

FIZZ FIGHT: HOW SODA TAXES AFFECT COCA-COLA'S BUSINESS STRATEGY

*Margaret Sherman and Harold Weston **

I. INTRODUCTION

How does a firm respond when government tries to tax away demand for its products? It responds with typical opposition (litigation, public relations, lobbying), and in the case of sugar taxes on soft drinks, by changing its business strategy to offer different products. Thus, in addition to the impact sugar taxes may have on consumer demand behavior, sugar taxes have significant impact on supplier behavior, as this study on The Coca-Cola Company's responses to soda taxes shows.

Since 2012, state and municipal governments in the United States, and in other countries, have considered and implemented taxes on sodas and sugar-sweetened drinks to address the growing obesity epidemic. Such taxes are often called "sin taxes" because they are assessed against products deemed to have a harmful effect in order to decrease consumption of the products. The goal of the sugar taxes (or soda taxes, because the tax applies mainly to soft drinks with sugar) is to discourage consumption and encourage manufacturers to modify their products. In addition, governments have focused on taxing sodas and sugary drinks because the revenue generated by soda taxes can fund public health programs or raise much-needed general revenue for communities.¹ The American Heart Association recommends a daily maximum intake of 25 grams of sugar for adult women and 36 grams for adult men. Compare this against a 20-ounce bottle of regular Coca-

* Margaret Sherman is Clinical Associate Professor of Legal Studies, and Harold Weston is Clinical Associate Professor of Risk Management and Insurance, at Georgia State University, J. Mack Robinson School of Business, Atlanta, Georgia. Professor Weston also holds a secondary appointment at the Georgia State University College of Law. Assistant Professor of Business Law & Ethics, Georgia College

¹ Lester Wan, Elaine Watson, & Rachel Arthur, *Sugar Taxes: The Global Picture in 2017*, BEVERAGEDAILY.COM, Dec. 20, 2017, <https://www.beveragedaily.com/Article/2017/12/20/Sugar-taxes-The-global-picture-in-2017>.

Cola having 65 grams of added sugar.² Governments further argue the taxes are warranted because obesity is now at crisis levels: over 1.9 billion adults in the world are overweight (a body mass index of 25 or higher) in 2016, and of these, 650 million qualified as obese (a body mass index of 30 or higher), according to the World Health Organization (“WHO”).³ In the United States specifically, 39.8% (about 93.3 million) of adults qualified as obese in 2015 to 2016.⁴ Obesity reduces quality of life, and causes diabetes, heart disease, stroke, and some types of cancer.⁵

As a result of this drive to impose soda taxes, The Coca-Cola Company (“Coke”) and other soft drink manufacturers confront a changing regulatory environment for their products. Coke and the soft drinks industry have responded to the state and municipal initiatives with two strategies. The first strategy is to oppose the taxes by lobbying, litigation, sponsoring research, direct marketing and advertising campaigns, and funding opposition organizations that support these tactics. Coke and the soft drinks industry argue there is no scientific evidence to support the effectiveness of soda taxes and such measures destroy jobs in the industry.⁶ The second strategy is to modify products to reduce and reformulate the caloric content of some

² Anna Lappe & Christina Bronsing-Lazalde, *How to Win Against Big Soda*, N.Y. TIMES, Oct. 16, 2017, at A21.

³ World Health Org., *Obesity and Overweight Key Facts*, (Feb. 16, 2018), <https://www.who.int/en/news-room/fact-sheets/detail/obesity-and-overweight>. The 2016 statistics are the most recent provided on the WHO website.

⁴ Centers for Disease Control and Prevention, *Adult Obesity Facts*, (Aug. 13, 2018), <https://www.cdc.gov/obesity/data/adult.html>. The 2016 statistics are the most recent provided on the CDC website.

⁵ *Id.*

⁶ Wan, Watson, Arthur, *supra* note 1.

beverages, offer smaller-sized beverage containers, and add new products to appeal to market tastes that are being influenced by public health initiatives against obesity.

While soda taxes impact the entire beverage industry, this paper focuses on Coke since it is the world's largest nonalcoholic beverage company. This paper examines the impact of recent initiatives to tax soft drinks on Coke's business, and Coke's responses to such taxes, acting both individually and through the American Beverage Association ("ABA"), the trade association for the soft drink industry which is dominated by Coke, Pepsi and Dr. Pepper Snapple.⁷ Section II of the paper provides a brief background on Coke as a company. Section III explores the obesity epidemic. Section IV includes an overview of the various soda tax initiatives in the U.S. primarily, and in other countries, and the efforts by Coke to resist or seek to modify the tax initiatives through legislation and lobbying, litigation and other strategies. Section V discusses the government rationale for implementing sin taxes, and in particular soda taxes, which come within the idea of sin taxes. Section VI reviews the impact of these initiatives on Coke and its efforts to adapt to the new regulatory environment, including modification of, and diversification of, its product line. The lesson here is that Coke's change in business strategy shows that soda taxes, intended to affect consumer purchasing behavior to reduce calorie consumption and thus achieve individual welfare goals, also affected (perhaps more forcefully) the

⁷ Marion Nestle, *Soda Politics* 93 (2018).

manufacturer's behavior to reduce caloric content through changes in portion size and product offerings. Therefore, the role of law in business is not merely a matter of compliance with law and avoidance of liabilities,⁸ but also a matter of influencing business strategy.

II. THE COCA-COLA COMPANY

Coke is a part of American culture and one of the most recognized global brands. Atlanta pharmacist John Pemberton invented the beverage in 1886, and in 1888 Pemberton sold the company to Atlanta businessman Asa Candler. Originally, Coke sold its sodas only as fountain drinks in the form of a syrup mixed with carbonated water. Coke products were first bottled for sale in 1894 in Vicksburg, Mississippi, from the syrup, by the store's owner, Joseph A. Biedenharn, who noticed the brisk sales of the fountain drinks. He sent a case of the bottles to Asa Candler, who was unimpressed with the idea of bottling the beverage and preferred to focus on the fountain drink sales. A few years later, in 1899, two entrepreneurs from Chattanooga, Tennessee, obtained the bottling rights from Coke for \$1, and formed the first bottling plant. Coca-Cola bottle sizes originally were 6.5 ounces, and sold for 5¢ from 1899 until 1959, because the original \$1 bottling agreement specified that price.⁹

⁸ The spectrum of legal issues includes employment, tax, corporate structures, corporate securities (if applicable), contracts, products liability, pollution, etc.

⁹ World of Coca-Cola, *About Us, Coca-Cola History*, <https://www.worldofcoca-cola.com/about-us/coca-cola-history/>. See also, David Kestenbaum, *Why Coke Cost a Nickel for 70 Years*, NPR, Nov. 15, 2012, <https://www.npr.org/sections/money/2012/11/15/165143816/why-coke-cost-a-nickel-for-70-years>.

Coke is the world's largest nonalcoholic beverage company.¹⁰ Coke markets, manufactures and sells beverage concentrates and syrups, finished sparkling drinks and other beverages. Coke sells over 500 nonalcoholic beverage brands and approximately 4,300 different products in over 200 countries. Over 1.9 billion daily servings of Coke products are consumed each day.¹¹

In its traditional soft drink business, referred to as the beverage concentrates operations, Coke generally sells beverage concentrates and syrups to bottlers who add sweeteners and water (the main raw ingredients in Coke soft drinks) to produce the final beverage which is then licensed under Coke trademarks or trademarks licensed to Coke. The bottlers then sell to retailers, wholesalers and through other channels. The list of brands includes billion-dollar products like Coca-Cola, Coca-Cola Zero Sugar, Diet Coke, Fanta, and Sprite. The principal nutritive sweetener used in the US is high fructose corn syrup, and the principal sweetener used outside the US is sucrose (table sugar). The principal non-nutritive sweeteners used are aspartame, acesulfame potassium, sucralose, saccharin, cyclamate, and

¹⁰ David Gertner & Laura Rifkin, *Coca-Cola and the Fight against the Global Obesity Epidemic*, 60 THUNDERBIRD INT'L BUS. REV. No. 2, 161-162 (Mar/Apr 2018). Coke sold approximately 29.6 billion unit cases of its products in 2016, 29.2 billion in 2017, and 29.3 billion in 2018, according to its 2018 Form 10-K. The Coca-Cola Company 2018 Form 10-K for the Fiscal Year ended December 31, 2018, 4, <https://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/2019/annual-shareholders-meeting/2018-Annual-Report-on-Form-10-K.pdf>.

¹¹ 2018 Form 10-K, *supra* note 10, at 2, 32.

steviol glycosides.¹² Classic Coke is 90% carbonated water and the next largest ingredient is sugar or high-fructose corn syrup. A 12-ounce serving has 140 calories or more, with 39 grams of sugar.¹³

In its finished product operations, Coke also sells a variety of sparkling water drinks, bottled waters, sports drinks, juices, teas, coffees, and energy drinks to retailers, distributors, wholesalers and bottling partners.¹⁴ For example, Coke sells bottled water under brand names such as Dasani, Glaceau Smartwater, and Glaceau Vitaminwater, and sells teas under brand names such as Gold Peak Tea and Fuze Tea,¹⁵ and Minute Maid juice products and PowerAde sports drinks.¹⁶

For Coke, in years 2016 through 2018, approximately 69% of worldwide unit case sales were from soft drinks, with approximately 45% of sales from beverages that include the Coca-Cola or Coke trademarks in the brand name, such as Coca-Cola, Coca-Cola Zero Sugar, Diet Coke, Coca-Cola Life, and Cherry Coke. These brand name Coke products accounted for 43% of unit case volume in the U.S. market in 2018. Outside the US, Coke's largest customer bases in terms of unit case volume are Mexico, China, Brazil and Japan.¹⁷

Coke's most significant competitors include PepsiCo, Inc., Nestle S.A., Dr. Pepper Snapple Group, Inc., Groupe Danone,

¹² *Id.* at 7.

¹³ James Ellis & Dimitra Kesse, *Coke's Unlikely Savior*, BLOOMBERG, Mar. 23-Apr. 5, 2015, at 28; NESTLE, *supra* note 7, at 39.

¹⁴ 2018 Form 10-K, *supra* note 10, at 3.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 29.

¹⁷ *Id.* at 4.

Mondelez International, Inc., The Kraft Heinz Company, Suntory Beverage & Food Limited, and Unilever.¹⁸ Coca-Cola and Pepsi together control almost 50% of the world soft drinks market, with sales doubling in the past decade to \$532 billion.¹⁹

Despite significant sales, overall profits have been trending downward. Coke's net operating revenues in 2018 were \$31,856,000,000 (a 10% drop from the prior year), down from \$35,410,000,000 in 2017 and \$41,863,000,000 in 2016. Gross profit in 2018 was \$20,086,000,000, down from \$22,155,000,000 in 2017 (a 9% drop) and \$25,398,000,000 in 2016. Despite the decline in revenues, and due in part to reductions in its spending and general expenses, Coke's income before taxes rose in 2018 to \$8,350,000,000, up from \$6,742,000,000 in 2017 (a 24% increase). In 2017, income before taxes had declined from \$8,136,000,000 in 2016 (a 17% drop).²⁰ Income before taxes declined in 2017 from 2016 numbers as well. Revenue and soda sales are both declining. In fact, American soda sales have been declining for over twenty years. U.S. sales of full-calorie soda have fallen by more than 25% during this time frame.²¹ Overall soda consumption, which increased exponentially from the 1960s through 1990s, is now experiencing a "serious and

¹⁸ *Id.* at 7.

¹⁹ Special Report on Obesity, *Food for Thought*, THE ECONOMIST, Dec. 15, 2012, at 10.

²⁰ 2018 Form 10-K, *supra* note 10, at 48; The Coca-Cola Company 2017 Form 10-K for the Fiscal Year ended December 31, 2017, 47, <https://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/2018/2017-10K.pdf>.

²¹ Gertner, *supra* note 10, at 162.

sustained decline”²² due to increased awareness by consumers of the health concerns related to obesity.

III. THE OBESITY EPIDEMIC

The obesity epidemic started in 1980 and the diabetes epidemic started around 1990. According to the WHO, global obesity rates have tripled since 1975.²³ Obesity and being overweight are associated with the top three leading risks for global deaths, which are heart disease, stroke and pulmonary disease.²⁴ At least 2.8 million adults worldwide die each year as a result of being overweight or obese.²⁵ A 2015 study published in the *New England Journal of Medicine* found 54 out of every 100,000 deaths worldwide are related to being overweight.²⁶ In the U.S. specifically, from 1980 to 2000, the obesity rate doubled from less than 15% to 30%, and rose to approximately 40% in 2015-2016.²⁷ During this same time period, U.S. rates of type 2 diabetes also

²² Margot Sanger-Katz, *The Decline of “Big Soda,”* N.Y. TIMES, Oct. 2, 2015, <https://www.nytimes.com/2015/10/04/upshot/soda-industry-struggles-as-consumer-tastes-change.html>.

²³ *Obesity and Overweight Key Facts*, *supra* note 3.

²⁴ World Health Org., *The Top Ten Causes of Death*, (May 24, 2018), <https://www.who.int/news-room/fact-sheets/detail/the-top-10-causes-of-death>.

²⁵ World Health Org., *10 Facts on Obesity*, (Oct. 2017), <https://www.who.int/features/factfiles/obesity/en/>.

²⁶ Angela Chen, *Deaths from Obesity are Rising Worldwide*, THE VERGE, June 12, 2017, <https://www.theverge.com/2017/6/12/15781314/obesity-health-disability-global-survey-data>.

²⁷ NESTLE, *supra* note 7, at 67; Robert Wood Johnson Foundation, *State of Obesity: National Obesity Rates and Trends*, (2019), <https://www.stateofobesity.org/obesity-rates-trends-overview/>.

increased.²⁸

The Economist in its Special Report on Obesity wrote, “Far from being a passive storage unit, fatty tissue secretes hormones, including molecules that promote inflammation … Overloaded fat tissue also pours out fatty acids into organs where they don’t belong, particularly the liver. At its most extreme, the build-up of fat and scarring in the liver can lead to liver failure.”²⁹ In addition to higher risks of stroke, heart attack, and pulmonary disease, obesity is also associated with diabetes, gallbladder disease, hypertension, arthritis and some cancers such as breast, ovarian, kidney and colon cancer.³⁰ Non-alcoholic fatty-liver disease associated with obesity and overweight may affect up to one-third of Americans.³¹ The McKinsey Global Institute found the global economic costs associated with obesity are \$2 trillion annually.³² The medical costs for obesity and consequential illnesses in the U.S. rose from an estimated \$78.5 billion in 1998, to \$147 billion in 2008,³³ and \$149.4 billion in 2014.³⁴

²⁸ NESTLE, *supra* note 7, at 70.

²⁹ *Food for Thought*, *supra* note 19, at 7.

³⁰ Centers for Disease Control and Prevention, *Adult Obesity Causes & Consequences*, (Aug. 29, 2017), <https://www.cdc.gov/obesity/adult/causes.html>.

³¹ *Food for Thought*, *supra* note 19, at 7.

³² Richard Dobbs, Corinne Sawers et al, *How the World Could Better Fight Obesity*, MCKINSEY AND CO., Nov. 2014, <https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/how-the-world-could-better-fight-obesity>.

³³ Eric Finkelstein, Justin Trogdon, et al, *Annual Medical Spending Attributable To Obesity: Payer-And Service-Specific Estimates*, 28 HEALTH AFFAIRS No. 5, (Sept./Oct. 2009) (online) <https://www.healthaffairs.org/doi/10.1377/hlthaff.28.5.w822>.

Obesity is a complex health issue caused by a combination of contributing factors, including individual behavior. According to the Centers for Disease Control (“CDC”), the individual’s “balance of the number of calories consumed from foods and beverages with the number of calories the body uses for activity plays a role in preventing excess weight gain.”³⁵ The WHO is more conclusive, stating that the “*fundamental* cause of obesity and overweight is an energy imbalance between calories consumed and calories expended. [emphasis added].”³⁶ Thus, a main cause of obesity is too little exercise combined with too many calories. Too little exercise occurs because people are sedentary at work and at home, drive or take mass transportation, walk little, and live in urban neighborhoods designed for automobile transport, not for walking or bicycling.³⁷ Too many calories are consumed because people eat too much and eat the wrong types of foods, mainly junk food and fast food, as opposed to fruits, vegetables,

³⁴ Kim D. Kim & Basu Anirban, Systematic Review: Estimating the Medical Care Costs of Obesity in the United States: Systematic Review, Meta-Analysis, and Empirical Analysis, 19 VALUE IN HEALTH 602, 602 (July-Aug. 2016), <https://www.ncbi.nlm.nih.gov/pubmed/27565277>.

³⁵ Adult Obesity Causes and Consequences, *supra* note 30.

³⁶ *Obesity and Overweight Key Facts*, *supra* note 3.

³⁷ See generally, Peter James, et al., *Urban Sprawl, Physical Activity, and Body Mass Index: Nurses' Health Study and Nurses' Health Study II*, 103 J. OF PUB. HEALTH No. 2, 369 (2013); Beth Ann Griffin, et al., *The Relationship Between Urban Sprawl and Coronary Heart Disease in Women*, 20 HEALTH & PLACE 51 (2013); Jordan A. Carlson, et al., *Interactions Between Psychosocial and Built Environment Factors in Explaining Older Adults' Physical Activity*, 53 PREVENTIVE MED. 68 (2012); Frances Garden & Bin Jalaludin, *Impact of Urban Sprawl on Overweight, Obesity, and Physical Activity in Sydney, Australia*, 86 J. OF URB. HEALTH No. 1, 19 (2008). But see, J. Feng, et al., *The Built Environment And Obesity: A Systematic Review Of The Epidemiologic Evidence*, 16 HEALTH PLACE 175 (2010); Russell Lopez & H. Patricia Hynes, *Obesity, Physical Activity, and the Urban Environment: Public Health Research Needs*, 5 ENVIRN'L HEALTH, 25 (2006), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1586006/>.

lean meats and whole grains. Junk and fast “foods take less energy to break down and finely milled grains can be digested more completely, so the body absorbs more calories.”³⁸ Many of the junk food calories in today’s diet come from sugary soft drinks. In 2017, the CDC published a survey of high school students. At that time, 14.8% of high school students were obese and 15.6% were overweight, according to the CDC’s Youth Risk Behavior Survey. In the survey, 5.6% said they did not eat fruit or drink 100% fruit juices during the seven days before the survey, and 7.2% did not eat vegetables during the seven days before the survey. Meanwhile, 18.7% drank at least one can, bottle or glass of soda each day, and 7.1% drank a can, bottle, or glass of soda three or more times per day during the seven days before the survey.³⁹

The consumption of sugary soft drinks has definitively been associated with the rising rates of obesity. As mentioned earlier, a 12-ounce can of regular Coca-Cola contains 39 grams of sugar (in the form of high fructose corn syrup) which is the equivalent of 10 teaspoons.⁴⁰ The size of soda servings has been increasing: Coca-Cola was originally sold in 6.5-ounce bottles for many decades⁴¹ but in 1990, fountain drink sizes in America doubled and in 1994 bottle sizes

³⁸ *Food for Thought*, *supra* note 19, at 4.

³⁹ Centers for Disease Control and Prevention, Division of Adolescent and School Health, *Youth Risk Behavior Surveillance System Interactive Data* (June 20, 2018), <http://www.cdc.gov/healthyyouth/npa0/data.htm>.

⁴⁰ NESTLE, *supra* note 7, at 12-13.

⁴¹ *Id.* at 38.

tripled as Coca-Cola introduced a 20-ounce plastic bottle, containing 65 grams of sugar or the equivalent of 16 teaspoons. At the same time, rates of diabetes and obesity increased, with the CDC stating that 20% of US adults were obese by 1999.⁴² Today, cans and bottles are available in sizes from 7.5 ounces (25 grams of sugar or 6 teaspoons) to 2 liter bottles (216 grams of sugar or 54 teaspoons).⁴³ Association does not prove causation; however, statistics do show that from 1980 to 2000, as the US obesity rate doubled from less than 15% to 30% and rates of type 2 diabetes increased, production and consumption of regular sugary sodas also increased from 27 gallons per capita per year to greater than 40.⁴⁴

Dietary guidelines for consumption of sugar and sugary soft drinks have evolved over time, along with the obesity epidemic. According to information from the US Department of Agriculture (“USDA”) and the Health and Human Services Department (“HHA”), in 1980, as the obesity epidemic was beginning, the official guideline regarding sugar was simply to “Avoid too much sugar,” but by 1990, as the rates of diabetes also rose, the guideline changed to “Use sugar only in moderation.” In 2010, fat was added as a dietary culprit and consumers were advised to actively reduce consumption of these

⁴² Claire Suddath, *Coke is Ready to Talk About its Problem*, BLOOMBERG BUSINESSWEEK, Aug. 10, 2014, at 41; NESTLE, *supra* note 7, at 39.

⁴³ NESTLE, *supra* note 7, at 39.

⁴⁴ *Id.* at 67-70. Consumption of sugar and sweeteners regardless of source increased significant over the years, on average at 108.4 pounds per person in 1940, to 132.3 pounds per person in 1970, to 140.7 pounds per person in 2010. ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH 338 (2016). In addition, “After a century of stability between 1870 and 1970, total daily calories of food consumption after 1970 increased by more than 20 percent, enough to add fifty pounds to the average adult each year,” with a large part of this due to fats and cereals and flours. *Id.* at 345-346.

items, with the guidelines stating, “Reduce the intake of calories from solid fats and added sugars (SoFAS).”⁴⁵ In 1980, the USDA and HHA advice regarding soft drinks specifically was to “Eat less of foods containing these sugars, such as candy, soft drinks....” In 1990, there was no specific mention or caution about soft drinks. In 2000, with the obesity epidemic in full-swing, the advice was strengthened to “Limit your use of these beverages,” and in 2010 the recommendation was “Drink few or no regular sodas.”⁴⁶ Federal guidelines in the US recommend that children and teenagers consume less than 10% of their total calories from added sugars, but current consumption rates are 17%, with almost half of that percent from sugary sodas, sports drinks and fruit-flavored beverages.⁴⁷ Internationally, in 2015, the WHO published guidelines stating adults and children should restrict their sugar intake to less than 10% of daily calories.⁴⁸

Other less-obvious factors also may be contributing to the epidemic. Genetics is believed to play a role in obesity because genetic variations impact how people respond to physical inactivity and consumption of high-calorie foods. Scientists have identified variants in certain genes that increase hunger and overall caloric intake, which

⁴⁵ NESTLE, *supra* note 7, at 56.

⁴⁶ *Id.* at 56.

⁴⁷ Andrew Jacobs, *Two Top Medical Groups Call for Soda Taxes and Advertising Curbs on Sugary Drinks*, N.Y. TIMES, Mar. 25, 2019, <https://www.nytimes.com/2019/03/25/health/soda-taxes-sugary-drinks-advertising.html>.

⁴⁸ Press Release, WORLD HEALTH ORG., *WHO Calls on Countries to Reduce Sugars Intake Among Adults and Children*, (Mar. 4, 2015), <https://www.who.int/mediacentre/news/releases/2015/sugar-guideline/en/>.

then impacts weight levels and obesity. Use of steroids and antidepressants may also be associated with obesity.⁴⁹ Bisphenol A (BPA) may be a contributing cause; according to a study in the *Journal of the American Medical Association*, about 22 percent of the children with highest levels of BPA were obese, compared to just 10 percent of kids with the lowest levels.⁵⁰ Lack of sleep – prevalent in the US – is also a factor in weight control.⁵¹ Antibiotics overuse may be another factor.⁵²

Public awareness of the risks and concerns of obesity has increased, resulting in a rise in exercise, a reduction in calories consumed, and a reduction in the amount of soda being consumed by 25% since the late 1990s. The consumer demand for beverages has also shifted. Instead of buying soft drinks, consumers are buying teas, juices, energy drinks and bottled water. In the decade from 2003 to 2013, sports drink consumption in the U.S. increased by approximately 45%, bottled water by approximately 35%, and soft drink consumption declined by 20%.⁵³ Historically, in the 1970s, the average American

⁴⁹ Adult Obesity Causes and Consequences, *supra* note 30.

⁵⁰ Mike Stobbe, *Study Suggests Tie Between BPA and Child Obesity*, YAHOO! FIN., Sept. 18, 2012, <https://finance.yahoo.com/news/study-suggests-tie-between-bpa-child-obesity-141219205.html>.

⁵¹ Nicole Ostrow, *Lack of Sleep May Lead to Obesity, Harvard Study Suggests*, BLOOMBERG, April 11, 2012, <http://www.bloomberg.com/news/2012-04-11/lack-of-sleep-may-lead-to-obesity-harvard-study-suggests.html>; *Waking Up to Sleep's Role in Weight Control*, HARV. SCH. OF PUB. HEALTH, <http://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/sleep-and-obesity/>.

⁵² Michaeleen Doucleff, *Could Antibiotics Be A Factor in Childhood Obesity?*, NPR, Aug. 22, 2012, <http://www.npr.org/blogs/health/2012/08/22/159743999/could-antibiotics-be-a-factor-in-childhood-obesity>. See also, Ellen Black, *Obesity: The “Market” May Hold the Solution*, 87 UMKC L. Rev. 269, 269-273 (Winter, 2019); Gertner, *supra* 10, at 161.

⁵³ The authors discuss later the research on whether soda taxes may be a cause of this

consumer doubled the amount of soda consumed, and by the 1980s, more soda was being consumed than water. That trend stopped. The average American now drinks about 450 cans of soda per year, the same amount approximately as in 1986.⁵⁴ In a comparison of North American unit case volume sales from 2015 to 2017, even Diet Coke experienced a 10% decline in sales.⁵⁵ As a result, new cases of diabetes in the U.S. have started to decline. There were 1.4 million new cases in 2014, but there had been 1.7 million in 2008.⁵⁶

Unlike PepsiCo which has the Frito-Lay food business to offset declining beverage sales, Coke's business is beverages: 74% of Coke's business worldwide and 68% in the United States derives from soda sales of all types. As sales continue to decline, so does Coke's revenue. Coke's annual reports list "obesity and other health concerns" as a major risk to the company.⁵⁷ In its 2018 Annual Report to Shareholders on Form 10-K, Coke listed the impact of obesity on demand for its products as its number one risk factor, stating:

There is growing concern among consumers, public health professionals and government agencies about the health problems associated with obesity. Increasing public concern about obesity; other

reduction, but there seems to be a collective reduced demand due to obesity awareness itself.

For this paper, the direct cause is not important.

⁵⁴ Suddath, *supra* note 42, at 40.

⁵⁵ 2017 Form 10-K, *supra* note 20, at 46.

⁵⁶ Sabrina Tavernise, *In Major Shift, Diabetes Cases Start to Decline*, N.Y. TIMES, Dec. 1, 2015, at A18.

⁵⁷ Suddath, *supra* note 42, at 42.

health-related public concerns surrounding consumption of sugar-sweetened beverages; possible new or increased taxes on sugar-sweetened beverages by government entities to reduce consumption or to raise revenue...could adversely affect our profitability.⁵⁸

Coke specifically referenced the imposition of sugar taxes as a business concern related to obesity.

IV. COKE FACES A CHANGING REGULATORY AND LEGAL ENVIRONMENT

The U.S. government has a 100-year history of taxing soft drinks and other foods and beverages to deter consumption of luxury and extravagant goods and to raise revenue during war times. These sin taxes began in World War I, and continued by various revenue acts through the 1930s.⁵⁹ The states also have taxed foods and beverages in the past, particularly during the Great Depression, but usually exempted necessities such as real food. However, “soft drinks, diluted fruit juices and often candy” did not count as real food and so were not exempted from these taxes. The states’ goal was also to raise revenue, because of the collapse of property tax revenues due to the Great Depression.⁶⁰ Some snack taxes persisted into the 1990’s.⁶¹

⁵⁸ 2018 Form 10-K, *supra* note 10, at 9.

⁵⁹ Weny Sheu, *The Evolution of the Modern Snack Tax Bill: From World War I to the War Against Obesity*, 5-9 (2006), <https://dash.harvard.edu/handle/1/8846753>. See also, Merav W. Efrat & Rafael Efrat, *Tax Policy and the Obesity Epidemic*, 25 J.L. & HEALTH 233, 252-253 (2012).

⁶⁰ Sheu, *supra* note 59, at 8-11.

⁶¹ *Id.* at 12-17. Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 856 (2000) (notably, South

Starting in 2012, numerous cities and states began implementing measures, primarily taxes on soda sales, in an effort to raise money to combat obesity and raise revenue in general. The governments' logic was that taxing sugar-sweetened sodas would discourage consumers from purchasing these beverages, resulting in lower consumption of such beverages and an overall decrease in obesity rates.⁶²

A typical and suitable business response to changes in laws and regulations that adversely affect the business is to challenge those changes in multiple ways, including lawsuits, legislative initiatives and lobbying. Coke engaged in these activities directly and through its trade association, the ABA. The use of trade associations moves the focus away from one company, allows companies to work as an industry to advance common objectives, even as companies compete against each other, and promotes positions that keep the company's name and brand out of the public spotlight. The beverage industry typically aggressively challenges soda taxes, arguing, among other things, that "soda taxes unfairly burden the poor, cause higher unemployment by squeezing industry sales, and fail to achieve their policy goal: reducing obesity."⁶³

Carolina enacted a tax in 1925).

⁶² Black, *supra* note 52, at 280.

⁶³ Andrew Jacobs & Matt Richtel, *After Drug Wars, A Dangerous Battle over Soda*, N.Y. TIMES, Nov. 14, 2017, at A1, A8.

A. SODA TAX INITIATIVES IN THE UNITED STATES AND COKE'S RESPONSES.

One of the earlier initiatives to curb consumption of sugary soft drinks occurred in 2012 in New York City. Led by Mayor Michael Bloomberg, the city first considered a direct tax on soda but this was blocked by the food and beverage industry in state legislature.⁶⁴ The city then barred supersized sodas in restaurants and food establishments, restricting the size to 16 ounces or less.⁶⁵ The city's reasoning was based on behavioral studies showing that people tend to eat (and drink) the quantities put before them. Also, people underestimate the caloric density of soft drinks.⁶⁶ Limiting sizes is the "nudge" concept articulated and promoted by law and economics professor Cass Sunstein, in his book *Nudge*, that government can encourage better personal habits by nudging people towards better choices, without actually restricting choices.⁶⁷ (The use of taxes, among various techniques, to alter people's behaviors in the name of social welfare is discussed in section 0.) Supporters of the ban argued that this action was not a total ban of soft drinks, but rather a limitation

⁶⁴ Brian Galle, *Tax, Command . . . or Nudge?: Evaluating the New Regulation*, 92 TEX. L. REV. 837, 837-838 (Mar. 2014).

⁶⁵ Michael Grynbaum, *Health Panel Approves Restriction on Large Sugary Drinks*, N.Y. TIMES, Sept. 13, 2012, <http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloomberg-soda-ban.html>.

⁶⁶ *Sugar Warning for "Healthy" Soft Drinks*, BBC NEWS, April 17, 2012, <https://www.bbc.com/news/health-17731052>; Rebecca Franckle, Jason Block, & Christina Roberto, *Calorie Underestimation When Buying High-Calorie Beverages in Fast-Food Contexts*, 106 AMER. J. OF PUB. HEALTH No. 7, 1254 (2016).

⁶⁷ RICHARD THALER & CASS SUNSTEIN, *NUUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* 101, 247-249, 251 (2009). *See also*, Galle, *supra* note 64, at 837-884, arguing that nudges provide greater incentives than sin taxes, other Pigouvian taxes and subsidies in many cases.

in serving size only, and that such a governmental nudge, if it resulted in lowering consumption and obesity rates, was worth the minor limitation of consumer choice.⁶⁸ The beverage industry, including Coke, immediately began a variety of tactics to resist the city's initiative to discourage soda consumption. The ABA hired a public relations firm to create an activist group to oppose the ban.⁶⁹ The public relations firm formed "New Yorkers for Beverage Choices," which was promoted as a "grassroots coalition" of citizens, business and community organizations advocating for consumer choice in beverage sizes. (As Drutman says, "Modern lobbying strategies increasingly have a kind of everywhere-and-everything-at-once approach that includes large-scale coalition building, grassroots activity, a comprehensive media plan, and a broad shaping of the 'intellectual environment'"⁷⁰) Most members were not aware this organization was the creation of the ABA and its public relation's firm. The public relations campaign points included referring to nanny states and raising concerns about government limits on personal freedom. The firm ran ads in *The New York Times* showing Mayor Bloomberg in a dress with the caption "New Yorkers need a Mayor, not a Nanny."⁷¹ Coke engaged in its own direct advertising efforts too, focusing on the fact that sugary drinks can be part of a person's diet if consumed in balance with calories expended in exercise, including an

⁶⁸ Galle, *supra* note 64, at 288.

⁶⁹ NESTLE, *supra* note 7 at 336. The ABA hired the public relations firm of Goddard Claussen Public Affairs. *Id.*

⁷⁰ LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING 25-26 (2015).

⁷¹ NESTLE, *supra* note 7, at 350-351.

ad in *The New York Times*⁷² and advertisements on national television showing thin, healthy people drinking Coca-Cola and exercising, along with the on-screen statement, “If you eat and drink more calories than you burn off, then you’ll gain weight.”⁷³ Critics including *The Financial Times* criticized Coke as disingenuous for trying to portray itself as having a role in the prevention of obesity, comparing it to the tobacco companies’ ads in the 1950s.⁷⁴

After the New York law limiting soda sizes was officially approved in September 2012, the ABA turned to litigation tactics and sued Mayor Bloomberg and New York City. The ABA obtained an injunction stopping the limitation-size law on March 11, 2013, the day before it was supposed to be implemented.⁷⁵ Mayor Bloomberg and New York City appealed, but the New York Court of Appeals affirmed the prior court’s decision that the city exceeded its regulatory authority in imposing the size ban.⁷⁶ According to OpenSecrets.org, in 2012, Coke spent \$5,180,020 in overall lobbying efforts, including efforts to

⁷² *Id.* at 351. *The New York Times* ad stated “Everything in moderation.... By promoting balanced diets and active lifestyles, we can make a positive difference.” *Id.*

⁷³ Alan Rapaport, *Coke: Out for the Calorie Count*, FIN. TIMES, Jan. 25, 2013, <https://www.ft.com/content/cbd21108-66c1-11e2-a83f-00144feab49a>.

⁷⁴ *Id.*

⁷⁵ Leon Stafford, *First Big U.S. City Backs Tax on Sugary Drinks*, ATL. J.-CONST., June 17, 2016, at A6. NESTLE, *supra* note 7, at 353.

⁷⁶ Michael M. Grynbaum, *New York’s Ban on Big Sodas is Rejected by Final Court*, N.Y. TIMES, June 26, 2014, <https://www.nytimes.com/2014/06/27/nyregion/city-loses-final-appeal-on-limiting-sales-of-large-sodas.html>; New York Statewide Coal. of Hispanic Chambers of Commerce v. New York City Dep’t of Health & Mental Hygiene, 23 N.Y.3d 681, 16 N.E.3d 538 (2014). The court held that the Board of Health regulation infringed on the legislative jurisdiction of the City Council of New York, and that whether to restrict size for public health reasons was a matter of policy making, not regulation, thus exceeding the Board’s authority. By this reasoning, if the City Council had made the policy decision, the ban might well have been legal.

fight the New York City initiative, and in 2013, Coke spent the highest amount on overall lobbying of any other food and beverage company, \$5,981,527, which exceeded even the \$1,240,000 spent by the ABA that year.⁷⁷

Legislators then turned to taxing sugar, instead of limiting serving sizes. Such sin taxes are intended to deter the harmful behavior and generate revenue for governments. Such taxes have been utilized effectively in the past against tobacco and alcohol, and economists have found that a 1% increase in price due to such a tax correlated with a .05% reduction in consumption of alcohol and tobacco.⁷⁸ One study suggested even a penny tax could reduce consumption of sodas by 8 to 10%.⁷⁹ Soda tax legislation initially had been proposed at the federal level. Congress considered a tax on sodas in 2009.⁸⁰ In that year, Coke spent \$9.4 million in lobbying expenses and the ABA spent

⁷⁷ The Center for Responsive Politics, *2012 Lobbying Coca-Cola Co.*, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000212&year=2012>; The Center for Responsive Politics, *2013 Lobbying Coca-Cola Co.*, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000212&year=2013>; The Center for Responsive Politics, *2013 Lobbying American Beverage Association*, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000491&year=2013>.

⁷⁸ *The Taxes of Sin*, THE ECONOMIST, July 28, 2018, at 44.

⁷⁹ *Taxing Soda to Slow the Obesity Epidemic*, HARV. SCH. OF PUB. HEALTH (October 2009), <https://www.hsph.harvard.edu/nutritionsource/2009/10/15/taxing-soda-to-slow-the-obesity-epidemic/>.

⁸⁰ Precedent existed for such federal action. Congress had actually implemented a 10% tax on sodas before, during 1918-1921, to raise revenue during World War I. NESTLE, *supra* note 7, at 362. The soda industry was so upset by this tax that they formed the trade association that ultimately became the American Beverage Association. *Id.*

\$19 million.⁸¹ The measure did not pass. In 2014, Congress tried to enact the Sugar-Sweetened Beverage Tax Act to raise an estimated \$10 billion in revenue to prevent and treat diseases related to obesity.⁸² This did not pass either. According to OpenSecrets.org, in 2014, Coke spent over \$9 million in total lobbying efforts, including challenging the Congressional tax; the ABA spent an additional \$1,180,000.⁸³

With no federal law in place, municipalities began to move forward on their own. In 2014, (the same year the federal Sugar-Sweetened Beverage Tax Act failed), the city of Berkeley, population of approximately 120,000, became the first city to pass a soda tax, at a penny-per-ounce on sugar-sweetened drinks which impacted soft drinks, sweetened teas and fruit drinks, energy drinks and caffeinated drinks, but did not apply to diet drinks that use sugar substitutes.⁸⁴ Berkeley promised to use the funds for community gardens and similar health programs.⁸⁵ Again, Coke and the beverage industry fought the tax, spending \$2 million on the effort, but the vote was 76% in favor, due to the efforts of a coalition of the local NAACP, Latinos Unidos, teachers unions and other community groups who campaigned for the measure due to increasing public awareness of the beverage industry's

⁸¹ *Id.* at 317.

⁸² *Id.* at 383. The bill was introduced by Rosa De Lauro (D-Conn.).

⁸³ The Center for Responsive Politics, 2014 *Lobbying Coca-Cola Co.*,

<https://www.opensecrets.org/lobby/clientsum.php?id=D000000212&year=2014>; The Center

for Responsive Politics, 2014 *Lobbying American Beverage Association*,

<https://www.opensecrets.org/lobby/clientsum.php?id=D000000491&year=2014>.

⁸⁴ Yasmin Anwar, *Soda Tax Linked to Drop in Sugary Beverage Drinking in Berkeley*, Aug. 23, 2016, <http://news.berkeley.edu/2016/08/23/sodadrinking/>; Margot Sanger-Katz, *Yes, Soda Taxes Do Seem to Discourage Soda Drinking*, N.Y. TIMES, Oct. 13, 2015, at A3.

⁸⁵ Margot Sanger-Katz, *Pointing to Cash, Not Health, to Make a Soda Tax Palatable*, N.Y. TIMES, April 4, 2016, at A3.

role in fighting the tax.⁸⁶ Advocates declared the tax a success. A 2016 University of California-Berkeley study surveyed 2,500 residents of low-income neighborhoods and concluded the tax reduced consumption of soda and other sugary beverages 21%.⁸⁷ The study could not determine conclusively if the decrease was due to the price increase or to greater public awareness of the health issues associated with soft drink consumption.⁸⁸ Berkeley residents also reported a 63% increase in consumption of water, compared to a 19% increase in San Francisco and Oakland, although those cities reported a 4% increase in soda consumption, which could indicate consumers were simply going outside of Berkeley to purchase sugary drinks.⁸⁹ Data from 2016 show that the tax raised \$1.5 million in that year for public health and nutrition programs.⁹⁰

In 2013, California proposed a state-wide soda tax of a penny per ounce, but it failed to advance in the legislature.⁹¹ The state re-

⁸⁶ Lappe, *supra* note 2.

⁸⁷ Jennifer Falbe, Hannah Thompson, et al. *Impact of The Berkeley Excise Tax On Sugar-Sweetened Beverage Consumption*, 106 AMER. J. OF PUBLIC HEALTH, 1865 (2016), <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2016.303362>.

⁸⁸ Anwar, *supra* note 84; Margot Sanger-Katz, *Faced with a New Tax, Berkeley Drinks Less Soda*, N.Y. TIMES, Aug. 25, 2016, at A3.

⁸⁹ A 2018 study by researchers at Duke University concluded that there is only ‘limited’ evidence to support reduced purchases of soda as a result of the Berkeley tax and further established that consumers were indeed purchasing soda outside the Berkeley tax zone. Black, *supra* note 52, at 281.

⁹⁰ Lappe, *supra* note 2.

⁹¹ Melanie Mason, *Healthcare Groups Want California Voters to Tax Soda*, L.A. TIMES, July 2, 2018, <https://www.latimes.com/politics/la-pol-ca-soda-tax-initiative-20180702>.

introduced two successive soda tax bills of a 2-cent per ounce tax in 2015 and 2016, and this time specifically added that the funds raised would be used for obesity and diabetes clinics. These initiatives also stalled in the legislature. From the start of 2015, Coke, PepsiCo and the California Nevada Beverage Association spent over \$413,000 on lobbying to fight the state proposals.⁹²

Overall, Coke spent more than \$8 million on total lobbying efforts in 2015, according to OpenSecrets.org; the ABA spent 1,380,000.⁹³

In June 2016, Philadelphia, with a population of about 1.6 million, became the first major US city to pass a soda tax, at 1.5 cents per ounce, to be levied on distributors and to apply to all sugary or

story.html. *See also*, Carolyn Jones, *More Soda Tax Measures May Be Coming*, SFGATE, Nov. 29, 2012, <http://www.sfgate.com/bayarea/article/More-soda-tax-measures-may-be-coming-4079117.php>.

⁹² KQED News Staff, *Statewide Soda Tax Bill Dead for the Year*, KQED NEWS, April 13, 2016, <https://ww2.kqed.org/stateofhealth/2016/04/13/statewide-soda-tax-bill-dead-for-the-year/>. In this same time frame, on July 9, 2015, San Francisco passed initiatives declaring ads for sugary soft drinks must include the warning label: “WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.” Katy Steinmetz, *San Francisco Approves Warning Label for Sugary Drink Ads*, TIME, June 10, 2015, <http://time.com/3915485/san-francisco-soda-warning-label>. However, this initiative was never implemented because the Ninth Circuit Court of Appeals determined, among other things, that the warning “unduly burdens and chills protected commercial speech.” *Am. Beverage Ass’n v. City & Cty. of S.F.*, F.3d 884, 888 (9th Cir. 2017); Galle, *supra* note 64, at 287.

⁹³ The Center for Responsive Politics, *2015 Lobbying Coca-Cola Co.*, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000212&year=2015>; The Center for Responsive Politics, *2015 Lobbying American Beverage Association*, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000491&year=2015>.

artificially sweetened drinks sold by distributors in Philadelphia.⁹⁴ Unlike in Berkeley, the Philadelphia tax was levied on both regular and diet sodas, whether sweetened with sugars or non-caloric sweeteners. The tax was levied directly on the distributors and equated to a price increase of 60 cents for a 20-ounce bottle of soda; however, the distributors passed an average of 97% of the cost on to consumers resulting in a 34% price increase on average.⁹⁵ While Berkeley's soda tax was marketed as a means to change poor health habits, the Philadelphia City Council promoted their tax purely as a source of general revenue that would raise more than \$400 million over five years to fund universal preschool and renovations to community assets like parks and libraries.⁹⁶ The soda industry argued the tax would not be stable enough for items like preschool that require permanent, predictable funding, and would disproportionately affect poorer consumers.⁹⁷ The ABA fought the initiative via lobbying, advertising, and by funding the group "Philadelphians Against the Grocery Tax" which used aggressive media campaigns to fight the tax.⁹⁸ The ABA,

⁹⁴ Stafford, *supra* note 75, at A1; Andrew Jacobs, *Philadelphia's Primary Will Decide Future of Soda Tax, Though It's Not on Ballot*, N.Y. TIMES, May 21, 2019, at A16.

⁹⁵ Sanger-Katz, *Pointing to Cash, Not Health, to Make a Soda Tax Palatable*, *supra* note 85, at A3; Sachin Waikar, *How to Design a Better Soda Tax*, INSIGHTS STANFORD GRAD. SCH. OF BUS., Mar. 22, 2019, <https://www.gsb.stanford.edu/insights/how-design-better-soda-tax>.

⁹⁶ Sanger-Katz, *Pointing to Cash, Not Health, to Make a Soda Tax Palatable*, *supra* note 85, at A1. As of May 2019, funds from Philadelphia soda taxes have been used to add 4,000 prekindergarten slots and build 12 new community schools. Jacobs, *Philadelphia's Primary Will Decide Future of Soda Tax, Though It's Not on Ballot*, *supra* note 94.

⁹⁷ Sanger-Katz, *Pointing to Cash, Not Health, to Make a Soda Tax Palatable*, *supra* note 85, at A3.

⁹⁸ Lappe, *supra* note 2.

local grocery owners and the Teamsters union together spend \$10.6 million in the process of fighting the initiative in 2016, compared to \$2 million spent by supporters of the tax, including former New York Mayor Michael Bloomberg.⁹⁹

The ABA sued Philadelphia, calling its tax illegal. The ABA stated the tax “is a regressive tax that unfairly singles out beverages – including low-and no-calorie choices. But most importantly, it is against the law. So we will side with the majority of the people of Philadelphia who oppose this tax and take legal action to stop it.”¹⁰⁰ The trial court ruled against the ABA. The ABA appealed, but in July 2018, the Pennsylvania Supreme Court affirmed the trial court’s decision in a 4-2 ruling.¹⁰¹

Soda tax advocates hailed the Philadelphia tax as a success. One study showed a 40% decrease in soda consumption in the area after the tax was implemented, and a 2019 study in the *Journal of the American Medical Association* that compared soda sales in the year before and after the tax showed a 38% drop in soda sales in Philadelphia.¹⁰² Meanwhile, the impact of the tax had a negative effect

⁹⁹ Holly Otterbein, *The Beverage Lobby Spent \$10.6 Million to Kill the Soda Tax – and Failed*, PHIL. MAG, Aug. 2, 2016, <https://www.phillymag.com/citified/2016/08/02/soda-tax-spending-lobbying/>; Jacobs, *Philadelphia’s Primary Will Decide Future of Soda Tax, Though It’s Not on Ballot*, *supra* note 94.

¹⁰⁰ Stafford, *supra* note 75, at A6.

¹⁰¹ *Pennsylvania Supreme Court Upholds Philadelphia’s Beverage Tax*, GRANT THORNTON, Aug. 16, 2018, <https://www.grantthornton.com/library/alerts/tax/2018/SALT/P-T/PA-supreme-court-upholds-Philadelphia-beverage-tax-08-16.aspx>.

¹⁰² Andrew Jacobs, *When Yes Really Means No to a Tax on Sugary Drinks*, N.Y. TIMES, Nov. 3, 2018, at B4; Andrew Jacobs, *Philadelphia’s Primary Will Decide Future of Soda Tax, Though It’s Not on Ballot*, *supra* note 94. See also, Christina Roberto, Hannah Lawman, et al, *Association of a Beverage Tax on Sugar-Sweetened and Artificially Sweetened Beverages*

on soda sales for Coke and other soda companies. A 2017 study of the impact of the Philadelphia tax shows retailers experienced a 46% decrease in demand for soda.¹⁰³ Pepsi even stopped selling 2-liter bottles and 12-packs in the city.¹⁰⁴ While sales of sugary sodas dropped in Philadelphia during the first five months of the new law's implementation, there was a parallel increase in purchases outside the Philadelphia city limits.¹⁰⁵ The 2017 study proposes that consumers in some cases switched to water or other untaxed beverages, but in other cases, simply went to other counties to purchase the drinks at a lower

with Changes in Beverage Prices and Sales at Chain Retailers in a Large Urban Setting,
321 J. OF AM. MED. ASSOC. 1799, 1806 (May 14, 2019),
https://jamanetwork.com/journals/jama/fullarticle/2733208?guestAccessKey=86610f39-a0eb-46d4-a30a-3ddef0036408&utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_content=tfl&utm_term=051419.

¹⁰³ Waikar, *supra* note 95. For example, the ABA published a study with Oxford Economics, presenting data to support a 29% decrease in bottler sales in Philadelphia for the first three months in 2017 in comparison to data for the first three months in 2016, before the tax was effective. The study also showed a 26% increase in bottler sales in the region surrounding Philadelphia during the same time period, and attributes that increase to consumers traveling outside the tax zone to purchase sugary drinks. The study also concludes that employment in bottling, beverage trade and transport and grocery retail decreased by 1,192 workers as a result of the tax, a corresponding loss of local tax revenue of \$4.5 million. *The Economic Impact of Philadelphia's Beverage Tax*, AM. BEV. ASS'N AND OXFORD ECON., Dec. 2017, at 4-5, <https://www.ameribev.org/files/resources/oe-economic-impact-study.pdf>.

¹⁰⁴ Wan, Watson, Arthur, *supra* note 1. Pepsi's CEO Indra Nooyi has stated that she opposes soda taxes because they are "regressive," "unfairly target one category or industry," and are "more revenue generation-focused rather than health-focused." *Id.*

¹⁰⁵ *Id.* See also, Black, *supra* note 52, at 281-282, noting that in its first year, tax revenues were nearly 15% below estimated amounts, negatively impacting the programs funded by the tax.

price.¹⁰⁶ Coke's North American President Sandy Douglas told delegates at an industry conference in 2017 that the "Philadelphia tax had been a '*complete disaster*,' which had cost jobs and 'materially reduced our business.'"¹⁰⁷

After Philadelphia, other cities imposed taxes in quick succession: a penny-per-ounce soda tax in the California cities of San Francisco, Oakland, and Albany in 2016 (predicted to raise soda prices by 67 cents on a two-liter bottle and \$1.44 on a 12-pack),¹⁰⁸ and a 2 cents per ounce tax in Boulder, Colorado. The San Francisco, Oakland and Albany taxes were each levied on distributors of sugar-sweetened beverages, with the revenue to be used for health programs.¹⁰⁹ The Boulder tax revenue is also to be spent on health and wellness programs, particularly those related to obesity.¹¹⁰ The beverage industry again spent millions on advertising campaigns against the taxes, arguing they were "grocery taxes" that would disproportionately impact the poor and unfairly target one item when it is the overall calorie consumption from all foods that matters most. The industry also argued that obesity rates continue to rise even as soda consumption is declining.¹¹¹ Spending by both proponents and

¹⁰⁶ Waikar, *supra* note 95.

¹⁰⁷ Wan, Watson, Arthur, *supra* note 1.

¹⁰⁸ Margot Sanger-Katz, *A One-Cent Soda Tax Gets Expensive in California*, N.Y. TIMES, Nov. 8, 2016, at A3.

¹⁰⁹ Treasurer and Tax Collector, City and County of San Francisco, *Sugary Drinks Tax*, <https://sftreasurer.org/sugary-drinks-tax>; Oakland Food Policy Council, *An Overview of the Oakland Soda Tax*, <https://www.oaklandsodataxnews.org/sodataxbasics>; Albany, Dept. of Finance and Administrative Services, *Sugar-Sweetened Beverage Tax*, <https://www.albanyca.org/departments/finance/sugar-sweetened-beverage-tax>.

¹¹⁰ City of Boulder, *Sugar-Sweetened Beverage Tax*, <https://bouldercolorado.gov/tax-license/finance/sugar-sweetened-beverage-tax>.

¹¹¹ Anahad O'Connor, *University's Sugary Soda Ban Comes Amid Policy Battle*, ATL. J.-

opponents of the taxes exceeded \$50 million, with the beverage industry outspending proponents by 3 to 2. Coke itself spent almost \$8 million on overall lobbying in 2016, according to OpenSecrets.org; the ABA spent \$1,160,000.¹¹² The taxes passed in all three cities.

In June 2017, the Seattle City Council imposed a 1.75 cents per ounce tax on distributors of sugary drinks (excluding diet drinks), to be used for health programs, although, similar to Philadelphia, the mayor originally proposed to use the revenue to fund education programs for low income children.¹¹³ The tax, the cost of which has mostly been passed on to consumers, raised over \$16 million in its first nine months of being effective.¹¹⁴ Revenue has been used to improve access to healthier foods for low-income families, such as vouchers to be used at farmers' markets.¹¹⁵

In addition to cities, a few medical centers have banned sugary

CONST., Nov. 13, 2016, at A12.

¹¹² Margot Sanger-Katz, *A One-Cent Soda Tax Gets Expensive in California*, *supra* note 108; The Center for Responsive Politics, *2016 Lobbying Coca-Cola Co.*, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000212&year=2016>; The Center for Responsive Politics, *2016 Lobbying American Beverage Association*, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000491&year=2016>.

¹¹³ Daniel Beekman, *Seattle Passes Tax on Sugary Drinks*, ATL. J.-CONST., June 7, 2017, at A13.

¹¹⁴ Daniel Beekman, *Seattle's Soda-Tax Collections Top \$16 million in 9 Months, Surpass First-Year Estimate*, SEATTLE TIMES, Dec. 20, 2018, <https://www.seattletimes.com/seattle-news/politics/seattles-soda-tax-collections-top-16-million-in-9-months-surpass-first-year-estimate/>.

¹¹⁵ Jacobs, *When Yes Really Means No to a Tax on Sugary Drinks*, *supra* note 102, at B4.

drinks. In 2015, the University of California, San Francisco, medical center removed all drinks with added sugars from its campus of more than 24,000 employees, including from all stores and vending machines on campus. Early surveys of 2,500 employees indicate that soda consumption fell by 25%. Similarly, the Cleveland Clinic in Ohio, the University of Michigan Health System, and about 30 other medical centers have implemented such bans.¹¹⁶

The cumulative effect of Coke's and the beverage industry's lobbying, litigation and media efforts to oppose soda taxes began to bear results. While Seattle was passing its soda tax, in Santa Fe, New Mexico, voters rejected a soda tax in May 2017, and in Cook County, Illinois (Chicago), county commissioners repealed their soda tax of 1-cent-per-ounce two months after it had been enacted.¹¹⁷ The beverage industry spent additional millions in TV and advertisements fighting the Cook County tax after its implementation, in a campaign called "Can the Tax." The campaign especially criticized the fact the tax revenue here was being used to address budget deficits, not public health or even pre-K funding. One commissioner "acknowledged that the beverage industry used its financial power to shape public opinion before supporters of the tax were able to craft their own message for public debate."¹¹⁸ The ABA has been successful in defeating soda

¹¹⁶ O'Connor, *University's Sugary Soda Ban Comes Amid Policy Battle*, *supra* note 111, at A12.

¹¹⁷ Wan, Watson, Arthur, *supra* note 1; American Beverage Association & Oxford Economics, *The Economic Impact of Philadelphia's Beverage Tax*, (Dec. 2017), at 6, <https://www.ameribev.org/files/resources/oe-economic-impact-study.pdf>. The tax was effective in August 2017, repealed in October 2017, and abolished on Dec. 1 2017. *Id.*

¹¹⁸ Lappe, *supra* note 2. See also, Black, *supra* note 52, at 282. Vermont has considered a tax as well.

taxes in more than thirty states and cities.¹¹⁹

In 2017, the beverage industry introduced a different tactic in the fight, going directly to the legislatures to draft pre-emptive statewide legislation to preclude cities from enacting future taxes on foods, including sodas. This is part of the lobbying that businesses engage in, and every business and industry must make a strategic decision whether to lobby to achieve business goals or protect existing business goals and practices.¹²⁰ Lobbying by drafting legislation is a common strategy,¹²¹ and has been used in a variety of other issues such as fracking, minimum wages, gun ordinances, and bathroom usage: “Recent preemption efforts can be understood, at one level, as part of longstanding campaigns waged by industry groups hoping to stop or limit progressive local policies in order to create a friendlier business environment for themselves.¹²² Most of the proposed

¹¹⁹ Stafford, *supra* note 75, at A6.

¹²⁰ FRANK BAUMGARTNER, LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 113 (2009); DRUTMAN, *supra* note 70, at 25-28; LAWRENCE LESSIG, REPUBLIC LOST 136-138 (2015).

¹²¹ DRUTMAN, *supra* note 70, at 40-41; *How a Bill Really Becomes a Law*, BLOOMBERG BUSINESSWEEK, Aug. 1 – 7, 2011, at 30. The article quotes Bob Edgar of Common Cause, “This is just another hidden way for corporations to buy their way into the legislative process.” Brendan Greeley & Alison Fitzgerald, *Pssst ... Wanna Buy A Law?* BLOOMBERG BUSINESSWEEK, Dec. 5, 2011, at 65, 70.

¹²² Industry groups and trade associations first began pressuring state legislatures to rein in their cities in the late 1980s. Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS: J. OF FEDERALISM 403, 405 (2017). See also, Luke Fowler & Stephanie Witt, *State Preemption of Local Authority: Explaining Patterns of State Adoption of Preemption Measures*, 47 PUBLIUS: J. OF FEDERALISM 540

legislation did not specifically mention soda taxes directly, referring to bans on taxes of food in general, but such broad legislation has the effect of prohibiting future soda taxes. As a result, in 2017, legislatures

(2019) ("our findings indicate that preemption is better explained by political factors than institutional features, which would suggest that recent preemption activity is likely a result of increasing political competition and/or partisan polarization." at 553; and "the rise in state preemption in recent years appears to be connected to increased political competition more so than allocating policy responsibilities in such a way that it produces the best public services" at 554, <https://doi.org/10.1093/publius/pjz011>; David A. Dana and Janice Nadler, *Soda Taxes as a Legal and Social Movement*, 13 NW J. L. SOC. POL'Y 84, 94-100 (2018). According to the National Council of State Legislators, six states considered state preemption laws on local bathroom ordinance, with only North Carolina implementing it. <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>. In another food example, Ohio passed a law written by the lobbyists for the Ohio Restaurant Association that barred localities from making health decisions as to restaurant food, specifically trans-fat; a trial court found the law unconstitutional. Stephanie Strom, *Judge Rules Restaurant Law Styles Ohio Cities*, N.Y. TIMES, June 13, 2012, at B4; Joe Palazzol, *Judge Gets Behind Cleveland's Trans-Fat Ban*, WALL ST. J., June 13, 2012, <http://blogs.wsj.com/law/2012/06/13/judge-gets-behind-clevelands-trans-fat-ban/> ("two months after Cleveland passed its law, the Ohio Senate amended the state budget to prohibit municipalities from regulating the ingredients eateries use to prepare food — a victory for the Ohio Restaurant Association, which lobbied for the measure."); City of Cleveland vs. State of Ohio, 989 N.E.2d 1072 (Ct. App. 2013) ("We also have concerns regarding the process behind how the amendments were passed. In *response* to the city of Cleveland's trans-fats Ordinance, the Ohio Restaurant Association ("ORA") sent an email to the Ohio Department of Agriculture with an attached legislative proposal. The email stated that the Ordinance was "exactly what we want to preempt with the attached amendment." The email also stated that the amendment was "a high priority for Wendy's, McDonalds and YUM!." At 1087. "According to the email, a senator had already been given a copy of ORA's proposed legislation and would offer it in the Senate Finance Committee. Thus, the amendments were drafted on behalf of a special interest group with the specific purpose of snuffing out the Ordinance. ... The facts giving rise to the birth of the amendments, coupled with the lack of a nexus between the amendments and the appropriations bill, create a strong suggestion that the provisions were combined for tactical reasons. The amendments in this case present us with a classic instance of impermissible logrolling. [citation omitted] We find that the amendments do not constitute a general law and violate the single-subject rule." At 1085-1086).

in Michigan, Arizona, and California enacted state laws that prohibit local governments from implementing taxes on foods for a set number of years.¹²³ Michigan and Arizona were not considering any active soda tax bans when their legislatures passed the bans. The California law is most striking, considering Berkeley was the first city to pass a soda tax, the number of cities in the state that already have soda taxes in place, and the fact that additional California cities were actively pursuing such taxes. The existing California soda tax laws are not impacted by the 2018 ban on food taxes. The beverage industry fought hard for such bans, arguing that decreased consumption would cost jobs and food taxes disproportionately affect low-income consumers. William Dermody, Vice President of Policy for the ABA, stated, “Our aim is to help working families by preventing unfair increases to their grocery bills....At the same time, we’re working with the public health community and government officials to help ... reduce sugar consumption in ways that don’t cost jobs or hurt the small businesses that are so important to local communities.”¹²⁴ In 2017, Coke spent more than \$6 million on lobbying efforts in general, according to OpenSecrets.org; the ABA spent \$1,280,000.¹²⁵

¹²³ Jacobs, *When Yes Really Means No to a Tax on Sugary Drinks*, *supra* note 102, at B4; Wan, Watson, Arthur, *supra* note 1.

¹²⁴ Jacobs, *When Yes Really Means No to a Tax on Sugary Drinks*, *supra* note 102; Caitlin Dewey, *California, Home of the First Soda Tax, Agrees to Ban Them*, WASH. POST, June 30, 2018, https://www.washingtonpost.com/news/wonk/wp/2018/06/30/california-home-of-the-first-soda-tax-agrees-to-ban-them/?noredirect=on&utm_term=.f49a0e18273d.

¹²⁵ The Center for Responsive Politics, *2017 Lobbying Coca-Cola Co.*, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000212&year=2017>; The Center

In 2018, both Oregon and Washington had similar bans on future food taxes on the ballot in the Fall elections. Oregon's ballot initiative did not pass, but Washington's did, making it the fourth state that now prohibits future food taxes. The new initiatives did not impact Seattle's soda taxes already in place. Many voters in Oregon and Washington were unaware that the ABA, Coke and Pepsi largely financed the ballot initiatives, including together spending \$25 million in commercials alone.¹²⁶ While some criticize these new laws as a restriction on democracy and the independence of local government, proponents of such bans, including spokesmen for the ABA and the Washington Teamsters Union, cite the fact that most consumers don't want taxes on food items, including soda, and that the taxes are regressive because they "take money out of the pockets of folks least able to afford them."¹²⁷ Coke and other beverage companies fund most of the ballot initiatives against soda taxes¹²⁸ and will continue to seek to preempt cities from imposing soda taxes by lobbying for new state laws that prohibit local imposition of such taxes.¹²⁹ In 2018, in addition to funds spent on advertising, Coke spent \$6,770,000 in

for Responsive Politics, *2017 Lobbying American Beverage Association*, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000491&year=2017>.

¹²⁶ Jacobs, *When Yes Really Means No to a Tax on Sugary Drinks*, *supra* note 102; Rachel Arthur, Elaine Watson, et al, *Sugar Taxes: The Global Picture*, FOOD NAVIGATOR, Dec. 14, 2018, <https://www.foodnavigator-latam.com/Article/2018/12/14/Sugar-taxes-the-global-picture>.

¹²⁷ Jacobs, *When Yes Really Means No to a Tax on Sugary Drinks*, *supra* note 102, at B4.

¹²⁸ Andrew Jacobs, *Where 'Yes! to Affordable Groceries' Really Means No to a Soda Tax*, N.Y. TIMES, Nov. 2, 2018, <https://www.nytimes.com/2018/11/02/health/grocery-taxes-oregon-washington-soda-tax.html>.

¹²⁹ Anahad O'Connor & Margot Sanger-Katz, *California, of All Places, Has Banned Soda Taxes, How a New Industry Strategy Is Succeeding*, N.Y. TIMES, June 27, 2018, <https://www.nytimes.com/2018/06/27/upshot/california-banning-soda-taxes-a-new-industry-strategy-is-stunning-some-lawmakers.html>.

lobbying efforts and the ABA spent \$1,360,000.¹³⁰

Legislative efforts to enact state-wide soda taxes continue in Connecticut, California and Massachusetts, as the ABA continues to fight them.¹³¹ In 2019, the Governor of Connecticut is proposing a 1.5 cents per ounce tax on sugary drinks such as soda, sports drinks, energy drinks, canned or bottled tea and coffee, but not diet sodas.¹³² In 2019, a California legislator again proposed a statewide soda tax, only to shelve the initiative until 2020 because of lack of support. Legislators in Massachusetts have introduced bills to tax sugary drinks as well.¹³³

¹³⁰ The Center for Responsive Politics, *2018 Lobbying Coca-Cola Co.*, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000212&year=2018>; The Center for Responsive Politics, *2018 Lobbying American Beverage Association*, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000491&year=2018>.

¹³¹ Christopher Keating, *A Soda Tax Could Raise \$163M a Year for Connecticut. Opponents Say it Would be an Unfair Burden on Businesses and Families*, HARTFORD COURANT, Apr. 16, 2019, <https://www.courant.com/politics/hc-pol-clb-soda-tax-details-20190416-qgtpghdglx5h6jegfbwa2e4rnpm-story.html>. Associated Press, *California Proposal to Tax Soda Pushed to Next Year*, L.A. TIMES, Apr. 23, 2019, <https://www.latimes.com/politics/la-pol-ca-soda-tax-20190423-story.html>; Katie Lannan, *Legislators Eye Soda Tax*, METROWEST DAILY News, Mar. 28, 2019, <https://www.metrowestdailynews.com/news/20190328/legislators-eye-soda-tax>.

¹³² Keating, *supra* note 131. Estimates are the tax will raise \$163 million by its second year. The ABA is supporting a coalition called “Keep CT Affordable” to oppose the tax, arguing the move will hurt small businesses such as gas stations and corner stores and force them to cut jobs. The coalition claims a 12-pack of soda will rise in price from \$5.69 to \$7.85 if the tax is implemented. *Id.*

¹³³ Associated Press, *California Proposal to Tax Soda Pushed to Next Year*, *supra* note 131; Lannan, *supra* note 131. The proposed tax would be tiered, with beverages with 7.5 grams

The American Academy of Pediatrics and the American Heart Association in March 2019 issued policy recommendations encouraging legislators to pass new laws to tax soft drinks, impose warning labels and restrict advertising, in an effort to keep younger people from consuming too many of the beverages. The two leading medical groups referred to such drinks as “a grave health threat to children and adolescents,” with one doctor stating “I’ve seen 2-year-olds with fatty liver disease and teenagers with Type-2 diabetes...These are diseases we used to see in their grandparents.”¹³⁴ The ABA continues to argue that sugary drinks are being unfairly blamed at a time when the industry is working to create healthier products with less calories.

B. SODA TAX INITIATIVES OUTSIDE THE UNITED STATES AND COKE’S RESPONSES

The drive to tax sugary drinks is worldwide. For example, France implemented a flat-rate tax of 7.53 euro per hectoliter on all sugar-sweetened in 2012, and banned restaurants from offering free refills of sugary sodas and drinks in 2017. In 2014, obese adults made up 15.3% of the French population, compared to the European average of 15.9% and the then-U.S.-average of 36.5%.¹³⁵ In 2018, France modified its soda tax to introduce a tiered system, with a 20 euro per

of sugar or less per 12 fluid ounces being untaxed, those with 30 grams of sugar or more per 12 fluid ounces being taxed at 2 cents per ounce, and those falling in between being taxed at 1 cent per ounce. *Id.*

¹³⁴ Andrew Jacobs, *Two Top Medical Groups Call for Soda Taxes and Advertising Curbs on Sugary Drinks*, *supra* note 47.

¹³⁵ Kimiko de Freytas-Tamura, *New Law in France Bans Free Soda Refills*, N.Y. TIMES, Jan. 28, 2017, at A7.

hectoliter tax if the product contains more than 11 grams of added sugar per 100ml. Coke has not reformulated its products in France, but has reduced bottle sizes and increased prices in response.¹³⁶

In 2013, Mexico passed a soda tax, a significant development because Mexico's obesity rate is the second-highest in the developed world, just behind the United States.¹³⁷ At that time, Mexico was the largest consumer of Coke products in the world, with the average adult drinking 728 servings during the year.¹³⁸ The tax was applied to the bottlers and distributors, so it would be reflected in the price tag on the bottle itself, not added at the cash register. The result was a one peso increase for each liter, or about a 10% price increase.¹³⁹ The soda industry fought hard against the tax here too, including publishing ads claiming 3.5 million people would lose jobs as a result of the tax and ads attacking the link between soda consumption and obesity. Coke itself, through its Mexican branch, spent \$131,000 installing special drinking fountains that purify tap water in forty-two Mexican schools, promising to spend approximately \$2 million more to install such fountains in another seven hundred schools. Critics complain that was merely for brand publicity, since all the water fountains were clearly

¹³⁶ Arthur, et al., *supra* note 126.

¹³⁷ *In Mexico, A Soda Tax Success Story*, BLOOMBERG BUSINESSWEEK, Jan. 18, 2016, <http://www.pressreader.com/australia/bloomberg-businessweek-asia/20160118/281715498614593>.

¹³⁸ Special Report on Obesity, *The Big Picture*, THE ECONOMIST, Dec. 15, 2012, at 3-4.

¹³⁹ Sanger-Katz, *Yes, Soda Taxes Do Seem to Discourage Soda Drinking*, *supra* note 84.

marked with the Coca-Cola logo.¹⁴⁰ However, such lobbying and advertisement campaigns failed to defeat Mexico's law. By December 2014, research shows a 12% drop in soda sales in Mexico, and a 17% drop among lowest-income consumers. As with all of the studies of the impact of soda taxes on demand, any correlation between the soda tax and a decrease in rates of obesity and diabetes will take years to determine definitively; however, soda tax advocates hail Mexico's tax as a success.¹⁴¹

In 2014, Chile imposed one of the highest soda taxes in the world, at 18% on beverages with high sugar content. The food laws also require companies to remove cartoon characters from cereal boxes that contain sugar, ban the sale of junk foods like ice cream and chocolate in the schools, and prevent these items from being advertised on various media sites that target children between the hours of 6 a.m. and 10 p.m. Food companies must place a warning label on products high in sugar, salt and saturated fat, even on foods often labeled as "healthy," such as cereal bars, yogurt and juice boxes. In Chile, 75% of adults and 50% of six-year-olds are overweight or obese; the medical costs of obesity in 2016 were over \$800 million. By 2017, over 20% of the food products sold in Chile were reconfigured to comply with the new law and avoid the black warning label.¹⁴² In 2018, Chile reported a 22% decrease in sales of sugary soft drinks.¹⁴³

In October 2016, the World Health Organization stated that

¹⁴⁰ NESTLE, *supra* note 7, at 374.

¹⁴¹ Sanger-Katz, Yes, *Soda Taxes Do Seem to Discourage Soda Drinking*, *supra* note 84.

¹⁴² Andrew Jacobs, *In Sweeping War on Obesity, Chile Slays Tony the Tiger*, N.Y. TIMES, Feb. 7, 2018, <https://www.nytimes.com/2018/02/07/health/obesity-chile-sugar-regulations.html>.

¹⁴³ Arthur, et al., *supra* note 126.

countries should impose soda taxes on sugary drinks like sodas, energy drinks and iced teas, to reduce consumption and fight obesity.¹⁴⁴ Taxes have been implemented in over 30 countries, including France, India, Saudi Arabia, South Africa, Thailand, Great Britain, Ireland, Canada, Hungary, the United Arab Emirates, and Israel.¹⁴⁵ The United Kingdom and Ireland both imposed new taxes in 2018. The U.K. Soft Drink Industry Levy imposes a tax of 18 pence per liter for beverages with 5 grams of sugar per 100ml or more and 24 pence if the sugar content is 8 grams or more. The soda tax raised \$197 million in its first seven months. The Irish Sugar Sweetened Drinks tax is similar to the U.K. tax and was expected to raise \$45 million in its first year.¹⁴⁶ On the other hand, Colombia rejected a soda tax in 2016.¹⁴⁷

As soda consumption continues to fall, obesity is leveling off.¹⁴⁸ From Mexico to Ireland, from Philadelphia to Seattle, soda taxes have led to measurable declines in consumption. A 10% tax on average produces a 7% drop in consumption, according to recent

¹⁴⁴ Sabrina Tavernise, *W.H.O. Recommends Taxing Sugary Drinks*, N.Y. TIMES INTERN'L, Oct. 12, 2016, at A11.

¹⁴⁵ Jacobs, *Philadelphia's Primary Will Decide Future of Soda Tax, Though It's Not on Ballot*, *supra* note 94; Jacobs, *After Drug Wars, a Dangerous Battle Over Soda*, *supra* note 63 at A1, A8; Sanger-Katz, *Pointing to Cash, Not Health, to Make a Soda Tax Palatable*, *supra* note 85 at A3; Wan, Watson, Arthur, *supra* note 1; Olga Khazan, *What the World Can Learn from Denmark's Failed Fat Tax*, WASH. POST, Nov. 11, 2012, <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/11/what-the-world-can-learn-from-denmarks-failed-fat-tax/>; Arthur, et al., *supra* note 126.

¹⁴⁶ Arthur, et al., *supra* note 126.

¹⁴⁷ *Id.*

¹⁴⁸ NESTLE, *supra* note 7, at 385.

research.¹⁴⁹ The decrease is not evenly distributed among the population; however, as soda consumption rates remain high in lower-income communities.¹⁵⁰ Additional studies show consumers will shop for soda in other cities outside the jurisdiction, obviating the health benefit of the tax.¹⁵¹

Coke acknowledges the risk of soda taxes to its business. Coke's Annual Report to Shareholders on Form 10-K, Coke states:

In addition, in the past, the U.S. Congress considered imposing a federal excise tax on beverages sweetened with sugar, HFCS or other nutritive sweeteners and may consider similar proposals in the future. As federal, state and local governments in the United States and throughout the world experience significant budget deficits, some lawmakers have singled out beverages among a plethora of revenue-raising items and have imposed or increased, or proposed to impose or increase, sales or similar taxes on beverages, particularly sugar-sweetened beverages. Increases in or the imposition of new indirect taxes on our business operations or products would increase the cost of products or, to the extent levied directly on consumers, make our products less affordable, which may negatively impact our net operating revenues and profitability.¹⁵²

With such a major risk to its profits, Coke and the beverage industry will continue to challenge soda tax and similar regulatory initiatives in the United States and abroad. Susan Neely, President of

¹⁴⁹ Jacobs, *Two Top Medical Groups Call for Soda Taxes and Advertising Curbs on Sugary Drinks*, *supra* note 47.

¹⁵⁰ *Id.*

¹⁵¹ Black, *supra* note 52, at 283.

¹⁵² 2018 Form 10-K, *supra* note 10, at 14.

the ABA stated at an industry conference in 2013 that the industry will continue to fight soft-drink taxes: “We will continue to challenge, wherever there is an onerous tax or onerous regulation in the public domain, and we will be there and we will fight it.”¹⁵³

C. FUNDING RESEARCH TO OPPOSE LEGISLATIVE INITIATIVES

Lobbying, legislative initiatives and litigation are ways to address unfavorable changes to laws and regulations, a necessity because a firm must operate within the legal constraints of that country (or multiple countries in the case of multinational companies). As discussed above, Coke and the soft drink industry followed standard lobbying practice, strategy and tactics in opposing the soda tax proposals through legal and legislative means.

Another tactic is to fund research that can be used in support of the lobbying efforts,¹⁵⁴ mostly to have citable research to refute the

¹⁵³ Alan Rappeport, *Coke: Out for the Calorie Count*, FIN. TIMES, Jan. 25, 2013, <http://www.ft.com/cms/s/0/cbd21108-66c1-11e2-a83f-00144feab49a.html>.

¹⁵⁴ Eric Lipton et al., *Top Scholars or Lobbyists? Often It's Both*, N.Y. TIMES, Aug. 9, 2016, at A1; Eric Lipton & Brooke Williams, *Scholarship or Business? Think Tanks Blur the Line*, N.Y. TIMES, Aug. 8, 2016 at A1; KAY LEHMAN SCHOLZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 362-364 (1986); DRUTMAN, *supra* note 70, at 35-40 (“Corporations … are investing considerable sums in suturing the ‘intellectual environment,’ overloading minds of policymakers and their staff so that when the time comes to make a decision, certain arguments and frames will come to mind quicker than others, an certain ideas and solutions will have been pre-legitimated by a wide range of trusted experts … [¶] Detailed policy analysis and thought leadership costs money – and

evidence that ascertained the injurious health effects in the first place. Soda companies often sponsor research efforts related to obesity, type 2 diabetes and other health issues in order to have influence over recommendations and guidelines. Such research results also can be used in support of lobbying efforts to oppose the initiatives to tax soda.¹⁵⁵ Such strategies are common place in industry. “[E]xperts – especially think tanks – are a frequent presence alongside interest groups and lobbyists in the political process.”¹⁵⁶ *The New York Times* reported:

An examination of 75 think tanks found an array of researchers who had simultaneously worked as registered lobbyists, members of corporate boards or outside consultants in litigation and regulatory disputes, with only intermittent disclosure of their dual roles.

With their expertise and authority, think tank scholars offer themselves as independent arbiters, playing a vital role in Washington’s political economy. Their imprimatur helps shape

corporations are willing to pay for it.”). ANDREW RICH, THINK TANKS, PUBLIC POLICY, AND THE POLITICS OF EXPERTISE 103 (2004): “... think tanks, as policy experts, to be quite politically engaged in policy making; the results suggest the possibilities for think tanks to affect, if not determine, the dimensions and extent of their political engagement.” Also, “Once an issue is under deliberation and headed toward policy enactment, from the point when policy makers are collectively involved until final decisions are imminent, elected officials are positioning themselves on issues, and expertise becomes valuable as ammunition in policy battles and as support for policy makers’ already-developed views.” *Id.* at 108.

¹⁵⁵ For a more exhaustive list of Coke’s other initiatives to influence research and public awareness, *see* NESTLE, *supra* note 7, at 133-328.

¹⁵⁶ RICH, *supra* note 154, at 209. “Experts are political actors, and think tanks are among the most active and efficient expert political institutions. Think tanks have certain ad- vantages for making their work influential, advantages that enhance the political role of experts.” *Id.* at 210.

government decisions that can be lucrative to corporations.

But the examination identified dozens of examples of scholars conducting research at think tanks while corporations were paying them to help shape government policy....

Largely free from disclosure requirements, the researchers' work is often woven into elaborate corporate lobbying campaigns.¹⁵⁷

In this instance, Coke donates money to fund research. For example, Coke has sponsored or donated money to numerous organizations, including the Juvenile Diabetes Research Foundation, the American Academy of Pediatrics, the American Diabetes Association, and the International Union of Nutritional Sciences. Coke gave over \$1.75 million to the Foundation for the National Institutes of Health during the period from 2010 to 2014.¹⁵⁸

The Coke-funded research tends to minimize the impact of sugar consumption on obesity rates. As a result, the connection between Coke and the research institution is often controversial and results in negative media attention. From 2010-2012, when both

¹⁵⁷ Lipton, et al., *supra* note 154. In the battle for net neutrality that was then an issue before the Federal Communications Commission, the industry provided a dozen studies that had been funded by the telecommunications industry, according to *The Times*. *Id.* Likewise, “FedEx teamed up with the Atlantic Council — a think tank that focuses on international relations, with annual revenue that has surged to \$21 million from \$2 million in the last decade — to build support for a free-trade agreement the company hoped would increase business. Lipton and Williams, *supra* note 154.

¹⁵⁸ NESTLE, *supra* note 7, at 258. See also, Black, *supra* note 52, at 166-167, for further examples of Coke's contributions to foundations during this time period.

obesity and diabetes rates were increasing, Coke donated over \$1.4 million to the CDC Foundation. Some of the CDC projects designated to receive the funds promoted exercise as the solution to obesity and minimized the impact of sugar consumption. Then, in 2013, Coke funded \$1 million, almost 100% of the \$1.2 million budget, of the state of Georgia's "Power Up for 30" program to promote 30 minutes of additional exercise per day for children. After the connection became public and subject to negative media attention, the CDC cut ties with Coke in 2013, concluding there was a misalignment of mission between the CDC and Coke.¹⁵⁹

In November 2015, journalists reported that Coke had funded research to downplay the effects of Coke products on obesity rates. Coke established a non-profit organization, Global Energy Balance Network, whose members were university scientists who again encouraged consumers to focus on exercise more so than calories and sugar consumption. Coke spent \$1.5 million to support the group, including \$1 million to the University of Colorado medical school. After the news story broke, Coke's chief science and health officer, Rhona Applebaum, resigned and the University of Colorado returned the donation.¹⁶⁰ In December 2015, Coke shut down the Global Energy Balance Network due to pressure from public health authorities who objected to the group's stated mission of playing down the correlation between soft drinks and obesity. Several groups that had been accepting funding, including the American Academy of Pediatrics and

¹⁵⁹ Sheila Kaplan, *Chief of C.D.C. Saw Coca-Cola as Fitness Ally*, N.Y. TIMES, July 23, 2017, at A1, A21.

¹⁶⁰ Anahad O'Connor, *Coke's Chief Scientist, Who Orchestrated Obesity Research, Is Leaving*, N.Y. TIMES, Nov. 24, 2015, <https://well.blogs.nytimes.com/2015/11/24/cokes-chief-scientist-who-orchestrated-obesity-research-is-leaving/>.

the Academy of Nutrition and Dietetics, also severed their relationships with the organization and Coke.¹⁶¹

In 2016 *The Annals of Internal Medicine* published a review attacking global advice to consume less sugar, arguing the scientific evidence for such advice is weak. Critics immediately complained that the review was biased because it was paid for by the International Life Sciences Institute. Based in Washington, D.C., this group is funded by large food and chemical companies, including Coke and Tate & Lyle, one of the world's largest suppliers of high-fructose corn syrup. Critics argue this is clearly 'an attempt by the industry to undermine sugar guidelines from the World Health Organization and other health groups that urge children and adults to consume fewer products with added sugar, such as soft drinks....'¹⁶²

Also in 2016, an article in the *American Journal of Preventative Medicine* showed that Coke and PepsiCo donated millions to health organization at the same time they were spending millions to defeat legislation that would limit soda consumption. For example, the nonprofit Save the Children supported soda taxes until 2010 when it accepted a \$5 million grant from Pepsi and was seeking a

¹⁶¹ Anahad O'Connor, *Research Group Financed by Coca-Cola Says It Will Disband*, N.Y. TIMES, Dec. 1, 2015, <https://well.blogs.nytimes.com/2015/12/01/research-group-funded-by-coca-cola-to-disband/>. For a more detailed discussion of Coke's relationship with Global Energy Balance Network, *see* Black, *supra* note 52, at 167.

¹⁶² Anahad O'Connor, *Study Tied to Food Industry Tries to Discredit Sugar Guidelines*, N.Y. TIMES, Dec. 20, 2016, at B1, B5.

grant from Coke. The Academy of Nutrition and Dietetics, which did not support New York's 2012 attempt to ban extra-large sodas, also accepted \$525,000 in donations from Coke that same year. The American Diabetes Association, the American Heart Association, and the National Institutes of Health have all received donations from Coke in recent years, ranging from \$140,000 to nearly \$2 million. At the same time, from 2011 to 2015, Coke spent over \$6 million a year on average lobbying against federal, state and local laws that would limit soda consumption.¹⁶³ In general, Coke's practice of funding research has resulted in doubts whether the recipient groups are really advancing unbiased medical research or are overly influenced by Coke's direction and financial support. Nevertheless, Coke continues utilizing this tactic, and there are many examples of Coke's funding of research and organizations, often resulting in unfavorable publicity when disclosed.¹⁶⁴ Other tactics used by Coke, the ABA, and the soft drink industry in general, comprise the usual lobbying methods of contacts with legislators, legislative staff, hiring consultants, testifying at hearings including regulatory hearings, filing comments with regulators on proposed regulations, and engaging in public education and public relations campaigns.¹⁶⁵

¹⁶³ Anahad O'Connor, *Soda Giants Back, Then Lobby Against, Public Health*, N.Y. TIMES, Oct. 11, 2016, at B2.

¹⁶⁴ For example, see Anahad O'Connor, *Coca-Cola Funds Scientists Who Shift Blame for Obesity Away from Bad Diets*, N.Y. TIMES Aug. 9 2015, <https://well.blogs.nytimes.com/2015/08/09/coca-cola-funds-scientists-who-shift-blame-for-obesity-away-from-bad-diets/?auth=login-email>; Anahad O'Connor, *Coke Discloses Millions in Grants for Health Research and Community Programs*, N.Y. TIMES, Sept. 22, 2015, <https://well.blogs.nytimes.com/2015/09/22/coke-discloses-millions-in-grants-for-health-research-and-community-programs/>.

¹⁶⁵ BAUMGARTNER, *supra* note 120, at 151-152 (describing lobbying generally).

Internal e-mails leaked from Coca-Cola reveal a “coordinated war” against soda taxes and show the company, and the ABA and other beverage companies, continue to resist soda taxes by funding grass-roots organizations to counter negative messaging, funding “research to give a hue of legitimacy to their anti-tax claims, pursuing social media influencers, lobbying at every level of government and targeting key journalists for persuasion.”¹⁶⁶ Coke and the beverage industry have actively and aggressively engaged in the tactics of lobbying, advertising and marketing, and litigation to counter soda taxes in the United States and around the world.

V. GOVERNMENT RATIONALE FOR USING SODA TAXES TO ADDRESS CONSUMPTION AND RELATED OBESITY

The use of taxes to encourage or discourage consumption choices is long-standing. Sin taxes have been used to discourage consumption of alcohol and tobacco and other items.¹⁶⁷ Pollutant taxes (including cap-and-trade versions) seek to discourage toxic emissions. Employer-provided wellness programs and pre-tax deductions for fitness activities and exercise equipment seek to encourage personal

¹⁶⁶ Lappe, *supra* note 2.

¹⁶⁷ Rachell Holmes Perkins, *Salience and Sin: Designing Taxes in the New Sin Era*, 2014 B.Y.U. L. REV. 143, 149-159 (2014); Franklin Liu, *Sin Taxes: Have Governments Gone Too Far in Their Efforts to Monetize Morality?*, 59 B.C. L. REV. 763, 767-768 (2018) (noting that the excise tax in 1791 on whiskey and other alcoholic spirits was one of the first sin taxes intended to generate revenue and “warn the public about the negative effects associated with consuming alcohol”).

health.¹⁶⁸

Soda taxes, and the New York City portion restriction attempt, do not restrict a person's consumption of sugary sodas, unlike some laws that do ban particular ingredients.¹⁶⁹ Similarly, taxes on alcohol and tobacco do not restrict a person's consumption of those items. The taxes instead seek to discourage some level of consumption because the higher price – raised by taxes – should make the product relatively less attractive compared to other things the consumer might spend his or her money on.¹⁷⁰ Why should government care about this behavior and take action to discourage it?

One axis of concern is individual welfare, which has the tension of, on one end, paternalism, and the other end, the right of self-determination. Paternalism involves “making someone do something

¹⁶⁸ Efrat, *supra* note 59, at 257-258. Liu, *supra* note 167, at 771 (“the main justifications advanced in support of sin taxes include their ability to raise revenue, advance private health outcomes by discouraging individual consumption of sinful goods and services, and promote public health by compensating society for the costs of sinful consumption”).

¹⁶⁹ E.g., trans fats in restaurants, which started with New York City, N. Y. City Health Code §81.08. This reduced the serum levels of trans fatty acids in people by up to 62%, with a resulting 23% decline in coronary risk. Melecia Wright, et al., *Impact of a Municipal Policy Restricting Trans Fatty Acid Use in New York City Restaurants on Serum Trans Fatty Acid Levels in Adults*, 109 AM. J. OF PUB. HEALTH 634, 635 (2019). The U.S. Food and Drug Administration banned trans fats in 2015 (effective 2018), <https://www.fda.gov/food/food-additives-petitions/final-determination-regarding-partially-hydrogenated-oils-removing-trans-fat>.

¹⁷⁰ Jonathan Cummings, *Obesity and Unhealth Consumption: The Public-Policy Case for Placing a Federal Sin Tax on Sugary Beverages*, 34 SEATTLE U. L. REV. 273, 293-294 (2010): “Rather than banning a product or activity outright, sin-tax policies merely provide economic and health-related incentives not to consume an unhealthy product; the final choice whether to consume or not still remains unabridged. Sin taxes do not impede the autonomous functioning of adults, but instead help coax and cajole those autonomous adults into healthier decision making.”

she does not want to do, or keeping her from doing something she does want to do, in order to increase her welfare”¹⁷¹ Paternalism “prevents harm to self, not harm to others. Actions that improve someone's welfare, without interfering with her liberty or autonomy, are also not paternalism”¹⁷² At the other end is the utilitarian side, that governmental efforts to promote individual welfare are unlikely to succeed, and anyway individuals have and ought to have the autonomy and self-determination to make decisions,¹⁷³ even to make bad decisions, especially when those decisions may reflect values, in this case whether health is more valued than pleasure.¹⁷⁴ The argument here is that the decision to drink soda should be an “area of individual self-determination where the government should have not part.”¹⁷⁵ The welfare/paternalistic response, however, is that “mindless eating” is addictive or similarly defective behavior that:

... is not an exercise of autonomy and does not necessarily reflect

¹⁷¹ Anne Barnhill, *Choice, Respect and Value: The Ethics of Healthy Eating Policy*, 5 WAKE FOREST J.L. & POL’Y 1, 9-10 (2015).

¹⁷² *Id.* at 10. Hard paternalism prevents someone from engaging in voluntary and informed action; soft paternalism prevents someone from engaging in involuntary and uninformed action. *Id.* at 18.

¹⁷³ *Id.* at 10-11. *Also see*, Brian Galle, *The Problem of Intra-Personal Cost*, 18 YALE J. HEALTH POL’Y, L. & ETHICS 1, 19 (2018).

¹⁷⁴ Barnhill, *supra* note 171 at 11. Although sometimes the value may be engaging in desired social activities with others even if it means eating bad food. Galle, *supra* note 173, at 28-29. There is a separate and deep economics literature of studies on identifying consumer preferences, particularly over time periods, that is beyond the scope of this paper.

¹⁷⁵ Andrew J. Haile, *Sin Taxes: When the State Becomes the Sinner*, 82 TEMP. L. REV. 1041, 1053 (2009).

individuals' informed choices, preferences, goals, or values, [and] policies preventing people from engaging in mindless eating do not violate individual autonomy, do not impose values upon people, and are likely to increase individual welfare because they will reduce the incidence of rationally defective behavior and make people healthier.¹⁷⁶

Because foods high in sugar, fat and salt stimulate the reward system of the brain to engage in certain behaviors, even if the person does not really want it, and because environmental cues encourage certain eating behaviors (thus large portions encourage more consumption),¹⁷⁷ the paternalistic response is that individuals are not acting of their own volition. These various triggers cause systematically irrational behaviors,¹⁷⁸ which is a problem for libertarian and economic theories that rely on the assumption of rational actors.¹⁷⁹ Thus, soft paternalism says, 'You can buy two 16-oz bottles or glasses of soda, if you want that, but a default to a 32-ounce serving size displaces deliberative choice.'"¹⁸⁰ As Anne Barhnhill and

¹⁷⁶ Barnhill, *supra* note 171, at 12-13.

¹⁷⁷ *Id.* at 13-14. *See also*, Galle, *supra* note 173, at 20: "By observing individual behavior over time, we can see whether people regret some of their own decisions, or take steps (commitments) to prevent themselves from making bad choices. In this way, we can still rely on revealed preferences. The concept of an 'internality' does not necessarily privilege long-run over short-run preferences; we can treat them equally by simply adding them up, in effect balancing the revealed value of long-term preferences, such as regret and commitment, against the revealed value of momentary, System preferences. But since long-run preferences last much longer, they often will greatly outweigh those that last only fleetingly."

¹⁷⁸ *Id.* at 15-16. Galle, *supra* note 173, at 29-32, which provides an excellent compilation of economic reasons why interventions for internalities are useful. The effects of poverty on decision-making is a topic beyond the scope of this article.

¹⁷⁹ Cummings, *supra* note 170, at 282-283.

¹⁸⁰ *See generally*, Barnhill, *supra* note 171, at 19-20.

others point out, perhaps the paternalism involved here is not protecting the individual consumer against him- or herself but from the manipulations by industry:

According to this line of thought, the food environment that encourages unhealthy eating was created largely as a result of intentional action by industry. Industry formulates unhealthy food products to be in some sense irresistible, intentionally misleads consumers about the nutritional value of foods, and engages in aggressive marketing that establishes unhealthy food as desirable and socially normative. If unhealthy eating is not conceptualized primarily as individuals harming themselves, but as industry intentionally harming consumers, then policies preventing unhealthy eating are in fact efforts to protect consumers from harm at the hands of others – not efforts to protect consumers from themselves. In this way of framing the issues, even those who think that government has no business in paternalistically protecting us from ourselves, and think that the coercive power of government should only be used to protect us from each other, might still support policies limiting food options.¹⁸¹

¹⁸¹ *Id.* at 24-25. See also, Pierre Chandon, *How Package Design and Packaged-Based Marketing Claims Lead to Overeating*, 35 APPLIED ECON. PERSP. & POL'Y 7, 11-12 (2013), noting that “Health halos driven by branding, marketing, health or nutrition claims do not simply change expectations but can act as a placebo and change post-intake evaluations and consumption....” and “Health halos influence the volume of food consumption and can lead to overeating, defined here as people eating more without being aware of it....” and “larger sizes are typically more profitable for food marketers, and they benefit from a higher perceived economic and environmental value – a win-win in all aspects aside from convenience and consumption control....” Also “...larger serving sizes significantly increase consumption,” at 14; See also Katherine Pratt, *A Constructive Critique of Public Health Arguments for Anti-obesity Soda Taxes and Food Taxes*, 87 TUL. L. REV. 73, 105

This argument leads to the second axis of concern, social welfare and public good, particularly where the costs of health care for the obese are borne by other people through medical insurance or through publicly-provided medical benefits.¹⁸² Medicare and Medicaid pay for half the obesity-caused health expenses in the United States.¹⁸³ These costs are economic externalities of the individual choices that others bear, for which taxes on those who cause such externalities are a way to recoup those costs, in what are called “Pigou taxes” after economist Arthur Cecil Pigou.¹⁸⁴ A Pigovian tax is “designed to help individuals account for, or internalize, the negative side effects their personal consumption habits impose upon other members of society. ... the consumer is forced to internalize that additional social cost when making their purchase decision, as the price now reflects the sum of both the private and social cost of their behavior.”¹⁸⁵ Proponents of sin taxes note that such taxes better allocate the costs from use of the harmful product because the cost is borne by the individual using the product rather than by the general population.¹⁸⁶ If the harm is borne by the sick, obese people

(2012): “In the context of fast-food restaurant meals, critical realists argue that manufactured situational pressures (for example, larger portions) cause restaurant patrons to consume more, without consumers even being aware of the manipulation.”

¹⁸² Chandon, *supra* note 181, at 25-26.

¹⁸³ Cummings, *supra* note 170, at 287-289.

¹⁸⁴ Cummings, *supra* note 170, at 286-287. See generally, Erin Adele Scharff, *Green Fees: The Challenge of Pricing Externalities under State Law*, 97 NEB. L. REV. 168 (2018). Other externalities include extra greenhouse gas emissions from generating the extra food eaten, resulting nitrogen-based fertilizer run-off into waterways, land degradation from sugar beet production, decreased worker productivity, and government crop subsidies for the crops that comprise junk foods. Roberta F. Mann, *Controlling the Environmental Costs of Obesity*, 47 ENVTL. L. 69, 703-707 (2017).

¹⁸⁵ Liu, *supra* note 167, at 772-772.

¹⁸⁶ Haile, *supra* note 175, at 1047.

themselves, the problem is not an externality but an internality, for which taxes may not be effective,¹⁸⁷ and which shifts the question back to the first axis of individual choices.¹⁸⁸

A third axis of concern is justice, particularly tax justice. Governments must raise revenues, and thus tax, and the decision of what to tax “is inevitably a form of regulation,” writes Shoked:

Any tax determines which actors will contribute to the government, how much, and when. That determination must affect individual economic and social behavior. It renders some activities more expensive, and thus diverts investments into other activities. This is doubly true with respect to excise taxes. These are taxes that single out specific goods or behaviors – and not other, similar ones – for special treatment. Choosing to tax certain products but not others – sweetened beverages but not unsweetened ones, plastic bags but not reusable ones – by definition involves a judgment call respecting products' relative worth and interferes with relevant market actors' future behavior. This judgment call and interference might well represent the original spur for the enactment of a given excise tax, ...

Especially when analyzing excise taxes, therefore, attempts to categorically separate government's function as a collector of revenue from its function as a regulator are – as far as sound economic thinking goes – futile. The enacting local officials often do not even attempt to

¹⁸⁷ Victor Fleischer, *Curb Your Enthusiasm for Pigovian Taxes*, 68 VAND. L. REV. 1673, 1704-1708 (2015); Perkins, *supra* note 167, at 176-181.

¹⁸⁸ Galle, *supra* note 173, at 11-14.

do so themselves.¹⁸⁹

Whether particular taxes are fair is also debatable.¹⁹⁰ A tax on sugary beverages addresses the externalities of obesity-related healthcare, and should “increases fairness by better allocating the previously unaccounted costs of overconsumption.”¹⁹¹ Taxes that have greater impact on lower-income people are considered regressive (as Coke has argued).¹⁹² Soda taxes consume a more proportionate share of a poor person’s income than a wealthier person’s.¹⁹³ Yet every income, sales, and consumption tax always affects the lowest income people more. Further, if the poorest people are least able to evaluate long-term health decisions, then arguably the need for public welfare incentives is greater. Every tax credit and tax subsidy are also intended to modify behavior, though such effectiveness is also questionable and beyond the scope of this paper.¹⁹⁴

¹⁸⁹ Nadav Shoked, *Cities Taxing New Sins: The Judicial Embrace of Local Excise Taxation*, 79 Ohio St. L.J. 801, 830 (2018). *But see*, Haile, *supra* note 175, at 1053-1054, arguing that states develop moral hazard and thus a conflict of interest by relying on sin taxes, to keep such sales going to generate revenue, as exemplified in the master tobacco litigation settlements. “Earmarking” or designating such revenues for the particular external cost to be recouped should solve the problem. Haile, *id.* at 1064-1065.

¹⁹⁰ For a good discussion along these lines, *see generally* Lindsay Wiley, *Health Law as Social Justice*, 24 CORNELL J.L. & PUB. POL’Y 47 (2014); Tyler LeFevre, *Justice in Taxation*, 41 V.T. L. REV. 763 (2017).

¹⁹¹ Cummings, *supra* note 170, at 293.

¹⁹² Galle, *supra* note 64, at 886-887; Liu, *supra* note 167, at 778-780.

¹⁹³ Haile, *supra* note 175, at 1050.

¹⁹⁴ Efrat, *supra* note 59, at 257 (discussing wellness programs); Fleischer, *supra* note 187, at 1709-1710.

VI. COKE ADAPTS ITS BUSINESS STRATEGY TO A CHANGING REGULATORY AND LEGAL ENVIRONMENT

The health and public policy rationales for sin taxes in general, and soda taxes in particular, focus on reducing consumer demand for a product. However, an additional rationale for such taxes may be the impact on the supply side of the equation, in that such taxes may promote changes by the manufacturer in the product deemed by government to be harmful. During the same time frame that Coke and the beverage industry have fought soda taxes and other legislative initiatives through lobbying, litigation, marketing and advertising, and research donations, Coke also has been changing its business objectives to be an all-inclusive beverage company. In its 2018 Annual Report on Form 10-K, Coke notes that customer preferences are changing in regards to health and wellness, obesity, artificial sweeteners, changing lifestyles and other factors.¹⁹⁵

Coke's Annual Report for 2018 notes that one of the five strategic priorities for the company now is "accelerating growth of a consumer-centric portfolio"¹⁹⁶ In 2017, Coke's new President and CEO, James Quincey, introduced a new direction for the company called "Beverages for Life." According to Quincey, "we're focusing on people's evolving tastes and preferences by giving them more of

¹⁹⁵ 2018 Form 10-K, *supra* note 10, at 10.

¹⁹⁶ *Id.* at 31.

the drinks the want. That's how we will become a larger part of the eight beverages a day people drink.”¹⁹⁷ Coke describes its new business philosophy as: “We believe our success depends on our ability to connect with consumers by providing them with a wide variety of beverage choices to meet their desires, needs and lifestyle choices.”¹⁹⁸ Coke’s Annual Report on Form 10-K for 2018 notes that consumer demographics are changing and consumer preferences are evolving, and:

As a consequence of these changes, many consumers want more choices, personalization, a focus on sustainability and recyclability, and transparency related to our products and packaging. We are committed to meeting their needs and to generating new growth through our portfolio of more than 500 brands and more than 4,300 beverage products (including more than 1,400 low- and no-calorie products), new product offerings, innovative and sustainable packaging, and ingredient education efforts. We are also committed to continuing to expand the variety of choices we provide to consumers and to providing options that reflect consumer concerns about impacts to our planet.¹⁹⁹

Coke now sells low and no-sugar brands and is increasing the

¹⁹⁷ The Coca-Cola Company, *Q&A with Our President and Chief Executive Officer, Beverages for Life*, 2018 Proxy Statement, at 4. Quincey used himself as an example of the “Beverages for Life” concept, stating, “I drink juice in the morning – Simply if I’m in the U.S., innocent if I’m back in the UK, or Del Valle if I’m visiting Mexico. I drink Smartwater throughout the day, and I have been drinking a Coke Zero Sugar daily for a long time.” *Id.* at 5.

¹⁹⁸ 2018 Form 10-K, *supra* note 10, at 30.

¹⁹⁹ *Id.* at 32-33.

use of alternate sweeteners.²⁰⁰ Coke has lowered the average number of calories in its drink products by 9% since 2000.²⁰¹ Coke reduced the amount of sugar in more than 200 of its soft drinks sold globally in 2016 and reduced sugar in an additional 500 in 2017 and another 100 in 2018. Coke currently offers more than 1,100 reduced or no-sugar drinks. In response to the recent initiatives in Chile, Coke created 32 new drinks to be sold in the country and 65% of Coke's portfolio in Chile is now low or no-sugar drinks.²⁰²

Also, Coke has experimented with other all-natural sweeteners, such as stevia, to replace the more controversial aspartame in Diet Coke. Coke notes in its annual Form 10-K filings that "Public debate and concern about perceived negative health consequences of certain ingredients in our beverage products, such as non-nutritive sweeteners and biotechnology-derived substances.... may affect consumers' preferences and cause them to shift away from some of our beverage products."²⁰³ Due to consumer concern about aspartame, Diet Coke was losing sales at 7% a year, almost double the decline rate of U.S.

²⁰⁰ Jay Moye, *Coke's Strategic Evolution Supports World Health Organization's Daily Added Sugar Recommendations*, May 16, 2017, https://www.coca-colacompany.com/stories/coke_s-strategic-evolution-supports-world-health-organizations-d; Jay Moye, *Coke's Way Forward: New Business Strategy to Focus on Choice, Convenience and the Consumer*, Feb. 23, 2017, <https://www.coca-colacompany.com/stories/cokes-way-forward-new-business-strategy-to-focus-on-choice-convenience-and-the-consumer>.

²⁰¹ *Food for Thought*, *supra* note 19, at 10.

²⁰² Jacobs, *In Sweeping War on Obesity, Chile Slays Tony the Tiger*, *supra* note 142.

²⁰³ 2018 Form 10-K, *supra* note 10, at 11.

cola sales in total.²⁰⁴ The new stevia-sweetened product, first launched in 2013, is sold in green bottles under the brand name Coca-Cola Life.²⁰⁵ It is sweetened with a blend of cane sugar and stevia leaf extract and has 35% fewer calories and less sugar than regular Coca-Cola.²⁰⁶

Coke is relaunching certain of its products to focus on non-sugar alternatives. In 2017, Coke relaunched the Coke Zero product and renamed it Coke Zero Sugar.²⁰⁷ Coke changed the blend of natural flavors in the Coke Zero Sugar product but continued to sweeten it with aspartame and acesulfame K. Coke believes the name now more clearly informs consumers that the drink has zero sugar because that fact is included in the name itself.²⁰⁸ In 2017, Coke successfully completed a global launch of Coke Zero Sugar in 20 markets.²⁰⁹ In

²⁰⁴ Ellis, *supra* note 13, at 27.

²⁰⁵ Suddath, *supra* note 42, at 43.

²⁰⁶ *What's the Difference between your Colas- Coca-Cola, Diet Coke, Coke Zero and Coca-Cola Life?*, <https://www.coca-colaproductfacts.com/en/faq/brand/four-cola-difference/>.

²⁰⁷ NESTLE, *supra* note 7, at 22. Coke previously introduced called Coke Zero in 2005. The drink was sweetened with aspartame and acesulfame K. Both the former and new product contain zero sugar, zero calories, zero carbohydrates, and zero caffeine. The original marketing focus was on zero everything. Now the focus is on zero sugar specifically. *Id.*

²⁰⁸ Journey Staff, *What's the Difference Between Coke Zero and Coca-Cola Zero Sugar?*, Aug. 4, 2017, https://www.coca-colacompany.com/stories/what_s-the-difference-between-coke-zero-and-coca-cola--zero-suga. See also, Journey Staff, *Our Way Forward: Inside the Bottle*, Feb. 23, 2017, <https://www.coca-colacompany.com/stories/inside-the-bottle>; Eric Bellman & Jennifer Maloney, *Coca-Cola Launched 500 Drinks Last Year. Most Taste Nothing Like Coke*, WALL ST. J., Aug. 23, 2018, <https://www.wsj.com/articles/coca-cola-launched-500-drinks-last-year-most-taste-nothing-like-coke-1535025601>; Cara Lombardo, *Coca-Cola Earnings Boosted by New Diet Flavors*, WALL ST. J., Apr. 24, 2018, <https://www.wsj.com/articles/coca-cola-earnings-boosted-by-new-diet-flavors-1524576907>.

²⁰⁹ The Coca-Cola Company, *Q&A with Our President and Chief Executive Officer*, *supra* note 197, at 9.

2018, Coke also did a complete relaunch of the Diet Coke brand in North America, in part to counter declining sales in 2016 and 2017. The new slim cans have a sleeker packaging and come in four new flavors designed to appeal to a younger audience: Ginger Lime, Feisty Cherry, Zesty Blood Orange, and Twisted Mango.²¹⁰

Coke has also tried moving consumers away from supersize portions and back to smaller sizes. In 2009, it began offering a 7.5-ounce mini-can with fewer than 100 calories in 140 countries. Approximately 40% of all Coke's sparkling brands are now available in 8.5-ounce (250-milliliter) cans.²¹¹ These smaller sizes are reminiscent of Coke's early offerings in the original 6.5-ounce bottles.²¹² The 7.5 and 8 ounce mini-cans are experiencing an increase in sales at the same time that sales of the standard 12-ounce cans are flat, even though the cost per fluid ounce is 3 times more for the mini-can than the 12-ounce size – 9.5 cents per fluid ounce for the 8-ounce mini-can versus only 3.1 cents per fluid ounce for the 12-ounce can.²¹³ The smaller sizes achieved 15% sales growth (while the traditional 12-ounce cans and 2-liter bottles fell 2%) and are more profitable because

²¹⁰ Jay Moye, *Diet Coke Launches into 2018 with Full Brand Restage in North American*, Jan. 10, 2018, <https://www.coca-colacompany.com/stories/diet-coke-relaunch>.

²¹¹ The Coca-Cola Company, *2016 Sustainability Report: Our Way Forward*, (Aug. 18, 2017), <https://www.coca-colacompany.com/stories/2016-our-way-forward>.

²¹² Brooke Metz, *For Coca-Cola North America, Small Packs Bring Big Business*, July 22, 2015, <https://www.coca-colacompany.com/stories/less-is-more-for-coca-cola-small-packs-mean-big-business>.

²¹³ Brad Tuttle, *Why Soda Drinkers Are Happily Paying More to Get Less*, MONEY, Jan. 27, 2016, <http://time.com/money/4196272/coke-mini-can-value/>.

of the higher per ounce price.²¹⁴

Coke has also diversified its beverages beyond sodas. Coke started its Venturing and Emerging Brands division in 2007, and has since bought or launched several brands, including Zico and Core Power (sports drinks), Honest Tea and Gold Peak (iced teas), Glaceau and Fruitwater (waters), and Odwalla, Simply and Fuze (juices). Coke purchased a 16.7% ownership stake in Monster for approximately \$2.15 billion, and the two companies entered into a strategic partnership wherein Monster's Peace Tea and other non-energy drink brands were transferred to Coke, and Coke became Monster's preferred distribution channel.²¹⁵ Coke has also launched a cold brew coffee machine with Keurig, and in 2009 it introduced its Freestyle soda fountain machine that offers over 100 different drink choices that consumers can mix themselves. Both the Freestyle and Keurig machines transmit consumer choice data to Coke, and the data is analyzed and factored into marketing and product decisions.²¹⁶ Interestingly, despite significant efforts to diversify in container size and product offerings, the same classic Coke drink sold 100 years ago remains the company's number-one selling product.²¹⁷

Coke says it wants "to be a more helpful and credible partner in the fight against obesity. Across the Coca-Cola system, we are

²¹⁴ Hadley Malcolm, *5 Ways Coke is Battling Fizziling Soda Sales*, USA TODAY, Apr. 19, 2016, <https://www.usatoday.com/story/money/2016/04/19/five-ways-coke-is-combatting-fizziling-soda-sales/83076286/>.

²¹⁵ Nathan Buehler, *5 Companies Owned by Coca-Cola*, INVESTOPEDIA, Oct. 12, 2018, <https://www.investopedia.com/articles/markets/011216/top-5-companies-owned-coca-cola-ko.asp>.

²¹⁶ Suddath, *supra* note 42, at 43.

²¹⁷ *Id.*

mobilizing our assets in marketing and in community outreach to increase awareness and spur action.”²¹⁸

To further its marketing and community outreach, in 2014, Coke partnered with the Alliance for a Healthier Generation, the Clinton Foundation, and other major beverages companies, including Pepsi, to launch the Clinton Global Initiative to help fight obesity by committing to reduce beverage calories consumed per person by 20% by 2025. Coke and the other beverage companies agreed to use their significant marketing and distribution strength to increase consumer interest in beverage options such as smaller portions, water, and low-calorie options, and to provide more calorie information and promote greater calorie awareness on the more than 3 million vending machines nationwide, as well as at fountain dispensers and in convenience stores, restaurants and other facilities where their products are sold. Coke and the other beverage companies agreed to concentrate their efforts in those lower-income communities where food and beverage choices have been limited historically and consumption is still high.

Critics have complained that the initiative is moving slowly, noting there has only been a 3 percent reduction in consumption since the initiative began.²¹⁹ Other critics have noted that Coke’s pledge is

²¹⁸ 2017 Form 10-K, *supra* note 20, at 31.

²¹⁹ Alliance for a Healthier Generation, Alliance for a Healthier Generation and America’s Beverage Companies Announce Landmark CGI Commitment to Reduce Beverage Calories Consumed Across the Nation, (Sept. 23, 2014), <https://www.healthiergeneration.org/articles/alliance-for-a-healthier-generation-and->

merely reflective of what is already happening in the market place: “All the trends are showing decreased consumption of high-calorie beverages, and so what better way to get a public relations boost than to promise to do what is happening anyway?”²²⁰

In 2017, Coke, Pepsi, Dr. Pepper and the ABA launched a website at www.BalanceUS.org, stating the three companies “have come together to support your family’s efforts to balance what you eat, drink and do. We know an important part of finding that balance is reducing the sugar from beverages in your family’s diet.”²²¹ The coalition reiterated its voluntarily goal to reduce beverage calories consumed in the US by 20% by 2025, which it now calls the Balance Calories Initiative. The initiative is first focusing on Los Angeles, Little Rock, New York City, Montgomery (Alabama), and the Mississippi Delta because these communities have obesity rates higher than the national average.²²² In addition, the website contains exhaustive information on the sugar content of Coke products; information on health concerns related to sugar, high fructose corn syrup and artificial sweeteners; and dietary guidelines for sugar consumption, all with a focus on balance and moderation. Coke points out it is reducing sugar in more than 500 of its drinks worldwide, that 19 of its top 21 global brands have a reduced- or no-sugar alternative, than in the U.S., 250 of the 800 plus beverages offered are reduced or

americas-beverage-companies-announce-landmark-cgi; Jacobs, Two Top Medical Groups Call for Soda Taxes and Advertising Curbs on Sugary Drinks, *supra* note 47.

²²⁰ Gertner, *supra* note 10, at 166.

²²¹ American Beverage Association, *Find a Balance that Works for You*, <https://www.balanceus.org/>.

²²² American Beverage Association, *Cutting Sugar in the American Diet*, <https://www.balanceus.org/industry-efforts/cutting-sugar-american-diet/>.

no-sugar, and that since 2014, Coke has launched almost 500 new reduced- or no-sugar drinks worldwide. Coke even directs those who want no sugar to its teas, water and juice drinks.²²³ Coke also implemented a policy not to market on television, websites, social media and other channels that directly target children less than 12 years of age.²²⁴ Thus, as the regulatory environment and public awareness of the obesity epidemic have changed, Coke has adapted not only by challenging the new changes through lobbying and litigation, but also by evolving the very nature of its business into a complete beverage company, as opposed to a soda company. Changes in regulations and public perception have resulted in the transformation of Coke into a more diverse organization.

VII. CONCLUSION

Consumption taxes such as sin taxes are mostly enacted to reduce consumption, usually for public health reasons, and also to raise revenue. There is evidence that such taxes have had some impact on soda consumption, although more research is needed over longer periods of time to determine this conclusively. The corporate response has been, predictably, opposition on multiple fronts, with litigation, lobbying, sponsored research to achieve specific scientific outcomes, and public relations campaigns. The corporate response has also been

²²³ Product Facts: The Coca-Cola Company, *Does Sugar Make You Fat*, <https://www.coca-colaproductfacts.com/en/faq/sugar/does-sugar-make-you-fat/>

²²⁴ The Coca-Cola Company, *2016 Sustainability Report: Our Way Forward*, *supra* note 211.

to change corporate products, which is to say, the supply side of the equation. Here, the imposition and activism of sugar taxes has induced Coke (as much as the sugar taxes have induced consumers) to alter its behavior, by expanding its products lines with reduced portions and reduced or zero sugar products.

Whether or not soda taxes are effective at reducing demand for public health reasons, or merely generate a new source of revenue, a review of Coke's responses to sugar taxes shows that the supplier has changed its behavior. Coke's business strategy was to sell a lot of sugary soda. Coke's business strategy now is to sell a variety of beverages, including many healthier options.