were ongoing within the federal government to reach an agreement with the restaurant industry on menu labeling. He noted that as time has passed, these officials have come to see the benefits of having a federal law because it covers a large number of jurisdictions, many of which would be unable to pass such a bill locally. The federal law also has extended the scope of labeling to include food in vending machines and self-service items. At the same time, however, it has limited labeling in other ways—for example, by not requiring notification of sodium, carbohydrate, or saturated fat levels. According to Krieger, the lesson learned is that advocates at all levels—local, state, and federal—must agree early on as to the desired outcomes of any kind of negotiation.

According to an evaluation of menu labeling after the King County regulation went into effect, the percentage of people who were aware of calorie information rose from 13 to 49 percent. For nutritional informa-

tion not added to menus, such as saturated fats and carbohydrates, there was little change in awareness. King County is now evaluating the impact of menu labeling on caloric intake. According to Krieger, a big change is not expected. The primary group expected to be affected is those most concerned about calories—those who are overweight or have diabetes or other weight-related health problems.

Land Use Planning

Land use planning as a means of improving public health has a long history. In the early 1900s, attention focused on water and sanitary conditions and prevention of communicable diseases. Today, land use planning also encompasses promoting physical activity and good nutrition by improving the environment (see also Chapter 6).

Local public health departments do not have regulatory authority over land use. Their objective is therefore to partner with other branches of government to instigate change. For example, they can issue guidelines that other agencies can use when establishing regulations.

In Washington State, a state-level growth management act requires multicounty units to set guidelines for planning policies, after which each county develops countywide guidelines. These guidelines ultimately influence the comprehensive plans that lay out the zoning and other regulations that affect land use at the city and county levels.

In King County, which comprises 39 cities, the public health department has been working to effect the incorporation of health-related elements into the plans of individual communities. For example, the board of health recently passed a resolution recommending the inclusion of specific "healthy community" elements in community plans. It also has obtained a federal grant to work with local jurisdictions to incorporate model elements into the plans by supporting local planning staff. Examples might include a robust local farm-to-table chain; long-term preservation of farmland; and measures to ensure adequate numbers of retail food outlets, particularly in low-income neighborhoods. Planning and land use design can also provide such opportunities by, for example, locating facilities within walkable distances; creating parks, sidewalks, and bike trails; and ensuring that transit can be reached by walking or biking.

The county provides technical assistance from the health department and from private contractors for the drafting of these elements. By 2014, said Krieger, the objective is for most communities in King County to have incorporated health-related elements into their comprehensive planning process.

Physical Activity

A board of health guideline in King County is that everyone should have access to safe and convenient opportunities for physical activity and exercise, Krieger explained. As noted above, planning and land use design can help provide such opportunities. In this process, a variety of questions arise: What will be the impact of an action? How much will it cost? What externalities might occur? How feasible is it? Is it acceptable to move forward before the evidence is clear?

The actual choice of policy is often determined by a political window of opportunity, Krieger noted. The right people and forces line up and make it possible to move. When these opportunities occur, it is important to have a comprehensive political strategy for taking advantage of them. The right language needs to be used, stakeholders need to be engaged, communities need to be mobilized, experts need to be involved, and all these elements need to be integrated into a campaign that will result in success.

Emerging priorities in King County include improving school nutrition and physical education, improving child care nutrition and physical activity, and promoting health at small-employer worksites. The county will be working to increase access to healthier foods by supporting urban farmers, particularly in low-income communities; by promoting healthy food in retail outlets through food financing initiatives; by using government procurement policies to buy healthier foods; and by reducing the consumption of sugar-sweetened beverages. The county also will be increasing opportunities for physical activity through local planning, joint-use agreements, and increased access to recreational activities in low-income communities (see Chapter 6).

THE ROLES OF ATTORNEYS GENERAL

Attorneys general wear two hats, said William Sorrell, attorney general for Vermont. They represent the government in court, but they also represent the general welfare and well-being. From both perspectives, the prevention of obesity falls squarely within their purview.

During his tenure as attorney general, Sorrell has convened several year-long initiatives that have brought stakeholders together to agree on recommendations for legislative and policy changes. One such initiative was on end-of-care life; another was on lead in the environment. The most recent initiative has been on obesity prevention. A meeting in February 2010 brought together nearly 100 stakeholders, "everyone from organic farmers to the beverage association to the retail grocers to the health department," said Sorrell. Subcommittees on child and family nutritional issues, the built environment, and the retail environment met during the spring and summer

to arrive at recommendations. The initiative's final report was scheduled to be issued a few weeks after the workshop.

Issuing such a report should be seen as part of a political campaign, said Sorrell. The media should be encouraged to attend the release of the report, with subsequent outreach to the public. The timing of elections and other political events also should be considered for a report to gain maximum traction.

Many attorneys general are becoming interested in obesity issues, Sorrell noted. A conference of western attorneys general held in Santa Fe in 2010 included a panel on obesity issues. The First Lady's interest in the subject has helped make the issue a priority. And with 14 to 18 new attorneys general coming into office in the 2010 election cycle, it is a good time to promote the issue at the state level.

The Vermont report will contain proposals on beverage taxes, school lunch programs, the Supplemental Nutrition Assistance Program, and low-interest loans to small retailers to make healthier foods available. "I am hoping Vermont's 640,000 people can lead the nation in effectively trying to deal with this huge public health problem," said Sorrell.

CHILD CARE AND OBESITY

Approximately two-thirds of children under the age of 6 in the United States spend some time in child care. About half of these children are in large, formal centers, while the other half spend time in a variety of home-based settings, such as care by a nanny, family member, friend, or neighbor.

Research on the relationship between child care attendance and obesity has yielded mixed results, said Sara Benjamin Neelon, assistant professor, Department of Community and Family Medicine and Duke Global Health Institute, Duke University. One or two studies have found that child care attendance may have a slightly protective effect against obesity, particularly for certain groups of children (Lumeng et al., 2005). On the other hand, a number of other studies have found that child care may contribute to the development of obesity, particularly for infants (Kim and Peterson, 2008; Maher et al., 2008; Benjamin et al., 2009; Pearce et al., 2010). Despite this conflicting evidence, Benjamin Neelon noted that children in child care tend to have somewhat poor diets; in particular, they often do not eat enough fruits, vegetables, or fiber. Children in child care also could be more physically active.

Regulation of child care is the responsibility of each individual state and the District of Columbia, Puerto Rico, the Virgin Islands, and the Department of Defense. Cities and other municipalities also have the ability to regulate child care facilities within their jurisdiction. Most states regulate a number of different types of child care facilities, but they typically divide those facilities

into child care centers—the larger facilities with more stringent rules—and family child care homes, which are also licensed but tend to be less formal and have fewer regulations.

According to the most recent data, 29 states visit their child care centers at least once annually to see whether they are adhering to state regulations, 16 visit their centers every 2 years, and 6 do so every 3 or more years. For family child care homes, intervals between visits range from 6 months to 10 years.

Benjamin Neelon presented six issues for states to consider in setting child care regulations designed to prevent obesity:

- *Identify best practices*—States often ask about the evidence to support establishment of a regulation. Should children receive 60 minutes, 90 minutes, or 120 minutes of physical activity per day? What is the best practice? "Evidence is often very limited," Benjamin Neelon noted.
- *Understand avenues for regulatory change*—In some states, regulatory change comes from the legislature. In others, it comes through a body empowered by the legislature or through some other mechanism.
- *Estimate and acknowledge costs associated with regulatory change*—If a state tells its child care facilities that they must serve whole fruits or vegetables instead of juice, what are the economic costs associated with that new requirement? Who pays these additional costs?
- *Support the implementation of new regulations*—It is not enough simply to establish a regulation. States must provide support for its implementation. They must explain why compliance is important, how the regulation will affect children's health, and what tools are available to help with compliance.
- *Assess compliance*—Without assessing compliance, it is difficult to tell whether a regulation is being implemented and whether it is being implemented as planned.
- *Evaluate regulatory changes*—States should put systems in place to assess whether regulatory changes affect the health of children. Do new regulations achieve their intended outcome?

New York City recently enacted healthy eating and physical activity regulations that were more stringent than those for New York State through article 47 of the New York City Health Code. All child care facilities must provide 60 minutes of physical activity a day, half of which must be structured or teacher-led. Children cannot watch television in child care for more than 60 minutes a day, and what they watch is restricted to educational programs and programs designed to increase physical activity. Sugar-sweetened beverages and juice must be limited. Low-fat milk must be served to children

over 2 years of age. And parents receive nutrition information and cannot send junk food to child care with their children.

In Delaware, the state changed its Child and Adult Care Food Program (CACFP) standards. CACFP is a federal reimbursement program for eligible foods and beverages served to children in child care facilities. Even though it is a federal program, states can enact more stringent standards, which is what Delaware did, applying them to all facilities in the state. Delaware had the assistance of a large nonprofit, the Nemours Foundation, in making these changes. The partnership with Nemours resulted in a toolkit to help child care providers comply with the new regulations. Under these regulations, children over age 2 must receive low-fat milk, servings of grains must contain no more than 6 grams of sugar, one whole grain must be served daily, juice must be limited to one serving a day for toddlers and preschoolers (with no juice allowed for infants), and sugar-sweetened beverages are not allowed. Benjamin Neelon emphasized that a strong evaluation component is necessary to understand the effectiveness of such new standards and regulations.

Benjamin Neelon explained the actions of New York City and Delaware creating additional regulations by noting that, except for the standards covering federally funded programs such as CACFP and Head Start, there are no national standards for nutrition and physical activity for young children. She pointed out that the publication *Caring for Our Children: National Health and Safety Performance Standards* (National Resource Center for Health and Safety in Child Care and Early Education, 2002) is the gold standard for child care providers and often is used as the basis for state child care regulations. Until a set of recent revisions, however, the standards related to obesity in the publication were fairly weak.

Benjamin Neelon convened a group of experts to develop a list of potential eating and physical activity regulations that can be used as models for states. She then compared these model regulations with existing regulations and issued a report card to each state, along with the Virgin Islands, the Department of Defense, Puerto Rico, and Washington, DC. No state received an A, 8 received a B, 43 a C, 2 a D, and 1 an F because it deferred regulations to cities and municipalities (although it has since adopted state regulations).

The greatest need, said Benjamin Neelon, is for evidence-based standards to help states that want to enhance their regulations. "I receive probably one phone call a week from states interested in changing their state regulations," she noted, "so it is happening with or without our guidance."

DISCUSSION

During the discussion period, Krieger was asked by Patricia Crawford of the Standing Committee on Childhood Obesity Prevention how local governments choose among the wide range of options for obesity preven-

tion. He responded that actions often are based on politics rather than evidence. Is a legislative or executive branch champion ready to take on an issue? What do community partners think of the priorities? Are they willing to organize and mobilize around an issue? Does the current media climate contribute to progress? It also is influential when an organization such as the Institute of Medicine cites a particular action as important, he said, because that provides expert judgment to cite as justification for the action.

Robert Garcia asked Sorrell what attorneys general can do to enforce physical education regulations in individual states. Sorrell replied that one step is to get the issue on the agenda at national meetings of attorneys general. He also suggested emphasizing the child protection or public health aspects of physical education. Attorneys general do not move in lockstep, he noted, and each works within a unique combination of political pressures and legal authority.

In response to a question about the siloing of funds for different public health concerns, Sorrell noted that competition can exist among public health groups. Groups that receive funding do not want to give up that funding when priorities change. Organizing groups around a broad umbrella issue can reduce competition. Joseph Thompson, member of the Standing Committee on Childhood Obesity Prevention and moderator of the session, pointed out that combating obesity requires a multisector approach in which many organizations and individuals are involved.

Russell Pate asked about the "price sensitivity issue" in child care. Benjamin Neelon pointed out that child care facilities operate on a shoestring budget. If a facility can no longer serve fruit juice and must instead serve whole fruits and vegetables, there can be a substantial financial impact, including driving the facility out of business.

Thompson pointed out that the contractual process also can be a legal option to help prevent obesity. For example, government officials can require that healthy food be available at every meeting. Thompson referred to these issues of procurement as a "lever" that can be used to contribute to a healthy environment.

9

Closing Remarks

Key Presenter Messages

- Reauthorization of several critical bills in the next few years will provide unparalleled opportunities to change policies that affect food consumption and obesity in the United States.
- The attention being given to obesity by the First Lady and many policy makers has increased the impetus for change.
- The potential for change demands continued focused research to determine which actions will be most effective.

This is an extraordinary time to be working on the prevention of childhood obesity, said William Dietz, member of the Standing Committee on Childhood Obesity Prevention, in his closing remarks at the workshop. The 2010 Child Nutrition Reauthorization Bill will arguably have the greatest impact on child nutrition of any legislation in the past 20 years because it will establish standards for the child and adult care food program and for what is served in schools. The Farm Bill will continue to have a profound impact on the agricultural system and food supply in the United States, in part through its subsidies for food prices, which in turn affect consumption levels. The Supplemental Nutrition Assistance Program (SNAP), formerly known as food stamps, is authorized under the Farm Bill as well. Dietz

noted that legislation that affects obesity is often intertwined with other important issues. The Farm Bill, as well as many other pieces of legislation, also affects such issues as land use and even infectious disease issues that arise from the use of antibiotics in cattle feeding operations. Finally, the reauthorization of the transportation bill includes measures that affect community design, public transit, and air quality, all of which have an impact on health and chronic disease. "From the national legislative perspective, there are some very important opportunities in front of us," said Dietz.

Other activities at the federal level also will have an effect on childhood obesity. The Food and Drug Administration (FDA) is working on menu and front-of-package labeling. The Federal Trade Commission (FTC) is developing voluntary standards for foods marketed to children. The Affordable Care Act mandates that companies afford breast-feeding support to nursing mothers, which has an effect on childhood nutrition. And the Communities Putting Prevention to Work initiative has allocated a substantial amount of money for community and state efforts to develop nutrition and physical activity strategies to address obesity.

Child care and healthy pregnancy are a substantial focus of the Childhood Obesity Task Force that is part of the First Lady's Let's Move initiative, particularly with respect to weight gain, tobacco use, and diabetes during pregnancy, all of which are risk factors for early childhood obesity. Also, the National Prevention Council, now getting under way, will work on obesity prevention initiatives, with an emphasis on nutrition and physical activity. The council includes 12 Cabinet members, providing an opportunity to incorporate health considerations into all federal policies.

Dietz identified these developments as the greatest opportunity to achieve advances in the fight against childhood obesity since the 1969 White House Conference on Food, Nutrition, and Health, from which a variety of important programs emerged (The White House, 1969). This opportunity is greatly enhanced by the First Lady's role as a champion for obesity prevention, and indeed for nutrition generally. "She is visible, articulate, and passionate about these issues," said Dietz.

Gaps are also plentiful, however. The multitude of initiatives being undertaken raises a number of questions. How can multiple efforts be not only coordinated but integrated? Which activities should have priority? Do networks exist to promote the rapid dissemination of innovations? If a lesson is learned in one area, how quickly can it be shared, amplified, disseminated, or replicated? How can new ideas and perceptions be transmitted to those in the field? Implementation requires pragmatism, opportunism, and mobilization, said Dietz. Scientific advances must be applied within the limits of political opportunities and pragmatism, which have a stronger effect on policy making.

Because obesity prevention is a new field, funds are needed for evalua-

tion, not just for action, said Dietz. Only through evaluation can we learn what works. Continuous measurement identifies areas for change, reveals problems, shows the impact of interventions, and drives change.

Finally, the question arises of how a workforce will be developed to carry out antiobesity efforts. Only then will the sustainability of these efforts be ensured.

Obesity prevention is but one component of meeting the broader needs of children, Dietz said. It is essential to institutionalize environments that protect the needs of children, nurture healthy development, and advance obesity prevention through improved nutrition and physical activity. Perhaps childhood obesity "could become the initiative that goes beyond the lip service that we give to children as our most precious resource," suggested Dietz.

References and Resources

Benjamin, S. E., S. L. Rifas-Shiman, E. M. Taveras, J. Haines, J. Finkelstein, K. Kleinman, and M. W. Gillman. 2009. Early child care and adiposity at ages 1 and 3 years. *Pediatrics* 124(2):555-562.

Brownell, K. D., and K. E. Warner. 2009. The perils of ignoring history: Big tobacco played dirty and millions died. How similar is big food. *Milbank Quarterly* 87(1):259-294.

Cardello, H. 2009. *Stuffed: An insider's look at who's {REALLY} making America Fat*. New York: Harper Collins.

Cawley, J., and C. Meyerhoefer. 2010. *The medical care costs of obesity: An instrumental variables approach*. NBER Working Paper No. 16467. Cambridge, MA: National Bureau of Economic Research.

CDC (Centers for Disease Control and Prevention). Law & the Prevention & Control of Obesity: a Selected Bibliography. www2.cdc.gov/phlp/docs/Obesity%20Prevention%20and%20Control%20Legal%20Bibliography_9_9_09.pdf (accessed April 6, 2011).

Chaloupka, F. J., and P. A. Davidson. 2010. *Applying tobacco control lessons to obesity: taxes and other pricing strategies to reduce consumption*. Saint Paul, MN: Tobacco Control Legal Consortium.

Courtney, B. 2006. Is obesity really the next tobacco? Lessons learned from tobacco for obesity litigation. *Annals of Health Law* 15(1):61-106

CFBAI (Children's Food and Beverage Advertising Initiative). 2009. *A snapshot of the nutritional quality of participants' child-directed food advertising*. http://www.bbb.org/us/children-food-beverage-advertising-initiative/ (accessed April 6, 2011).

Daynard, R. A., P. T. Howard, and C. L. Wilking. 2004. Private enforcement: Litigation as a tool to prevent obesity. *Journal of Public Health Policy* 25(3-4):408-417.

Dreze, X., S. J. Hoch, and M. E. Purk. 1994. Shelf management and space elasticity. *Journal of Retailing* 70(4):301-326.

Elliot, C. 2008. Assessing "fun foods": Nutritional content and analysis of supermarket foods targeted at children. *Obesity Reviews* 9(4):368-377.

FTC (Federal Trade Commission). 2006. *Perspectives on marketing, self-regulation, and childhood obesity*. http://www.ftc.gov/opa/2006/05/childhoodobesity.shtm (accessed April 6, 2011).

FTC. 2008. *Marketing food to children and adolescents. A review of industry expenditures, activities, and self-regulation*. http://www.ftc.gov/opa/2008/07/foodmkting.shtm (accessed April 6, 2011).

GMA Sales Committee (Grocery Manufacturers Association). 2009. *Shopper Marketing 3.0: Unleashing the next wave of value*. Washington, DC: Grocery Manufacturers Association.

Harris, J. L., M. B. Schwartz, and K. D. Brownell, 2009. Marketing foods to children and adolescents: Licensed characters and other promotions on packaged foods in the supermarket. *Public Health Nutrition* 13(3):409-417.

Hoek, J., and B. King. 2008. Food advertising and self-regulation: A view from the trenches. *Australian and New Zealand Journal of Public Health* 32(3):261-265.

IOM (Institute of Medicine). 2006. *Food marketing to children and youth: Threat or opportunity?* Washington, DC: The National Academies Press.

IOM. 2010. *Examination of front-of-package nutrition rating systems and symbols: Phase 1 report*. Washington, DC: The National Academies Press.

Kelley, B., and J. A. Smith. 2004. Legal approaches to the obesity epidemic: An introduction. *Journal of Public Health Policy* 25(3-4):346-352.

Kim, J., and K. E. Peterson. 2008. Association of infant child care with infant feeding practices and weight gain among U.S. infants. *Archives of Pediatrics and Adolescent Medicine* 162(7):627-633.

Kumanyika, S. K. 2007. The obesity epidemic: Looking in the mirror. *American Journal of Epidemiology* 166(3):243-245.

Lumeng, J. C., K. Gannon, D. Appugliese, H. J. Cabral, and B. Zuckerman. 2005. Preschool child care and risk of overweight in 6- to 12-year-old children. *International Journal of Obesity* 29(1):60-66.

Maher, E. J., G. Li, L. Carter, and D. B. Johnson. 2008. Preschool child care participation and obesity at the start of kindergarten. *Pediatrics* 122(2):322-330.

Mello, M. M., J. Pomeranz, et al. (2008). The interplay of public health law and industry self-regulation: The case of sugar-sweetened beverage sales in schools. *American Journal of Public Health* 98(4):595-604.

Monroe, J. A., J. L. Collins, P. S. Maier, T. Merrill, P. S. Benjamin, and A. D. Moulton. 2009. Legal preparedness for obesity prevention and control: A framework for action. *Journal of Law, Medicine, and Ethics* supplement: 15-23

National Resource Center for Health and Safety in Child Care and Early Education. 2002. *Caring for our children: National health and safety performance standards. Guidelines for out-of-home child care*. Elk Grove Village, IL: American Academy of Pediatrics.

NHTSA (*National Highway Traffic Safety Administration*). 2008. *Motor vehicle traffic crashes as a leading cause of death in the United States, 2005*. Washington, DC: NHTSA.

Ogden, C. L., M. D. Carroll, L. R. Curtin, M. M. Lamb, and K. M. Flegal. 2010. Prevalence of high body mass index in US children and adolescents, 2007-2008. *Journal of the American Medical Association* 303(3):242-249.

Pearce, A., L. Li, J. Abbas, B. Ferguson, H. Graham, and C. Law. 2010. Is childcare associated with the risk of overweight and obesity in the early years? Findings from the U.K. millennium cohort study. *International Journal of Obesity* 34(7):1160-1168.

Pomeranz, J. L., and L. O. Gostin. 2009. Improving laws and legal authorities for obesity prevention and control. *Journal of Law, Medicine, and Ethics Supplement* 62-75.

Pomeranz, J. L., S. P. Teret, S. D. Sugarman, L. Rutkow, and K. D. Brownell. 2009. Innovative legal approaches to address obesity. *Milbank Quarterly* 87(1):185-213.

Public Health Advocacy Institute. 2011. *Archive for the food and beverage marketing category*. www.phaionline.org/category/foodbeverage-marketing/ (accessed April 6, 2011).

Schuman, E. 2006. "*Self-checkout killing impulse items,*" *storefront backtalk*. http://www.eweek.com/c/a/Enterprise-Applications/SelfCheckout-Killing-Impulse-Items/ (accessed June 30, 2011), from Enterprise eWeek.

USDA (U.S. Department of Agriculture). 2009. *Access to affordable and nutritious food: Measuring and understanding food deserts and their consequences*. Washington, DC: USDA.

Teret, S. 2010. Unpublished. Lessons Learned from Other Areas. Presented at the Institute of Medicine Workshop Legal Strategies in Childhood Obesity Prevention, Washington, DC, October 21.

The White House. 1969. *White House Conference on Food, Nutrition, and Health*. http://www.nns.nih.gov/1969/full_report/PDFcontents.htm (accessed April 6, 2011).

A

Workshop Agenda

20 F Conference Center
20 F Street, NW, Washington, DC
October 21, 2010

Welcome, Introduction, and Workshop Overview

8:30–8:45 *Shiriki Kumanyika, University of Pennsylvania, Standing Committee Chair*
Kelly Brownell, Yale University, Chair of Planning Committee, Standing Committee Member

Lessons Learned from Other Areas

8:45–9:15 *Stephen Teret, Johns Hopkins Bloomberg School of Public Health*

Improving Food Marketing and Labeling Practices

9:15–10:00 **Moderator:** *Mary Story, University of Minnesota, Standing Committee and Planning Committee Member*

Food Industry Perspectives and Roles: *Scott Faber, Grocery Manufacturers Association*
FTC Authority and Actions: *David Vladeck, Federal Trade Commission*
FDA Menu Labeling, Nutrition Labeling, and Health Claims: *Barbara Schneeman and Michael Landa, Center for Food Safety and Applied Nutrition, Food and Drug Administration*

10:00–10:30 Discussion/Audience Q&A

10:30–10:45 Break

Improving Food Sales and Restaurant Practices

10:45–11:30 **Moderator:** *Shiriki Kumanyika*

Innovative Uses of Government Authority: *Jennifer Pomeranz, Yale University*
Food Industry Perspectives and Roles: *Joan Rector McGlockton, National Restaurant Association*
Using Taxes to Influence Food Purchasing and Obesity: *Lisa Powell, University of Illinois, Chicago*

11:30–12:00 Discussion/Audience Q&A

12:00–1:00 Lunch

Using the Law to Increase Physical Activity in Schools and Communities

1:00–1:45 **Moderator:** *Russell Pate, University of South Carolina, Standing Committee Member*

Civil Rights and Social Justice Strategies: *Robert Garcia, The City Project, Los Angeles*
Increasing Physical Activity in Communities: *Marice Ashe, Public Health Law and Policy*

1:45–2:15 Discussion/Audience Q&A

Using Litigation to Make Change

2:15–3:00 **Moderator:** *Stephen Sugarman, University of California, Berkeley*

Lessons and Opportunities: *Mark Gottlieb, Public Health Advocacy Institute, Boston, and Michael Jacobson, Center for Science in the Public Interest*
Food Industry Perspective and Roles: *Joseph Price, Faegre & Benson, Minneapolis*

3:00–3:30 Discussion/Audience Q&A

3:30–3:45 Break

State and Local Obesity Prevention Strategies and Players

3:45–4:30 **Moderator:** *Joseph Thompson, Robert Wood Johnson Foundation Center to Prevent Childhood Obesity, Standing Committee and Planning Committee Member*

City and County Actions: *James Krieger, Seattle-King County Public Health Department*
Role of State Attorneys General: *William Sorrell, Attorney General of Vermont*
Statutory and Regulatory Models for Improving Child Care Settings: *Sara Benjamin Neelon, Duke University*

4:30–5:00 Discussion/Audience Q&A

5:00–5:15 Closing Remarks

William Dietz, Standing Committee and Planning Committee Member

B

Speaker Biosketches

Marice Ashe, J.D., M.P.H., is executive director of Public Health Law and Policy, a nonprofit national technical assistance center offering public health leaders access to high-quality legal resources for public health campaigns related to both chronic and communicable disease control. In this position, she has launched and directs multiple pioneering efforts to improve public health outcomes through the use of law and policy. Ms. Ashe directs the National Policy and Legal Analysis Network to Prevent Childhood Obesity, which is funded by the Robert Wood Johnson Foundation as part of its $500 million commitment to reversing the childhood obesity epidemic by 2015. She directs Planning for Healthy Places, which integrates built environment and economic development strategies into public health practice. She also directs the Technical Assistance Legal Center, funded by the California Department of Public Health to provide legal technical assistance to tobacco control advocates statewide. Ms. Ashe is a frequent speaker at public health conferences throughout the nation, and she consults with federal and state agencies on how best to incorporate legal and policy tools into public health strategies. She is a graduate of the University of Notre Dame, and received her M.P.H. and J.D. from the University of California, Berkeley.

Kelly D. Brownell, Ph.D., is professor of psychology, professor of epidemiology and public health, and director of the Rudd Center for Food Policy and Obesity at Yale University. Earlier, he was a professor in the Department of Psychiatry and the University of Pennsylvania School of Medicine. His work is focused on environmental factors that contribute to obesity

and eating disorders; the specific effects of the "toxic environment" that encourages overeating and physical inactivity; bias, prejudice, discrimination, and obesity; cognitive factors that affect body image and associated psychological factors; food prices and food consumption patterns; dietary and exercise interventions in schools; reactions to obesity surgery; and public policy as a means of changing eating and activity in the population. His paper on "Understanding and Preventing Relapse," published in *American Psychologist*, was identified as one of the ten most frequently cited papers in psychology. Dr. Brownell has served as president of the Society of Behavioral Medicine, the Division of Health Psychology of the American Psychological Association, and the Association for the Advancement of Behavior Therapy, and has served on the board of directors of other organizations, including the North American Association for the Study of Obesity and the Society for the Experimental Analysis of Behavior. Dr. Brownell received his Ph.D. in clinical psychology from Rutgers University after completing an internship at Brown University. He is a member of the IOM and its Standing Committee on Childhood Obesity Prevention.

William H. Dietz, M.D., Ph.D., is director of the Division of Nutrition, Physical Activity, and Obesity, National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention (CDC). Prior to his appointment to CDC, he was a professor of pediatrics at the Tufts University School of Medicine and director of clinical nutrition at the Floating Hospital of New England Medical Center Hospitals. In addition to his academic responsibilities in Boston, Dr. Dietz was a principal research scientist at the Massachusetts Institute of Technology (MIT)/Harvard Division of Health Science and Technology; associate director of the Clinical Research Center at MIT; and director of the Boston Obesity/Nutrition Research Center, funded by the National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK). He has been a counselor for the American Society for Clinical Nutrition and is past president of the North American Association for the Study of Obesity. In 1995 he received the John Stalker Award from the American School Food Service Association for his efforts to improve school lunches. Dr. Dietz served on the 1995 Dietary Guidelines Advisory Committee, is a past member of the NIDDK Task Force on Obesity, and is former president of the then American Society for Clinical Nutrition. He received a B.A. from Wesleyan University, an M.D. from the University of Pennsylvania, and a Ph.D. in nutritional biochemistry from MIT. Dr. Dietz is a member of the IOM, where he serves on the Standing Committee on Childhood Obesity Prevention.

Scott Faber, J.D., is vice president for federal affairs for the Grocery Manufacturers Association (GMA). In this role, he oversees policy development

and advocacy for GMA, which represents more than 300 food, beverage, and consumer product companies. Prior to joining GMA, he served as an expert on food, agriculture, and water policies for two national environmental organizations. He serves on the board of directors for Protected Harvest, a farming standards certification organization, and has served on federal advisory committees on agriculture and energy issues. Mr. Faber holds a J.D. from Georgetown University Law Center.

Robert García, J.D., is executive director, counsel, and founder of The City Project in Los Angeles, California. He has extensive experience in public policy and legal advocacy, mediation, and litigation involving complex social justice, civil rights, human health, environmental, educational, and criminal justice matters. Mr. García's work in the past decade has focused on equal access to park, school, and health resources throughout Los Angeles and California. He previously served as an assistant U.S. attorney for the Southern District of New York under John Martin and Rudolph W. Giuliani, prosecuting organized crime, public corruption, and international narcotics trafficking cases. Also in New York, he practiced international litigation at a large law firm. Mr. Garcia served as western regional counsel with the NAACP Legal Defense and Education Fund, Inc. He has taught at Stanford Law School and University of California, Los Angeles (UCLA) Law School, where he also serves as a senior fellow in the UCLA School of Public Policy and Social Research. The Planning and Conservation League named the Robert García Environmental Justice Award in his honor for his efforts toward improving the environment in California, and he is also a recipient of the President's Award from the California Attorneys for Criminal Justice. Mr. García received his B.A. and J.D. from Stanford University.

Mark Gottlieb, J.D., is executive director of the Public Health Advocacy Institute at Northeastern University School of Law in Boston. He joined the staff of the Public Health Advocacy Institute in 1993 after graduating from law school. His efforts have focused on researching tobacco litigation as a public health strategy as director of the Tobacco Products Liability Project; reducing the harm caused by secondhand tobacco smoke through a variety of legal and policy approaches; fostering scholarship using tobacco industry documents; and, more recently, examining legal and policy approaches to addressing obesity. Recently, Mr. Gottlieb's focus has been on understanding how environmental contexts (legal, social, and political) enhance or impede the effectiveness of health interventions. Mr. Gottlieb received a B.A. from New College of Florida and a J.D. from Northeastern University School of Law.

Michael F. Jacobson, Ph.D., is co-founder and executive director of the Center for Science in the Public Interest (CSPI), a nonprofit health advocacy organization supported largely by the 850,000 subscribers to its *Nutrition Action Healthletter*. CSPI focuses its advocacy against obesity, cardiovascular disease, and other health problems, using tactics ranging from education to legislation to litigation. CSPI led efforts to win passage of the 1990 Nutrition Labeling and Education Act, a law requiring warning notices on alcoholic beverage labels, and a Food and Drug Administration (FDA) regulation requiring that trans fats be listed on foods labels. CSPI's studies on the nutritional quality of restaurant meals have helped spur major chains to add more healthful items to their menus. CSPI also has eliminated many deceptive food labels and ads through formal complaints to government agencies, discussions with companies, and litigation. Dr. Jacobson has written numerous books and reports, including *Nutrition Scoreboard*, S*ix Arguments for a Greener Diet*, *Salt: the Forgotten Killer*, and *Liquid Candy: How Soft Drinks Are Harming Americans' Health*. He holds a Ph.D. in microbiology from MIT.

James Krieger, M.D., M.P.H., is chief of the Chronic Disease and Injury Prevention Section at the Seattle-King County Public Health Department and clinical professor of medicine and health services and attending physician at the University of Washington. His current public health work focuses on interventions to reduce health disparities in obesity, diabetes, asthma, tobacco, healthy eating, and active living by addressing social and physical environmental determinants of health. Dr. Krieger has played a key role in the development and evaluation of the Seattle-King County menu labeling regulation and in current work to limit the consumption of sugar-sweetened beverages. He is currently principal investigator for three National Institutes of Health (NIH) grants: evaluating the effectiveness of community health worker home visits for adults with asthma and for adults with diabetes, and assessing the effectiveness of community-led policy and systems change to increase physical activity at public housing sites. Previous studies have assessed the impact of home visits and improved housing conditions on children with asthma. Dr. Krieger also has initiated and played a lead role in multiple community-based partnerships that address health inequities, including REACH, Steps, Allies Against Asthma (Robert Wood Johnson Foundation), and Food and Fitness (Kellogg's). He has authored more than 35 peer-reviewed publications and numerous book chapters. Dr. Krieger was a member of the IOM Committee on Childhood Obesity Action for Local Governments. He is chair of the National Association of County and City Health Officials Big Cities Chronic Disease Community of Practice, which focuses on public health policy actions to address healthy eating and active living. He has received numerous awards

for his work, including the U.S. Secretary of Health and Human Services' (HHS's) Innovation in Prevention Award. Dr. Krieger received his undergraduate degree at Harvard; completed medical training at the University of California, San Francisco in internal medicine; and received his M.P.H. degree at the University of Washington.

Shiriki K. Kumanyika, Ph.D., M.S.W., M.P.H., R.D., is professor of epidemiology in the Department of Biostatistics and Epidemiology and Pediatrics (Gastroenterology, Nutrition Section) and associate dean for health promotion and disease prevention at the University of Pennsylvania School of Medicine. Her interdisciplinary background integrates epidemiology, nutrition, prevention, minority health, and women's health issues across the life course. The main themes of Dr. Kumanyika's research concern the role of nutritional factors in the primary and secondary prevention of chronic diseases, with a particular focus on obesity, sodium reduction, and related health problems such as hypertension and diabetes. She has a particular interest in the epidemiology and management of obesity among African Americans. Dr. Kumanyika has served on numerous national and international advisory committees and expert panels related to nutrition and obesity, and currently serves as vice chair of the HHS Secretary's Advisory Committee for Healthy People 2020. She is co-chair of the International Obesity Task Force and serves as a consultant to the World Health Organization's Department of Nutrition for Health and Development. Dr. Kumanyika served as a member of the IOM Food and Nutrition Board, chair of the IOM Committee on an Evidence Framework for Obesity Prevention Decision Making, and a member of the IOM Committee on Prevention of Obesity in Children and Youth. She is currently chair of the IOM Standing Committee on Childhood Obesity Prevention. She received a B.A. from Syracuse University, an M.S.W. from Columbia University, a Ph.D. in human nutrition from Cornell University, and an M.P.H. from The Johns Hopkins University. She is a member of the IOM.

Michael M. Landa, J.D., is acting director of the Center for Food Safety and Applied Nutrition, FDA. His official position of record is deputy director for regulatory affairs, a position he has held since August 2004. He previously served as acting chief counsel and deputy chief counsel, FDA. Prior to that time, he was a shareholder with Heller Ehrman, a large international law firm; counsel and then partner with Fenwick & West, a law firm that focuses on technology and science; and, for various periods, assistant and then associate chief counsel for enforcement, medical devices, and veterinary medicine, FDA. Mr. Landa holds a bachelor's degree from Columbia College; a J.D. degree from the University of Virginia; and a Master of

Laws degree from New York University, where he was a Food and Drug Law Institute fellow.

Joan Rector McGlockton, J.D., is vice president of industry affairs and food policy at the National Restaurant Association. In this position, she leads the association's food regulatory policy efforts. Ms. McGlockton has had extensive experience in working with food service and hospitality issues, representing restaurants, contract food management companies, and lodging companies. She came to the association from Sodexo, Inc., where she was senior vice president of corporate affairs and led the company's Corporate and Social Responsibility Department, which focused on health, wellness, and sustainability initiatives. Ms. McGlockton joined Sodexo following a long term at Marriott Corporation, where she served as assistant general counsel and corporate secretary. She has had extensive experience in building strategic alliances and coalitions, as well as managing regulatory matters. Ms. McGlockton has served on several not-for-profit boards, including that of the American Dietetic Association Foundation. She remains on the board of the Sodexo Foundation and serves on the board of the Maya Angelou Public Charter School in Washington, DC. Ms. McGlockton received her bachelor's degree from Duke University and a J.D. from Harvard Law School.

Sara Benjamin Neelon, Ph.D., M.P.H., R.D., is assistant professor in the Department of Community and Family Medicine at Duke University Medical Center and the Duke Global Health Institute. Prior to joining Duke, Dr. Benjamin Neelon was a postdoctoral research fellow for the Obesity Prevention Program in the Department of Population Medicine at Harvard Medical School. Her research focuses on nutrition and physical activity interventions for children from birth to age 5, the nutrition and physical activity environment in child care settings, early childhood predictors of obesity, feeding practices as predictors of later obesity, and nutrition policy and regulation in child care. Dr. Benjamin Neelon has published a book on nutrition for children in child care: *Making Food Healthy and Safe for Children: How to Meet the National Health and Safety Performance Standards—Guidelines for Out-of-Home Child Care Programs and Nutrition and Physical Activity in Child Care*. She is currently serving on the Institute of Medicine (IOM) Committee on Obesity Prevention Policies for Young Children. Dr. Benjamin Neelon received both her M.P.H. and Ph.D. in nutrition from the University of North Carolina, Chapel Hill.

Russell R. Pate, Ph.D., is professor of exercise science at the Norman J. Arnold School of Public Health, University of South Carolina, Columbia. His research interests and expertise focus on physical activity measure-

ment, determinants, and promotion in children and youth. He also directs a national postgraduate course aimed at developing research competencies related to physical activity and public health. Dr. Pate is involved with the CDC-funded Prevention Research Center at the University of South Carolina. His research includes studies on preschoolers' physical activity levels and how schools can influence these levels, as well as multicenter trials on the promotion of physical activity among middle and high school–age girls. Dr. Pate was a member of the Physical Activity Guidelines Advisory Committee and served on the 2005 Dietary Guidelines Advisory Committee. He is a past president of both the American College of Sports Medicine and the National Coalition on Promoting Physical Activity. Dr. Pate served as a member of the IOM Committee on Prevention of Obesity in Children and Youth and Committee on Progress in Preventing Obesity in Children and Youth, and is a current member of the Standing Committee on Childhood Obesity Prevention and the Committee on Obesity Prevention Policies for Young Children. He received a B.S. in physical education from Springfield College and an M.S. and Ph.D. in exercise physiology from the University of Oregon.

Jennifer L. Pomeranz, J.D., M.P.H., is director of legal initiatives at the Yale Rudd Center for Food Policy and Obesity at Yale University. At the Rudd Center, Ms. Pomeranz develops meaningful legal solutions to public health issues related to food and obesity policy. She speaks and publishes on the subjects of food marketing to children, the First Amendment, menu labeling, regulation of the retail environment, and how health departments and attorneys general can address public health issues such as obesity. Ms. Pomeranz earned her J.D. from Cornell Law School, practiced law for 5 years, and then attended the Harvard School of Public Health to earn her M.P.H.

Lisa Powell, Ph.D., is senior research scientist in the Institute for Health Research and Policy and research professor in the Department of Economics at the University of Illinois, Chicago. She has extensive experience as an applied microeconomist in the empirical analysis of the effects of public policy on a series of behavioral outcomes. As principal investigator on a number of NIH-funded projects and as a member of the Robert Wood Johnson Foundation–funded ImpacTeen research team, she focuses much of her current research on assessing the importance of economic and environmental factors (such as food prices and taxes; access to food stores, eating places, and facilities for physical activity; and television food advertising exposure) in food consumption and physical activity behaviors and as determinants of body mass index and the prevalence of obesity. Dr. Powell's research also examines school-level food and fitness policies and the association between school meal participation

and children's weight status. In addition, her research has examined the importance of peer and parental influences in teen smoking, as well as the role of prices and public policies in alcohol use among college students and educational and violence-related outcomes. Dr. Powell is an associate editor of *BMC Public Health* and serves on a number of national and international advisory committees.

Joseph Price, J.D., is senior partner in the General Litigation Group at Faegre & Benson in Minneapolis. His experience includes litigation involving intrauterine devices, mammary implants, orthopedic prostheses, urologic implants, cardiovascular devices, a wide variety of prescription and over-the-counter drugs, and various chemicals. Mr. Price is also a recognized expert in the area of obesity/fast food litigation and has vast experience in trial/jury consulting and psychology. Additionally, he has acted as an active defense counsel in cases related to diet drugs and herbal supplements. He also served as national counsel for a major Fortune 500 company in several toxic tort cases. From more than 1,000 nominations, Mr. Price was selected this year by *PL Law 360* as one of the ten most admired product liability lawyers in the United States. Also this year, Faegre & Benson's product liability practice received recognition by *Chambers USA* as one of the leading product liability and mass tort practices in America. Mr. Price was singled out by *Chambers* as one of the leading individuals nationwide in the areas of product liability and mass torts. He has been with Faegre & Benson since he graduated from the University of Minnesota Law School in 1972.

Barbara O. Schneeman, Ph.D., is director of the Office of Nutrition, Labeling, and Dietary Supplements, Center for Food Safety and Applied Nutrition, FDA. In this position, she oversees the development of policy and regulations for dietary supplements, nutrition labeling and food standards, infant formula, and medical foods and serves as U.S. delegate to two Codex committees. Previously, she was professor of nutrition at the University of California, Davis, and served in several administrative roles, including chair of the Department of Nutrition and dean of the College of Agricultural and Environmental Sciences. Dr. Schneeman has been a visiting scientist at the University of California, San Francisco, and assistant administrator for nutrition in the Agricultural Research Service of the U.S. Department of Agriculture (USDA). Her professional activities include participation in Dietary Guidelines Advisory Committees; the IOM Food and Nutrition Board; and committees for the National Academy of Sciences (NAS) and for the state of California, USDA, the Food and Agriculture Organization of the United Nations, the World Health Organization, the American Society for Nutrition, and the Institute of Food Technologists.

Dr. Schneeman has been associate editor for the *Journal of Nutrition* and served on the editorial boards of *Proceedings of the Society for Experimental Biology and Medicine*, the Food and Nutrition Series of Academic Press, *Nutrition Reviews*, the *Journal of Nutrition*, the *Journal of Food Science*, and *California Agriculture*. Her professional honors include fellow of the American Association for the Advancement of Science, the Carl Fellers Award from the Institute of Food Technology, the FDA Commissioner's Special Citation, the Harvey W. Wiley Medal, the Samuel Cate Prescott Award for research, the Future Leader Award, and several honorary lectureships. Dr. Schneeman received a B.S. degree from the University of California, Davis; a Ph.D. from the University of California, Berkeley; and postdoctoral training in gastrointestinal physiology at Children's Hospital in Oakland, California.

William H. Sorrell, J.D., is attorney general for the State of Vermont. He is a native and resident of Burlington, Vermont. He previously served as Chittenden County deputy state's attorney and Chittenden County state's attorney; engaged in private law practice at McNeil, Murray & Sorrell; and served as Vermont's secretary of administration. As state's attorney, he successfully prosecuted several significant matters, including the first case allowing the admissibility of DNA evidence in a Vermont state court and a 10-year-old homicide case in which the victim's body had never been found. In May 1997, Governor Howard Dean appointed General Sorrell to fill the unexpired term of former attorney general Jeff Amestoy, who had been named Vermont's chief justice. He was reelected to full terms in November 1998, 2000, 2002, 2004, 2006, and 2008. He served as president of the National Association of Attorneys General (NAAG) from June 2004 to June 2005. Prior to his presidential year, General Sorrell served as chair of the NAAG's Tobacco Committee and co-chair of its Consumer Protection Committee. In June 2003 he was chosen by his fellow attorneys general to receive NAAG's prestigious Kelley-Wyman Award, given annually to the "Outstanding Attorney General" who has done the most to further the goals of the nation's attorneys general. In 2008 the American Legacy Foundation endowed in his name an annual lecture on tobacco issues. In October 2009, at its 196th annual meeting, the Vermont Medical Society recognized General Sorrell as its "Citizen of the Year" for 2009. He has served as chair of the NAAG Mission Foundation Board, as chair of the board of the American Legacy Foundation, on Vermont's Judicial Nominating Board, as president of United Cerebral Palsy of Vermont, as secretary of the Vermont Coalition of the Handicapped, and on the board of the Winooski Valley Park District. General Sorrell graduated from the University of Notre Dame and Cornell Law School.

Mary T. Story, Ph.D., R.D., is professor in the Division of Epidemiology and Community Health in the School of Public Health, University of Minnesota, Minneapolis. She is an adjunct professor in the Department of Pediatrics, School of Medicine, at the University of Minnesota. Dr. Story holds her Ph.D. in nutrition, and her interests are in the areas of child and adolescent nutrition, obesity prevention, and environmental and policy approaches to improve healthy eating. Her research focuses on the multiple factors related to eating behaviors of youth and on environmental, community, and school-based interventions for obesity prevention and healthy eating. Dr. Story has authored more than 300 journal articles and other publications in the area of child and adolescent nutrition and obesity. She is director of the National Program Office for the Robert Wood Johnson Foundation Healthy Eating Research program. She is currently on the editorial boards of the *Journal of the American Dietetic Association*, the *Journal of Adolescent Health*, and *Nutrition Today*. Dr. Story has received several awards for her work. She was a member of the IOM Committee on Food Marketing to Children and Youth and the Committee on Nutrition Standards for Foods in Schools, and is a current member of the IOM Standing Committee on Childhood Obesity Prevention. She is also a member of the IOM.

Stephen D. Sugarman, J.D., is Roger J. Traynor professor of law at the University of California, Berkeley School of Law. He joined the faculty in 1972. Previously, he served as acting director of the New York State Commission on the Cost, Quality and Financing of Education. Between 1967 and 1972, he was associated with the Los Angeles office of O'Melveny & Myers. At Berkeley, he served as associate dean from 1980 to 1982 and again from 2004 to 2005. He was director of the Earl Warren Legal Institute's Family Law Program from 1988 to 1999. He regularly teaches courses on torts and occasionally courses on sports law, educational policy and law, and other subjects in the social justice curriculum. Mr. Sugarman's books include *Torts Stories*; *All Our Families*; *Regulating Tobacco*; *School Choice and Social Controversy*; *Smoking Policy*: *Law, Politics and Culture*; and *In the Interest of Children*. He has been a visiting professor at the London School of Economics; University College, London; the University of Paris; the European University Institute, Florence; Kobe University Faculty of Law; Kyoto University Faculty of Law; and Columbia University School of Law. Mr. Sugarman is a senior consultant to the Robert Wood Johnson Foundation and an advisory board chair for the National Policy and Legal Analysis Network to Prevent Childhood Obesity. He received his J.D. and B.S. from Northwestern University.

Stephen Teret, J.D., M.P.H., is professor and associate dean in the Department of Health and Policy Management at the Johns Hopkins Bloomberg School of Public Health, where he also serves as director of the Center for Law and the Public's Health. He has held appointments at the George Washington University School of Law, the Johns Hopkins University School of Medicine, and a law firm in New York State. Mr. Teret's research focuses on the use of law as a tool in protecting the public's health, specifically in the areas of firearms, alcohol, and recently nutrition and obesity. He has also published on the role of law in injury prevention, immunization, and bioterrorism. In 1995, Mr. Teret founded the Johns Hopkins Center for Gun Policy and Research, which focuses on informing firearms policy from a public health point of view. Recently, he has begun to focus his research on obesity, having published on self-regulation in the food industry and recommending standards that should be met for such regulation to be effective. He also has lectured on legal strategies that can be used in preventing obesity. His work, especially on preventing firearm injuries, earned him numerous awards, including the Distinguished Career Award from the American Public Health Association and the National Angel of Peace Award, granted by the Violence Prevention Coalition of Greater Los Angeles. Mr. Teret received his J.D. from Brooklyn Law School and his M.P.H. from the Johns Hopkins University School of Hygiene and Public Health.

Joseph W. Thompson M.D., M.P.H., is surgeon general of the State of Arkansas, director of the Arkansas Center for Health Improvement, professor in the Colleges of Medicine and Public Health at the University of Arkansas for Medical Sciences, and director of the Robert Wood Johnson Foundation Center to Prevent Childhood Obesity. He has led efforts in the planning and implementation of health care financing reform and in tobacco- and obesity-related health promotion and disease prevention programs in Arkansas, including documenting the state's success in halting the progress of the childhood obesity epidemic. He helped implement ARHealthNet, Arkansas's health insurance waiver for low-income workers. Dr. Thompson served as Robert Wood Johnson Foundation clinical scholar at the University of North Carolina at Chapel Hill, Luther Terry fellow in preventive medicine in the office of the assistant secretary for health in HHS, and assistant vice president and director of research at the National Committee for Quality Assurance in Washington, DC. In 1997, he served as the first child and adolescent health scholar of the U.S. Agency for Healthcare Research and Quality (then the U.S. Agency for Health Care Policy and Research) before returning to Arkansas. Dr. Thompson earned his medical degree from the University of Arkansas for Medical Sciences and an M.P.H. from the University of North Carolina, Chapel Hill. He is a current member of the IOM Standing Committee on Childhood Obesity Prevention.

David C. Vladeck, J.D., is director of the Federal Trade Commission's Bureau of Consumer Protection, which works to protect consumers from unfair, deceptive, or fraudulent practices. The bureau conducts investigations, sues companies and individuals that violate the law, promulgates rules to protect consumers, and educates consumers and businesses about their rights and responsibilities. The bureau also collects complaints regarding consumer fraud and identity theft and makes them available to law enforcement agencies across the country. Mr. Vladeck is on leave from Georgetown University Law Center, where he is professor of law. Before joining the Georgetown faculty, he spent more than 25 years with the Public Citizen Litigation Group, handling complex litigation. He has argued a number of cases before the U.S. Supreme Court and more than 60 cases before federal courts of appeal and state courts of last resort. Mr. Vladeck testifies frequently before Congress and writes on issues related to administrative law, preemption, the First Amendment, and access to justice. In May 2008, Legal Times of Washington recognized him as one of 30 "champions of justice" and one of the 90 greatest lawyers in Washington, DC, over the past 30 years. Mr. Vladeck is a graduate of New York University and Columbia Law School.