

ARTICLES

Dead People Don't Eat: Food Governmentenomics and Conflicts-of-Interest in the USDA and FDA

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ABSTRACT

Conflicts of interest permeate the governance of the federal advisory committees that issue recommendations to consumer protection agencies, such as the Food and Drug Administration (FDA) and the United States Department of Agriculture (USDA), and therefore, American consumers need a federal solution to protect their health from biased recommendations. In order to promote a business-friendly food pyramid, agribusinesses and food industrialists lobby for dietary guidelines that boost their sales. The resulting guidelines cause great damage to public health, spur environmental pollution, and result in a loss of democratic freedoms. As a result, the FDA and USDA's bifurcated task of protecting both food producers and consumers, creates a conflict of interest within the agencies that often favor the food industry over consumer protection.

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This paper describes the problems embedded within the FDA and USDA's conflict of interest and the resulting revolving door of the heavily invested lobbyists, and finally, suggests statutory amendments to solve this problem. The proposed amendments will dispense with ineffective disclosure requirements and eliminate the possibility of waiving conflicts of interest for advisory committee members. By rebalancing the composition of the advisory committees and the scientific basis for the dietary recommendations, the proposed amendments will close the loopholes that large food industrialists currently abuse. As a result, consumer protection agencies, such as the FDA and USDA, are empowered to police the federal advisory committees issuing the dietary recommendations and prevent government officials from breaching their fiduciary duties to American consumers.

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INTRODUCTION

WHAT IS A CONFLICT?

Conflicts of interest permeate the governance of the federal advisory committees that issue recommendations to consumer protection agencies, and, therefore, American consumers need a federal solution to protect their health from biased recommendations. The foremost public duty of federal consumer protection agencies is to protect consumers.¹ Therefore, in the case of the Food and Drug Administration (FDA) and the United States Department of Agriculture (USDA), protecting public health should be a priority.

Agribusinesses, fast food producers, and snack food industrialists, "Big Food," should follow the principle "Primum Non Nocere (First, Do No Harm)"² because they "are ethically obligated to do no harm to their consumers, and are expected to manufacture high quality products that adhere to certain health and safety standards."³ Instead, the FDA and USDA should

¹ The Congressional Statement of Purpose under Title 7 of the United States Code provides:

[T]he purposes of this chapter [on Agriculture] are to . . .

(6) establish mechanisms for addressing the nutrition monitoring *needs of* Federal, State, and local governments, *the private sector, scientific and engineering communities*, health care professionals, and the public in support of the foregoing purposes; and

(7) provide *for the conduct of such scientific research and development as may be necessary or appropriate in support of such purposes.*

7 U.S.C. § 5301 (2012) (emphasis added).

² Haitham M. Ahmed, *Obesity, Fast Food Manufacture, and Regulation: Revisiting Opportunities for Reform*, 64 FOOD & DRUG L.J. 565, 567 (2009).

³ *Id.*

control the consumption of the amount and quality of fast food and snack foods in order to protect consumer health.⁴ However, this paper shows that the FDA and USDA fail to protect consumers from the diseases associated with excessive snack and fast food consumption. Instead, Big Food's "food governmentenomics"⁵ strategies seize control over government protection agencies without regard for public health consequences. Agribusinesses and food industrialists lobby for dietary guidelines to boost sales rather than protect consumers. The resulting guidelines cause great damage to public health, environmental pollution, and loss of democratic freedoms. As a result, the FDA and USDA's bifurcated tasks create a conflict of interest within the agencies that often favor the food industry over consumer protection.

In fact, the FDA and USDA try to balance seemingly irreconcilable responsibilities: promoting agribusinesses and food production while protecting consumers from abuse by the same. Because the food industry's profit margins are achieved by the promotion of unhealthy and dangerous snack and fast foods, the health of millions of Americans is compromised by "smart" business decisions. Thus, there is "undue influence of food companies not only on the health of the public but also on democratic

⁴ See Jeff Herman, *Saving U.S. Dietary Advice from Conflicts of Interest*, 65 FOOD & DRUG L.J. 285, 294 (2010). The author explains that the main functions of the USDA are to "1) ensure a safe food supply; 2) promote the agricultural industry; and 3) give dietary advice." *Id.* He adds that "[e]arly on, the second and third seemed consistent with each other: millions of Americans died each year from malnutrition, and it was believed that increasing consumption of agricultural products was the appropriate solution." *Id.* However, this no longer holds true. *Id.*

⁵ See *infra* Part I.C. Food Governmentenomics is a concept that describes the economic and public health effects resulting from agribusiness and food lobby influences on government agencies, such as the FDA and USDA, and federal advisory committees to change their priorities of interest from private industry to consumer protection.

political processes and institutions."⁶ This "undue influence" is commonly called a "conflict of interest," and is defined as "[a] real or seeming incompatibility between one's private interests and one's public or fiduciary duties."⁷ Therefore, the FDA and USDA's public duties to protect consumers and public health clashes with their fiduciary duties to promote American agriculture and, implicitly, Big Food's business.⁸ Such distortions in consumer protection are possible because loopholes permeate the laws governing the dietary guidelines. The statutory amendments to 7 U.S.C. § 5341, 18 U.S.C. § 208 and the Federal Advisory Committee Act suggested in this article may close these loopholes if enacted, and the dietary guidelines may be rebalanced to protect consumers and to promote public health.

In order to close those loopholes, I first propose that the legislature revise the composition of federal advisory committees that issue dietary recommendations to the FDA and USDA for the dietary guidelines. Second, I suggest how Congress may rebalance the scientific research basis for these guidelines through statutory requirements, in order to prevent Big Food from unduly influencing the interpretation and use of scientific data. Third, I explain why the mere disclosure of potential conflicts of interest for advisory committee member nominees is not enough to ensure that they do not issue guidelines that benefit the private industry at the cost of public health. Specifically, instead of only requiring disclosure of industry ties, I propose

⁶ See MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 91–115 (revised and expanded ed. 2007). See also WILLIAM HARRIS, *THE SCIENTIFIC BASIS OF VEGETARIANISM* (1995).

⁷ BLACK'S LAW DICTIONARY 319 (8th ed. 2004).

⁸ Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?*, 87 *THE MILBANK Q.* 259, 276 (2009) ("While working to promote healthy eating, the USDA at the same time has as its main objective the promotion of American agriculture (selling more food), so one goal typically prevails over the other when the two conflict.").

that the legislature should preclude committee members and nominees from waiving conflicts of interest. Therefore, my amendment establishes that all nominees and committee members have to rebut the presumption that they have a conflict of interest result from industry ties.

Statutory amendments could solve some of the problems embedded within the FDA and USDA's conflict of interest and are outlined hereinafter. Part I functions as a description and analysis of the problems associated with the FDA and USDA's conflict of interest practices. It discusses the negative effects of the food and beverage industry lobby on the consumer protection agencies, and outlines Big Food's strategy to lobby for favorable policies and dietary guidelines. A part of this discussion will focus on how the conflict of interest affects the FDA and USDA advisory committees. Part II will show how the dietary guidelines for Americans implement the conflicts of interest,⁹ and what the detrimental consequences of these recommendations are for public health, the environment, and democracy as a whole. Part III will provide suggestions for legislative action to stop Big Food from abusing the conflict-of-interest loopholes and show how similar approaches have yielded promising results in other countries.

I. THE PROBLEM: THE FDA AND USDA CONFLICT OF INTEREST

A. CONFLICTS OF INTEREST IN THE FOOD INDUSTRY

1. THE FOOD AND BEVERAGE LOBBY

The food and beverage lobby invests large amounts of money into shaping laws that are favorable to their businesses. Professor Marion Nestle,¹⁰

⁹ See 5 U.S.C. §§ 1–16 (2012), for recommendations on which the USDA and FDA base dietary guidelines. See 7 U.S.C. § 5341 (2012), for the dietary guidelines the USDA issues for American every five years.

¹⁰ Marion Nestle is Paulette Goddard Professor in the Department of Nutrition, Food Studies, and Public Health and Professor of Sociology at

one of the foremost analysts of food politics, explains that food companies "lobby Congress for favorable laws, government agencies for favorable regulations, and the White House for favorable trade agreements."¹¹ Lobbying, according to Nestle, "is a huge industry unto itself."¹² The Center for Responsive Politics reported that the total investment by the food and beverage industry in 2009 alone amounted to \$57,616,216.¹³ This enormous influx of what can be seen as legal bribery came from 71 reported companies and was disseminated by 348 reported lobbyists.¹⁴ In 2010, the numbers were greatly reduced, and in 2011 the numbers were only half of those reported in 2009.¹⁵ However, this decrease in financial contributions from the lobbyists,

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¹¹ NESTLE, *supra* note 6, at 93.

¹² *Id.* at 97.

¹³ *Lobbying: Food & Beverage Industry Profile, 2009*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/indusclient.php?id=n01&year=2010>; *Lobbying: Food & Beverage Industry Profile, 2011*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/indusclient.php?id=n01&year=2011>.

¹⁴ *Id.*

¹⁵ *Lobbying: Food & Beverage Industry Profile, 2010*, CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/lobby/indusclient_lob.php?id=n01&year=2010; *Lobbying Spending Database Food & Beverage*,

only reflects the *reported* contributions, indicating that there could be more funds contributed through additional means, although the numbers are already rather high.¹⁶ For example, in the 2011 fiscal year, Coca-Cola invested \$5,890,000, Pepsi-Co, Inc. \$3,260,000, the National Restaurant Association \$2,549,500, Mars Inc. \$2,250,000, and McDonald's Corporation \$1,555,000.¹⁷ These numbers show that the food lobby consists mainly of promoters of unhealthy snack and fast foods with immense power in the policy and law-making process in the United States.

Food producers stack the deck in order to push dietary recommendations that benefit their companies by marketing snack foods and fast foods as healthful. Although government officials may not directly accept funds from the industry,¹⁸ Big Food has nonetheless found loopholes to manipulate the law in its favor¹⁹ by "lobbying with massive resources to stifle government action."²⁰ Big Food buys the science to support the false health claims regarding mainstream snack and fast foods, thereby assuring that the dietary

2011, THE CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/lobby/indusclient_lobs.php?id=n01&year=2011.

¹⁶ *See id.*

¹⁷ *Lobbying Spending Database-Coca-Cola Co, 2011*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/firmsum.php?id=D000000212&year=2011>; *Lobbying Spending Database-McDonald's Corp, 2011*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/firmsum.php?id=D000000373&year=2011>; *Lobbying Spending Database-National Restaurant Assn, 2011*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/firmsum.php?id=D000000150&year=2011>; *Lobbying Spending Database-PepsiCo Inc., 2011*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/firmsum.php?id=D000000200&year=2011>.

¹⁸ *See* 18 U.S.C. § 208 (2006).

¹⁹ T. COLIN CAMPBELL & THOMAS M. CAMPBELL II, *THE CHINA STUDY* 311 (2006).

²⁰ Brownell & Warner, *supra* note 8, at 259.

guidelines are favorable to the foods Big Food promotes. Dr. Colin Campbell, professor of nutritional biochemistry at Cornell University and co-author of *The China Study*,²¹ explains:

[A]cademic scientists can receive personal compensation from industry while simultaneously undertaking government-sponsored activities of considerable public importance. Ironically, they can even help set the agenda for the same government authorities who have long been restricted from such corporate associations. It is a huge "conflict-of-interest" loophole allowing industries to exercise their influence through the side door of academia. In effect, the entire system is essentially under the control of industry. The government and academic communities, playing their respective roles, mostly do as they are expected. . . .²²

The conflict-of-interest loophole that Dr. Campbell describes must be closed in order to transform the FDA and USDA into true consumer protection agencies instead of Big Food's public relation agencies. Both the FDA and the USDA play their roles in favoring the industry by issuing dietary guidelines that encourage the consumption of products that the food lobby vigorously promotes and, in addition, supports the unhealthy dietary recommendations through industry-funded research.²³

²¹ *The China Study* describes the findings of the China-Cornell-Oxford Project, which was a long-term study conducted by the Chinese Academy of Preventive Medicine, Cornell University, and the University of Oxford, UK. CAMPBELL & CAMPBELL, *supra* note 19, at 7, 22. The *New York Times* described this study as "the Grand Prix of epidemiology." Jane E. Brody, *Huge Study of Diet Indicts Fat and Meat*, N.Y. TIMES, May 8, 1990, <http://www.nytimes.com/1990/05/08/science/huge-study-of-diet-indicts-fat-and-meat.html>.

²² CAMPBELL & CAMPBELL, *supra* note 19, at 311.

²³ See NESTLE, *supra* note 6, at 93.

2. GOVERNMENT-INDUSTRY PARTNERSHIPS

Government-industry partnerships are strong and ubiquitous²⁴ and assist Big Food in boosting its sales by including its products in the dietary guidelines. When the FDA, USDA, or the United States Department of Health and Human Services (DHHS) partner with industry representatives in so-called government-industry partnerships, the federal agencies are bound to give Big Food a say in their policies even though the agencies should act independently. The end-result of Big Food's influence in the process of drafting and issuing guidelines are recommendations that are harmful to public health because they are designed to boost Big Food's profits instead of protecting consumer health. The shift away from consumer protection in the recommendations' focus is possible due to the conflict-of-interest loophole.

Michele Simon, a public health lawyer, author, and law professor specializing in public health policy, blames the "[t]he cozy connection between the Federal Government and industry [which] is further cemented in so-called public-private partnerships aimed at allowing the two sectors to 'work together. . . .'"²⁵ The President's Council on Physical Fitness and Sport, for example, is supposed to advise the DHHS Secretary on healthy lifestyle choices,²⁶ but is deeply conflicted by its industry partnerships. Simon points

²⁴ See generally MICHELE SIMON, *APPETITE FOR PROFIT: HOW THE FOOD INDUSTRY UNDERMINES OUR HEALTH AND HOW TO FIGHT BACK* (2006).

²⁵ *Id.* at 158.

²⁶ The President's Council on Fitness, Sports & Nutrition website sets forth the organization's mission as follows:

The President's Council . . . [is] to serve in an advisory capacity through the Secretary of Health and Human Services. . . . Through partnerships with the public, private, and non-profit sectors, the Council promotes

out that "the council's focus on this single issue while partnering with major food companies detracts from nutrition policy and other thorny political questions that could spell trouble for industry."²⁷ Simon aptly points out the absurdity of the government-industry partnerships by asking, "what is a fitness council doing partnering with General Mills, makers of such empty-calorie products such as Lucky Charms cereal, Pillsbury cookies, and Häagen Dazs ice cream?"²⁸ Such partnerships are merely another way for the food industry to manipulate the government into favorable actions to boost Big Food's sales.

Proof that the FDA favors the industry appears in many places. One example is a 1993 defensive article for *The Food & Drug Law Journal* by Sharon Smith Holston, former Associate Commissioner for Management and Deputy Commissioner for International and Constituent Relations within the FDA. Holston wrote the article during the peak time of revolving-door policy, (see part D below), at the FDA and USDA, and explained how important close collaboration with the industry is for these agencies while explicitly admitting to the conflict of interest.²⁹ She writes:

programs and initiatives that motivate people of all ages,
backgrounds, and abilities to lead active, healthy lives.

About PCFSN, PRESIDENT'S COUNCIL ON FITNESS, SPORTS & NUTRITION,
<http://www.fitness.gov/about-pcfsn/index.html> (last visited Oct. 10, 2012).

²⁷ SIMON, *supra* note 24, at 159.

²⁸ *Id.*

²⁹ Sharon Smith Holston explains the FDA-industry partnership:

[A]t the Food and Drug Administration (FDA), we recognize how integral it is to have good working relationships and productive interactions with industry to accomplish our mission. Simply put, we at the FDA would like to think that we are partners with industry

It is important that [the FDA] continue to work to improve the partnership that now exists between the FDA and regulated industry. It would be good to be able to report next year on the progress that has been made and the resources that have been re-channeled toward the FDA's mission-oriented consumer protection activities as a result of our improved partnership. This will be possible only if the FDA and regulated industry work "hand-in-glove." The FDA welcomes interest in the agency and looks forward to continuing to work together with industry.³⁰

Although her conception of a food industry that acts in the consumer's best interest and collaborates toward this goal with the FDA is ideal, it is unrealistic. Holston advocates for industry-government interactions, which leads to the conclusion that she is in favor of the industry's investment in government-controlled research and is concerned with the profitability of the companies sponsoring the research of the FDA.³¹ It is clear that this admission reveals the intent to inextricably intertwine the FDA and the industry;³² a revelation that could come as a shock to many consumers, as Holston seemingly welcomes the industry without much concern for the associated conflicts-of-interest.

working toward a common goal—providing consumers with safe, high-quality products.

Sharon Smith Holston, *Contact with the FDA-Ground Rules for Industry and Constraints for Agency Personnel When Interacting with Industry*, 48 FOOD & DRUG L.J. 35, 35 (1993).

³⁰ *Id.* at 39–40.

³¹ *See id.* at 35 (clarifying how "government employees and the private sector can, and should, interact.").

³² *See generally* MICHAEL POLLAN, IN DEFENSE OF FOOD: AN EATER'S MANIFESTO (2008) (describing influences on the American diet and how that diet must change).

Government-industry partnerships give the industry too much power over the government. The 20 years following her statement prove that the food politics worsened and that Big Food has gained even more power over the consumer protection agencies. As a result of these partnerships, Big Food erased much of the FDA's impartiality toward the industry.

Thirteen years after Holston's statement, Richard M. Cooper, an accomplished FDA lawyer who defends the food and tobacco industries,³³ made a similar admission to the conflict-of-interest in an apologetic article. He explains that when government agents' "views of science, ethics, or economics are contrary to any of these legal authorities, the official is required to follow the authorities, not his or her personal views."³⁴ Despite these virtuous obligations, he explains that, in reality, "the legal authorities require or encourage FDA personnel to apply science, ethics, and/or economics as *they* understand them,"³⁵ which is more often than not the way Big Food and Big Tobacco manipulate the other agencies' understanding of the science and ethics (emphasis added). Cooper also remarks that "[u]pholding the Constitution and laws comes second"³⁶ after the ethical obligations of FDA and other government officials. Taking into consideration Holston's rendition of the FDA's duties to the industry, Part III will explain the problem with Cooper's statement is that the ethical standards are by no means controllable or enforceable; they work to the detriment of the consumers when the interests of the industry and consumers collide. This imbalance causes the economic stimulus from the industry to prevail over

³³ Richard M. Cooper, WILLIAMS & CONNOLLY LLP, <http://www.wc.com/rcooper> (last visited Oct. 10, 2012).

³⁴ Richard M. Cooper, *Science, Ethics and Economics in FDA Decision-Making: The Legal Framework*, 61 FOOD & DRUG L.J. 799, 799 (2006).

³⁵ *Id.*

³⁶ *Id.* at 800.

consumer protection principles.³⁷ Cooper also justifies the implied exclusion of consumer interests by citing case law about the intentional inclusion of certain legal principles and exclusion of others as an accepted governmental practice.³⁸ Thus, unless the law specifically outlaws any conflict-of-interest between consumer protection agencies and the food or drug industry, even the brightest minds working for the FDA, and by analogy the USDA, will fail to become immune to the dangerous industry's bias (see parts B and C below).

3. BIG FOOD'S PLAYBOOK

The large American agribusinesses and food industrialists seem to have a playbook of strategies to gain a competitive advantage in the market by

³⁷ Cooper and Holston show no remorse in favoring the industry. For example, Cooper explains that

[t]he law, as understood by FDA, also sometimes requires the agency to apply economics. In setting tolerances for contaminants in food under section 406 of the FDCA, FDA applies a risk-benefit standard that incorporates an economic assessment of the cost of food foregone. Moreover, under the Regulatory Flexibility Act of 1980, the Unfunded Mandates Reform Act of 1995, the Congressional Review Act, and Executive Order 12866, FDA is required to conduct economic analyses of a number of the agency's regulatory initiatives.

Id. at 800–01 (footnotes omitted).

³⁸ "The very fact that the legal authorities that govern FDA expressly require consideration of science, ethics, and economics in some circumstances supports an arguable inference that those legal authorities also, by plain implication, exclude consideration of such factors in other circumstances." Cooper, *supra* note 34, at 801 (footnote omitted).

stifling any dietary recommendations that could diminish their sales. In an article comparing Big Food to Big Tobacco, Kelly D. Brownell and Kenneth E. Warner, explain that Big Food and its agents are "pressur[ing] administration officials into accepting weak and ineffective nutrition policies"³⁹ and "creat[ing] confusion and doubt about sound science on food and health"⁴⁰ in an organized manner. This strategic manipulation seems to follow a playbook similar to that of Big Tobacco two decades ago.⁴¹ Moreover, Big Food has the potential to do more damage than Big Tobacco did because of its diverse "industry players."⁴² As exhibited by the earlier description of the food and beverage lobby, Big Food's parent companies, such as Pepsi-Co, McDonald's and Yum! Brands, organize themselves politically through "lobbyists, lawyers, and trade organizations that in turn represent a type of food"⁴³ which is usually a snack or fast food high in fat and sugar. Examples of such organizations are the Snack Food Association, which mainly consists of junk food producers,⁴⁴ or the American Beverage Association, mainly consisting of soft and sports drink sellers members.⁴⁵

³⁹ Brownell & Warner, *supra* note 8, at 262–63 (internal citations omitted).

⁴⁰ SIMON, *supra* note 24, at 172.

⁴¹ *Id.*

⁴² See Brownell & Warner, *supra* note 8, at 263 ("[F]ood involves an immense array of products made by thousands of companies worldwide. The industry is diverse and fragmented . . . counting as its players . . . an organic farmer; mega companies like Kraft, McDonalds, and Coca-Cola; and even Girl Scouts selling cookies. The same company making fried foods laden with saturated fat might also sell whole-grain cereal.").

⁴³ *Id.*

⁴⁴ *Snack Food Association Member Directory*, SNACK FOOD ASSOCIATION, <http://www.sfa.org/memberdirectory.php> (last visited Oct. 17, 2012). Note that the conflict of interest has developed into a political co-dependency between the government and the food industry. Politicians even ask for Big Food's support in their campaigns and indebted themselves to the

Other ways in which lobbyists are organized are thorough representation from within the food industry. This representation is powerful enough to stifle the ultimate and overarching healthy food recommendation, namely to eat less, because "[a] shrinking market . . . would mean less money—a lot less"⁴⁶ for all the aforementioned industry groups. Another way to organize lobbyists is through the industry branch, such as the National Restaurant Association.⁴⁷ An additional way is via a constituent group of the food industry, such as the National Sugar Association.⁴⁸ Finally, a fourth way to organize is through the collaboration of the entire industry, such as the Grocer Manufacturers Association, which combines the effort of all major grocery chains in the country.⁴⁹

large monetary contributions. *See Gov. Huckabee at SNAXPO 2012: About Snacks and Politics*, SNACK FOOD ASSOCIATION, <http://www.sfa.org/news.php?id=69> (last visited Oct. 17, 2012).

⁴⁵ Brownell & Warner, *supra* note 8, at 263; *see generally* AMERICAN BEVERAGE ASSOCIATION, <http://www.ameribev.org/members/active-members/>.

⁴⁶ Brownell & Warner, *supra* note 8, at 263.

⁴⁷ *See generally* NATIONAL RESTAURANT ASSOCIATION, <http://www.restaurant.org/index.cfm> (last visited Oct. 17, 2012). Further proof that these associations and partnerships merely marks the promotion of unhealthy food choices is the "Healthy Dining Finder" program, sponsored by the National Restaurant Association's and linked to its homepage, featuring a 350-calorie McDonald's chicken burger and pizza. *See* HEALTHY DINING FINDER, <http://www.healthydiningfinder.com/restaurant-partners/get-featured> (last visited Oct. 17, 2012). The Healthy Dining Finder also provides resources and links to nutritionists who were likely schooled to promote Big Food's spin of a healthy diet to boost sales among diet-conscious consumers. *Id.*

⁴⁸ Brownell & Warner, *supra* note 8, at 263.

⁴⁹ *Id.* For members of the Grocery Manufacturers Association (GMA), *see generally* *Our Members*, GMA, <http://www.gmaonline.org/forms/MemberDirectory/viewMemberDirectoryAll> (last visited Oct. 10, 2012).

Brownell and Warner described the food industry's playbook as "suggest[ing] maneuvers to thwart changes that would benefit public health—strategies that may ultimately be self-defeating."⁵⁰ The first strategy consists of "[l]aying claim to concern for the public while continuing its destructive practices. . . ."⁵¹ For example, the industry claims to protect school children from the side effects of soft drinks high in sugar and thus, removed soda machines from many schools. However, the soda machines were replaced with sports drink machines, which are high in caffeine and yield similar profits. Studies have shown that "[t]he pharmacology of caffeine shows clear patterns of dependence, with signs of tolerance and withdrawal."⁵² Despite evidence that the taste of caffeine is virtually undetectable, the food industry continues to assert that caffeine enhances flavor, so they continue to add caffeine to foods that they want to sell to unsuspecting consumers: "potato chips, jelly beans, sunflower seeds, and candy bars."⁵³ All of these foods appear in school vending machines.⁵⁴

The intentional manipulation of foods is unconscionable because "[c]affeine may be an important player regarding poor nutrition and obesity because it is so often coupled with calories."⁵⁵ The removal and replacement of soda machines further proves that while Big Food appears to do good, in reality, Big Food only changes the way in which it boosts profits for its members at the cost of children's health.

⁵⁰ *Id.* at 286.

⁵¹ *Id.*

⁵² *Id.* at 281 (internal citations omitted).

⁵³ Brownell & Warner, *supra* note 8, at 281 (internal citations omitted).

⁵⁴ See generally VEND-UCATION: HEALTHY VENDING MACHINES FOR PUBLIC SCHOOLS, <http://www.vendingmachinesschools.com/> (last visited Oct. 10, 2012).

⁵⁵ Brownell & Warner, *supra* note 8, at 279 (internal citations omitted). "Soft drinks, energy drinks, coffee (with cream and sugar), and other foods to which caffeine is added deliver a great many calories to their consumers." *Id.*

Although the National School Lunch Program and the USDA should protect public school children from the obesity and diet-related diseases resulting from junk food sales in schools, the opposite is the case. The USDA promotes unhealthy food choices and teaches children to become Big Food's loyal consumers at the cost of their health and wellbeing.⁵⁶

A second strategy that Brownell and Warner noticed in Big Food's playbook consists of "formulating products in ways that maximize their addictive potential"⁵⁷ with the likely goal of increasing sales. The dairy industry, for example, accomplishes such increases in addictive substances through high concentrations of casein in cheese. Joseph Keon, author of *Whitewash: The Disturbing Truth About Cow's Milk and Your Health*, explained that milk contains natural opiates (exorphins) that are designed to stimulate calves to return to the cow to be fed.⁵⁸ These opiates, one of which is casein, force consumers to keep wanting and buying more dairy products. Since 1915, the per capita cheese consumption in the U.S. increased six-fold.⁵⁹ This increase correlates with the steady and improved public perception of dairy in the food pyramid,⁶⁰ a major component of the dairy industry's effort to promote an increase in dairy consumption. Increasing the addictive properties of certain foods that are promoted by the government's

⁵⁶ See generally *Kid-friendly veggies and fruits*, CHOOSEMYPLATE.GOV (June 2011), <http://www.choosemyplate.gov/food-groups/downloads/TenTips/DGTipsheet11KidFriendlyVeggiesAndFruits.pdf>; *National School Lunch Program*, UNITED STATES DEPARTMENT OF AGRICULTURE FOOD AND NUTRITION SERVICE (June 21, 2012), <http://www.fns.usda.gov/cnd/lunch/>.

⁵⁷ Brownell & Warner, *supra* note 8, at 286.

⁵⁸ JOSEPH KEON, *WHITEWASH: THE DISTURBING TRUTH ABOUT COW'S MILK AND YOUR HEALTH* 36 (2010).

⁵⁹ *Id.*

⁶⁰ The Food Pyramid is an illustration of the 2005 dietary guidelines. The MyPyramid.gov website was replaced by <http://www.choosemyplate.gov/> (last visited Oct. 19, 2012). Both MyPyramid and MyPlate are discussed in greater details in Part II (A) below.

dietary guidelines further demonstrates how Big Food manipulates what people eat.

Additional strategies in Big Food's playbook includes "paying scientists to do research that helps the industry, funding front groups, using money to influence professional organizations, failing to rein in trade associations that distort science and mak[ing] doubt one of their deliverables" ⁶¹ In 2008 for example, Coca-Cola, paid to enter into a partnership with the American Dietetic Association (ADA) to allow its partners to speak at national ADA meetings to gain "access to key influencers, thought leaders and decision makers in the nutrition marketplace." ⁶² Of course, this generosity came at a price, namely that "the Coca-Cola Company will share research findings with ADA members. . . ." As a result of this partnership, "[t]he ADA has taken a strong stand that there are no good foods or bad foods, a position that the food industry has then exploited" ⁶³ in wide-ranging advertising campaigns. One example of these campaigns is the television commercial "Question Mark" by the Corn Refiner's Association, claiming that all sugars are equal ⁶⁴—a factually incorrect statement on the molecular level and in terms

⁶¹ Brownell & Warner, *supra* note 8, at 286.

⁶² *Id.* at 277 (internal citations omitted).

⁶³ *Id.*

⁶⁴ TV Commercial: Question Mark (Corn Refiners' Association 2010), <http://www.cornsugar.com/video-gallery/>.

High fructose corn syrup is simply a kind of corn sugar that is metabolized by your body the same as sugar or honey. The term 'corn sugar' today is an FDA approved alternate label name for dextrose, a corn-based sweetener that contains no fructose. When we use the phrase 'corn sugar,' we are using it to describe high fructose corn syrup as a form of sugar made from corn.

See also Adland, The Corn Refiners Association—Corn Sugar / Question mark—(2010) (Sept. 15, 2010), <http://adland.tv/commercials/corn-refiners-association-corn-sugar-question-mark-2010>. *But see* DAVID L. NELSON &

of humans' physiological absorption of sugars. The Corn Refiner's Association's website features quotes from various health professionals who support the incorrect statement, which provides further proof of experts and FDA officials who are manipulated to make false health claims to boost sales.

Since creating the ADA-Coca-Cola partnership in 2008, the ADA has continuously provided research results and studies to the scientists who served on the 2010 advisory committee. Unsuspicious health care practitioners will continue to follow the ADA's advice and fall into Coca-Cola's hands at the expense of the federal agency's integrity. The consequences are explosive, and "[u]ltimately, Americans pay the high cost of government complicity—with their health."⁶⁵ This is only one of many examples in Big Food's bag of tricks.

Where the previously independent ADA most likely criticized the food industry's products, Big Food has now started to collaborate with several professional associations that previously opposed the fast food industry. For example, the ADA's Academy of Nutrition and Dietetics claims that there is little medical support to reduce the sugar consumption.⁶⁶ This statement stems from a scientifically unsound and heavily biased report, which is another example of Big Food's manipulation of science.⁶⁷ In sum, Big Food's playbook is diverse. Food industrialists' creative strategists use "heavy ammunition"⁶⁸ when the agribusiness or fast food industry is "[c]aught in the

MICHAEL M. COX, LEHNIGER PRINCIPLES OF BIOCHEMISTRY 241 (4th ed. 2005) (A table of monosaccharides and disaccharides illustrates the chemical compositions and differences of various types of sugars.).

⁶⁵ SIMON, *supra* note 24, at 165.

⁶⁶ Am. Dietetic Ass'n, *Position of the American Dietetic Association: Use of Nutritive and Nonnutritive Sweeteners*, J. Am. Diet. Assoc., Feb. 2004, at 255, available at <http://www.ncbi.nlm.nih.gov/pubmed/14760578>.

⁶⁷ *Id.*

⁶⁸ Brownell & Warner, *supra* note 8, at 262. "As an example, in response to menu-labeling initiatives, the restaurant industry has sued New

crosshairs."⁶⁹ The soundness of the science used as a basis for the dietary guidelines "com[es] right out of the industry's playbook"⁷⁰ and pervades the dietary recommendations issued every five years by the USDA.

B. CONFLICTS OF INTEREST IN RESEARCH: PLANTING DOUBT IN SCIENCE

Conflicts of interest permeate the scientific bases of the dietary recommendations in addition to the individuals serving on the advisory committees making the recommendations. Federal law requires that "[t]he information and guidelines contained in each report . . . shall be based on the preponderance of the scientific and medical knowledge which is current at the time the report is prepared."⁷¹ The soundness of the science is the fundamental building block for the dietary guidelines. As the ADA's endorsement of sugar consumption above illustrates that Big Food, through its professional and government agents, disclaims all science that could hamper its sales as unsound.⁷² Big Food highjacks true scientific progress to boost its profits at the cost of public health.

The corruption of scientific research, professional organizations, and government agencies for mere economic gain is a dangerous practice that must come to a stop. This "corporate takeover of academic research . . . threatens to undermine the entire scientific process."⁷³ Michele Simon

York City, used its political might to weaken legislation in California, and successfully encouraged federal legislators to introduce weak national legislation that would preempt states and cities from acting more aggressively." *Id.*

⁶⁹ *Id.*

⁷⁰ SIMON, *supra* note 24, at 161.

⁷¹ 7 U.S.C. § 5341(a)(2) (2006).

⁷² SIMON, *supra* note 24, at 161.

⁷³ *Id.* at 171.

explains that the resulting danger is "particularly worrisome in the case of food and nutrition" ⁷⁴ Instead of instructing people to eat more fruits, vegetables, nuts and grains, and to limit the intake of refined carbohydrates, sugars and trans-fats, the food guidelines seem to be more concerned about methods of tiptoeing around the fast food producers' feelings. ⁷⁵ Michele Simon notes that "when it comes to solving the nation's epidemic of diet-related diseases, Uncle Sam is more aligned with Big Food than with the citizens it's supposed to represent." ⁷⁶ But for the conflict-of-interest loophole, it would not be that easy for Big Food to control the American diet and to manipulate nutrition science.

Big Food also manipulates science by creating industry front groups, such as the Center for Consumer Freedom (CCF), the "king of the PR empire," ⁷⁷ as Michele Simon calls it. CCF is one of many examples of how the food industry organizes its attack on anybody who could hamper its profitability. She explains that CCF's strategy "include[s]: (1) lobbying against nutrition legislation unfriendly to industry interests, (2) preparing well-timed press releases, (3) publishing op-ed articles and letters to the editor, and (4) advertising its views. . . ." ⁷⁸ Thus, Big Food meddles so profoundly in the advisory committee's actions, that it converts these federal bodies into an industry tool to boost profit.

As a result of Big Food's meddling, the manipulated scientific bases for the dietary guidelines lose credibility and become a farce in Big Food's toolbox. Michele Simon remarks how important it is "that scientific research remain unfettered by corporate interests. As more and more health experts and organizations slide down the slippery slope of accepting corporate

⁷⁴ *Id.* at 172.

⁷⁵ *Id.* at 144–45.

⁷⁶ SIMON, *supra* note 24, at 143.

⁷⁷ *Id.* at 172.

⁷⁸ *Id.* at 173.

funding, we will ultimately lose a critical tool for effective policymaking."⁷⁹ When unsuspecting consumers and health professionals rely on this unsound science, as it is promulgated through Big Food's players, such as the ADA, an organization that has been compromised by Big Food, encourages people to make unhealthy food choices⁸⁰ that endanger their health, as the latter half of this paper will demonstrate. Jeff Herman warns that "[w]ith incomplete or inaccurate information, the government is unable to appropriately shape nutritional programs and people are deprived of the opportunity to make fully informed choices regarding their health."⁸¹ Although Big Food's "deliberate strategy to buy loyalty and to instill doubt: to confuse the public, give ammunition to political allies, and stall or prevent government action"⁸² has gained acceptance among health professionals and, by association, in consumer protection agencies, it remains dangerous to public health.

C. FOOD GOVERNMENTENOMICS: CONFLICTS OF INTEREST IN FDA AND USDA FEDERAL ADVISORY COMMITTEES

One way to manipulate the dietary guidelines in Big Food's favor is by manipulating the experts who issue the recommendations to the USDA. Often, nutrition experts serve as members on the USDA advisory committees while they have recent, ongoing, or prospective ties to the industry.⁸³ When these experts on the committees receive research grants, for example, it is likely that they will issue recommendations in an effort to avoid upsetting the industry sponsors. As a result, the recommendations may be—and often

⁷⁹ *Id.* at 192.

⁸⁰ Herman, *supra* note 4, at 289.

⁸¹ *Id.*

⁸² Brownell & Warner, *supra* note 8, at 278.

⁸³ *See generally* NESTLE, *supra* note 6.

are—biased⁸⁴ because "[s]cientists feel pressure to favor industry."⁸⁵ Studies showed that,

63 percent of scientists conducting clinical studies who received gifts from industry felt that the donor expected acknowledgment in publications, 32 percent felt the donor expected to review articles or reports before publication, and 29 percent felt the donor expected that the gift would not be used for commercial applications that might compete with the company's products.⁸⁶

⁸⁴ Herman explains:

Yet even where the expert might act in the best interests of the Committee, his/her ties to industry may create a risk and a perception he/she will not do so. Thus, even if an expert's relationships with industry are all in the past, he/she may appear less likely than other experts to follow the science, as he/she: 1) may feel a sense of duty to represent the interests of his/her former employers and sources of funding; 2) may have developed biased views of the science after serving industry interests; and/or 3) may try to secure new relationships by protecting industry interests. Even if these experts act completely professionally and follow the science, which they may, the public's trust in the process may still be compromised.

Herman, *supra* note 4, at 296.

⁸⁵ *Id.* at 297.

⁸⁶ Herman, *supra* note 4, at 297 (citing Erie G. Campbell et al., *Looking a Gift Horse in the Mouth: Corporate Gifts Supporting Life Sciences Research*, 279 JAMA 995, 997 (1998)).

The more advisory committee members entertain this line of thought, the more biased their recommendations will be. Likewise, the more power realized by the industry, the more pressure it will put on the advisory committee.

An alternative method of manipulating the advisory committees "is to invite academic experts to participate"⁸⁷ in industry-funded research. In fact, such partnerships with the industry are quite common. According to an article published in the *Food and Drug Law Journal* in 2010,

three out of 11 members on the 1995 Committee had past or present industry ties . . . seven out of 11 members on the 2000 Committee . . . 11 out of 13 members on the 2005 Committee . . . and currently nine out of 13 members on the 2010 Committee These relationships are substantial. For example, on just the 2000 Committee. . . , members had past or present ties to: two meat associations; four dairy associations and five dairy companies; one egg association; one sugar association; one grain association; five other food companies; six other industry-sponsored associations; two pharmaceutical associations; and 28 pharmaceutical companies.⁸⁸

Such government-industry partnerships increase the pressure on scientists serving on the committees until they bow to the industry's demands.

Even if the advisory committees refuse to give in to Big Food's demands, the industry often gets its way. Dr. David Aaron Kessler, pediatrician, lawyer, renowned author, and former Commissioner of the FDA, recounts that the food industry pressured the government agencies into

⁸⁷ SIMON, *supra* note 24, at 162.

⁸⁸ Herman, *supra* note 4, at 295–96 (internal citations omitted).

passing the food labeling laws in its favor and that the beef industry affected the daily recommended caloric intake in dietary guidelines.⁸⁹ He writes:

From the White House, the pressure moved down to the Office of Management and Budget, which had the power to block our regulations. As required, we had submitted draft after draft of the final rule to [the Office of Management and Budget (OMB)] and often had it returned to us with industry-sought changes. More than once, OMB's wording had been taken almost verbatim from food industry comments we had already carefully considered.⁹⁰

Thus, by increasing the allotted caloric intake, the meat, dairy, and sugar industries assured that their sales would not be stifled by "eat less" dietary recommendations.

Not only do Big Food players try to influence government officials, they also wage intimidation crusades against any critics of their foods who could uncover the truth behind the unwarranted health claims of their products. For example, Marion Nestle, a renowned author and Professor in the Department of Nutrition, Food Studies, and Public Health at New York University recounts a threatening letter she received from the Sugar Association in 2002,⁹¹ demanding that she repeal factually correct but economically harmful

⁸⁹ Brownell & Warner, *supra* note 8, at 274; David Kessler's biography on Bio 2004 Newsroom, accessed via WaybackMachine (beta), <http://web.archive.org/web/20070927222933/http://www.bio.org/events/2004/media/brunch/kessler.asp>.

⁹⁰ *Id.* (internal citations omitted), accessed via WaybackMachine (beta), <http://www.aeispeakers.com/speakerbio.php?SpeakerID=558>.

⁹¹ Letter from Jeffrey S. Tenenbaum, Venable, Baetejer, Howard & Ciciletti, LLP, to Marion Nestle, Department of Nutrition and Food Studies, New York University (Mar. 27, 2002), *available at* <http://www.foodpolitics.com/wp-content/uploads/SugarAssociationLetter.pdf>.

statements to high-sugar food sales. Again, in February 2012, the Sugar Association threatened her with a letter to allegedly provide accurate sugar consumption data,⁹² which were unrecognizably distorted and scientifically flawed. This time, Andrew C. Briscoe, President and Chief Executive Officer of the Sugar Association, contacted Professor Nestle personally, rather than through a lawyer as the Sugar Association did in 2002. He demanded Nestle's compliance with the Sugar Association's advertisements.⁹³ After all, the Sugar Association, as one of Big Food's major players, unscrupulously defends its distorted science to eliminate any opposition. Even worse, the Sugar Association proudly showcases Briscoe's letter on its website with the obvious intent to suppress critics of refined sugar and to assure supporters.⁹⁴ The letter presents heavily biased data about the nutritional and caloric value of sugar. In fact, according to Dr. Harris, physician and author of *The Scientific Basis of Vegetarianism*, Briscoe's distorted interpretation of USDA data,⁹⁵ which he attached to his letter to Professor Nestle, borders on malevolent misrepresentation. Sound science and the truth do not deter Big Food's major players from seizing control over the USDA's work product—they simply twist the data interpretations. Big Food coerces anything or anyone critical of its products into compliance in order to protect its profitability.

⁹² Letter from Andrew C. Briscoe, President and Chief Executive Officer of The Sugar Association, to Marion Nestle, Professor with Chair Nutrition, Food Studies, & Public Health at the Steinhardt School of Culture, Education, and Human Development Education, New York University (Feb. 23, 2012), *available at* <http://www.sugar.org/images/docs/letter-to-marion-nestle.pdf>.

⁹³ *Id.*

⁹⁴ The Sugar Assoc., *The Sugar Association Letter to Dr. Marion Nestle Providing Accurate Sugars Consumption Data*, SUGAR: SWEET BY NATURE, <http://www.sugar.org/press-releases/letter-to-marion-nestle.html>.

⁹⁵ HARRIS, *supra* note 6, at 92–97.

In addition to influencing the advisory committee members' decision, the industry also "deploy[s] third party experts"⁹⁶ such as members of health profession associations for their cause. One of the most detrimental examples involves the integrity of the aforementioned ADA, which is completely compromised, not only because of its partnership with Coca-Cola but also because the ADA is a member of the American Council on Fitness and Nutrition (ACFN). Michele Simon calls the ACFN "one of the most infamous front groups of" Big Food⁹⁷ and, thus, she awarded the special "Chuzpah Award" to the American Diabetes Association (also ADA), which "boasts a veritable rogue's gallery of corporate funders, including Kraft Foods, J.M. Smucker, General Mills, and H.J. Heinz."⁹⁸ The resulting collaboration between snack and fast food producers and the ADA erases the ADA's credibility in making healthy diet recommendations.

Another food governmentenomics strategy used to boost profits by sabotaging America's health is to buy partnerships affiliated with professional health associations.⁹⁹ Michele Simon explains that these alliances comply with Big Food's spin of a well-rounded diet. When members of those associations become members of the federal advisory committees, the industry exercises particular control over the dietary guidelines. "[I]t is particularly egregious when certain groups take money from those companies whose products are causing the very problems they are supposedly trying to combat,"¹⁰⁰ such as the American Heart Association and the American Cancer Association, which sell stickers of approval to snack food producers for advertisements on the food packages.¹⁰¹ Big Food's meddling thereby

⁹⁶ SIMON, *supra* note 24, at 172.

⁹⁷ *Id.* at 176.

⁹⁸ *Id.* at 182.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 192.

¹⁰¹ SIMON, *supra* note 24, at 182.

"ensures government gridlock for the foreseeable future."¹⁰² Consequently, not only are the professionals serving on the committees and representing the professional associations adopting a favorable bias to the industry, but their interpretation and use of research also results in conflicted science. If Congress does not close the loopholes allowing such corruption, Big Food may reduce the health claims and research from these professional organizations to snack food trade dress, the colorful wrappers of processed, nutritiously lacking foods.

D. HOW THE FDA & USDA ACT AS REVOLVING DOORS TO BENEFIT THE INDUSTRY

When government employees swing from USDA or FDA positions to the private sector and back, while supporting Big Food with their work, they become "revolvers." The revolvers provide the industry with "soft money" in the form of "legal but unsanctioned . . . gifts and . . . frequent job exchanges between lobbyists and federal officials known as the 'revolving door.'"¹⁰³ In 2009, 252 people were revolvers, which make up 72.4% of the food and beverage lobbyists.¹⁰⁴ Phrased slightly differently, more than half of the lobbyists obtain government positions with the FDA or USDA to push for Big Food's interest in government agencies. In 2011, 191 congressional committee members passed through this revolving door in the food and beverage industry,¹⁰⁵ in 2010, 226 members,¹⁰⁶ and in 2009, 252.¹⁰⁷ This

¹⁰² *Id.* at 161.

¹⁰³ NESTLE, *supra* note 6, at 99.

¹⁰⁴ *Lobbying: Food & Beverage*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/indusclient.php?id=n01&year=2009>.

¹⁰⁵ *Lobbying: Food & Beverage Industry Profile, 2011*, *supra* note 13.

¹⁰⁶ *Lobbying: Food & Beverage Industry Profile, 2010*, *supra* note 15.

¹⁰⁷ *Lobbying: Food & Beverage Industry Profile, 2009*, CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/lobby/indusclient_lob.php?id=n01&year=2009.

amounts to 646 highly skilled and trained lobbyists who passed through the revolving door in just three years. The soft money is unrestricted and unreported,¹⁰⁸ so there is likely much more employee shifting and money involved than what consumers are aware of. These shocking numbers prove how Big Food has permeated the government and created a network of public health saboteurs by high jacking the FDA and USDA. The revolving door practices date back to the early 1970's and has had a long and successful track record.¹⁰⁹

1. THE FDA AND USDA REVOLVING DOOR

One of the worst revolving door careers is that of Michael Taylor, which evidences the "cross-over effect"¹¹⁰ between the food industry and government. As soon as he graduated from the University of Virginia School of Law in 1976, he worked for the FDA. He quickly passed through the revolving door and went to the private-sector law firm King & Spalding to represent Monsanto, one of the world's leading and most corrupt agribusinesses.¹¹¹ A few years later, Taylor returned to the government, this time as FDA Deputy Commissioner for Policy where, according to Marion Nestle, he issued biotechnology friendly policies to get Monsanto's rBGH growth hormone for dairy cows FDA approval.¹¹² In 1994, Taylor went

¹⁰⁸ NESTLE, *supra* note 6, at 105.

¹⁰⁹ Brownell & Warner, *supra* note 8, at 276. *See also* HARRIS, *supra* note 6, at 101.

¹¹⁰ Harris, *supra* note 6, at 103.

¹¹¹ *See Monsanto: The Parable of the Sower: The Debate Over Whether Monsanto Is a Corporate Sinner or Saint*, THE ECONOMIST, Nov. 19, 2009, available at <http://www.economist.com/NODE/14904184/PRINT>.

¹¹² rBGH is a growth hormone for dairy cows that boosts milk production by 10 percent. The hormone, however, remains in the milk when it is consumed by humans and causes various health complications, including several forms of cancer. Monsanto pressured the FDA into declaring rBGH safe and lobbied to avoid food labeling laws from mandating that milk from

through the revolving door again to administer the USDA's Food Safety and Inspection Service. Four years later, in 1998, he had accomplished so much for Monsanto as a revolver, that the agribusiness giant appointed him Vice President for Public Policy.¹¹³ Taylor's abuse of his government and private industry connections is one of many terrible examples of Big Food's unscrupulous and crooked manipulation of the USDA and FDA without regard for the consequences.¹¹⁴

Revolvers show little remorse in exploiting the government for Big Food's profit at the expense of America's public health. For example, Steven Anderson, president and CEO of the National Restaurant Association until January 2007,¹¹⁵ was asked about "the role of restaurants in contributing to the obesity problem,"¹¹⁶ and replied that "[j]ust because we have electricity doesn't mean you have to electrocute yourself."¹¹⁷ This proves how Big Food's strategy to shift the burden on to the public at the expense of America's health and in order to boost profits continues to be framed by the industry.¹¹⁸ Anderson puts the blame on consumers for eating unhealthy food

rBGH treated cows be labeled as such. *See generally* KEON, *supra* note 58, at 34, 62; *see also* NESTLE, *supra* note 6, at 101.

¹¹³ NESTLE, *supra* note 6, at 101.

¹¹⁴ For a detailed list of revolvers and lobbyists, *see generally* Herman, *supra* note 4, at 309–16.

¹¹⁵ Statement by National Restaurant Association Chairman Edward R. Tinsley III on Resignation of President and Chief Executive Officer Steven C. Anderson, *available at* (Jan. 24, 2007), <http://www.restaurant.org/pressroom/pressrelease/?id=1373>.

¹¹⁶ Brownell & Warner, *supra* note 8, at 266.

¹¹⁷ *Id.* (internal citations omitted).

¹¹⁸ *Id.* at 266–67.

and fails to even consider that the bombardment of fast and snack food advertising encourages people to make unhealthy choices.¹¹⁹

2. PAYING THEIR WAY OUT OF OPPOSITION

If all of the strategies to control and manipulate the dietary guidelines fail, Big Food pays itself out of opposition with what seems to be charitable work. Such investments of corporate social responsibility illusions are also geared at improving profitability by "buying loyalty, or at least stifling opposition, from groups that might otherwise oppose a company's business practices,"¹²⁰ as Brownell and Warner explain. Examples are fast food franchises on university campuses and in hospital lobbies or the Ronald McDonald House charities,¹²¹ where the company donates houses to poor families and assures that children's needs are met. Although these projects do not directly affect the American diet, they buy Big Food loyalty and increase credibility, so that any critique or recommendations from its representatives

¹¹⁹ Consumer generally allow Big Food to make food choices for them:

Each consumer takes the blame for this "diet of conscientious inconsistency" because most people choose to eat what allegedly tastes good and prefer not to think about the consequences. Moreover, people let advertisements tell them what tastes good and then eat an unnatural diet, thereby emotionally externalizing the cost of food, just like the industries do with the production cost

Gabriela Steier, *Externalities in Industrial Food Production: The Costs of Profit*, 9 DARTMOUTH L.J. 163, at 171 (citing JONATHAN SAFRAN FOER, *EATING ANIMALS* 8–9 (2009) (footnote omitted)).

¹²⁰ See Brownell & Warner, *supra* note 8, at 268.

¹²¹ RONALD MCDONALD HOUSE CHARITIES, <http://rmhc.org> (last visited Oct. 7, 2012).

disarms snack and fast food opponents faster.¹²² As a result, consumers trust Big Food's statements and continue to buy its products.

By buying itself out of opposition, Big Food manages to stay under the blame radar for the obesity epidemic and public health consequences its business fuels. As long as the government allows Big Food to play by its book, the conflict of interest will continue to pervade the FDA and USDA's mission to protect consumers from detrimental promotions and eating habits advocated by the agribusinesses and fast food companies. Big Food's unfettered reign over the American public's health have devastating consequences for America's public health, the environment and democratic principles.

II. RESULTS OF THE CONFLICT OF INTEREST—MORE PROBLEMS

Health professionals of all levels are trained to believe in Big Food's propaganda and therefore fail to alert the public of the dangers associated with snack and fast foods. For example, Joseph Keon estimates that about 21 million Americans have some form of cow-milk allergy, which amounts to 7.5 percent of the population.¹²³ Moreover, Harvard allergist, Dr. Stephen Astor "is convinced that a third of the population suffers from some form of food allergy."¹²⁴ Nonetheless, many of these conditions remain undiagnosed because the food industry powerfully promotes its propaganda through the FDA and USDA in medical schools, hospitals, and beyond. Physicians,

¹²² Brownell & Warner, *supra* note 8, at 268–69 (internal citations omitted).

¹²³ KEON, *supra* note 58, at 37.

¹²⁴ *Id.* at 39–40 ("Food allergy symptoms include skin rash, hives, swelling, wheezing, congestion, diarrhea, constipation, vomiting, nausea, watery eyes, runny nose, buildup of mucus, earaches and ear infections, headaches, skin discoloration, joint swelling, asthma, ulcerative colitis, inability to focus, colic, chronic fatigue, swelling of the throat, intestinal bleeding . . . , and death.") (internal citations omitted).

nutritionists, and other health care practitioners are indoctrinated by Big Food's campaigns, such as the food pyramid.

Even the best medical or nutrition programs at some of America's most renowned universities buy into Big Food's scheme. For example, a nutrition course at the Tufts University School of Medicine recently promoted the 2005 MyPyramid as a wholesome diet.¹²⁵ Even the nutritionists at the neighboring Tufts University Friedman School of Nutrition Science and Policy, one of the nation's leading institutions on nutrition science have the MyPyramid on its website, and by association, show support of Big Food's propaganda. With such a public sign of support, professors may feel pressure to promote Big Food's campaign out of concern for losing their research grants and possibly their jobs. An assistant professor with a Ph.D. in nutrition at the Tufts School of Nutrition, who asked to remain anonymous, admitted: "I do think [food companies] play a role in the current obesity epidemic in a number of ways, including influencing policies that affect what ends up in the food supply."¹²⁶ However, she refused to concede that a vegan diet, as advocated by Dr. Campell in *The China Study* and similar works,¹²⁷ embodies wiser food choices than MyPyramid.¹²⁸

¹²⁵ Tufts University School of Medicine Nutrition Course Lecture Notes (2006/07) (on file with author).

¹²⁶ Interview with Anonymous, Assistant Professor, Tufts School of Nutrition (Feb. 11, 2012) (on file with author).

¹²⁷ See generally HARRIS, *supra* note 6; MARION NESTLE, WHAT TO EAT (2006).

¹²⁸ *MyPyramid: Steps to a Healthier You*, MYPYRAMID.GOV, Apr. 2005, <http://www.choosemyplate.gov/food-groups/downloads/MiniPoster.pdf>.

A. THE FOOD PYRAMID—IMPLEMENTATION OF CONFLICTED RECOMMENDATIONS

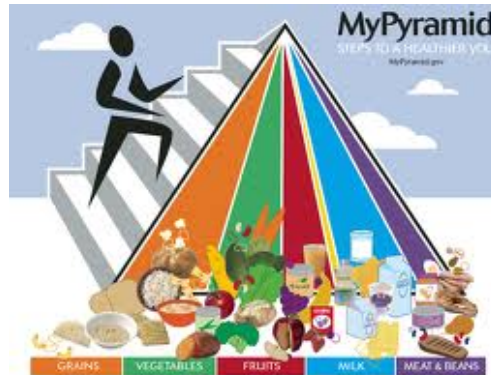


Figure 1 The 2005 Dietary Guidelines illustrate as a pyramid.

On a broad cultural basis, the primary way in which the conflicted recommendations reach the public is via the food pyramid illustration of dietary guidelines.¹²⁹ The two recent versions of the food pyramid, the 2005

¹²⁹ A dietary pattern analysis provides the following insights:

Dietary guidelines have been developed by many groups, including the World Health Organization, most national governments, and other organizations concerned with specific diseases such as cancer or heart disease. These guidelines are intended to provide education for the public about healthy food choices, and are also often used by governments for setting nutrition policies and by institutions in planning menus. Ideally, they would also guide agricultural and economic policies. These uses can reinforce each other and have an important effect on the health of a population; it is thus important that dietary

MyPyramid¹³⁰ and the 2010 MyPlate,¹³¹ fail to make dietary recommendations that truly prevent disease; instead, they promote American agribusiness.¹³² Every five years, the USDA and HHS together publish revised dietary guidelines for Americans, which "must be based on the preponderance of current scientific and medical knowledge, and they must be promoted by every federal agency when carrying out a food, nutrition or health program."¹³³ Unfortunately, as explained in Part I (B) above, the science is not usually as sound as it should be under 7 U.S.C. § 5341 (Establishment of Dietary Guidelines) because Big Food manipulates the bases of the advisory committees recommendations.

One of the main reasons for the great interest in the guidelines is the billions of dollars used to create them.¹³⁴ The National School Lunch and Breakfast Programs, for example, have allotted funds based on these guidelines and distributed food to over 31 million children nationwide, in

guidelines be based on the best available evidence and that they be evaluated rigorously. As the goal of dietary guidelines is to promote better health, the most direct way to evaluate them is to determine whether adherence to the guidelines predicts better health.

Walter C. Willett & Marjorie L. McCullough, *Dietary Pattern Analysis for the Evaluation of Dietary Guidelines*, 17 ASIA PAC. J. CLINICAL NUTRITION 75, 75 (2008).

¹³⁰ *MyPyramid*, *supra* note 128.

¹³¹ CHOOSEMYPLATE.GOV, www.choosemyplate.gov (last visited Oct. 17, 2012).

¹³² *See* SIMON, *supra* note 24, at 144.

¹³³ Herman, *supra* note 4, at 286 (internal citations omitted).

¹³⁴ *Id.*

correspondence with the food pyramid.¹³⁵ Additionally, schools participating in the School Lunch Program receive discounts, entitlements and bonuses from the USDA.¹³⁶ Big Food thereby ensures not only that children grow used to and become dependent on its products, but it also maintains government contracts to kindle its continuous sales.

The dietary advice illustrated by MyPyramid and MyPlate fails to do what it is supposedly designed for—preventing chronic disease and promoting healthy lifestyles.¹³⁷ Big Food's interests are so thoroughly promoted by the government's dietary guidelines that they drown out public health concerns. As Part II (B) shows, diet-related diseases have likely been aggravated by the dietary recommendations for those who followed them loosely and "[i]f adhering to the Guidelines cannot prevent chronic diseases, then they fail at their most basic purpose."¹³⁸ Thus, as Michele Simon notes, MyPyramid is "Our Problem,"¹³⁹ because "[t]he very names MyPyramid tells us the government is placing all responsibility for good nutrition squarely with [consumers]. Never mind those pesky government subsidies and tax breaks to big agribusiness and food manufacturers that make unhealthy food so cheap and ubiquitous."¹⁴⁰

Part of Big Food's goal is to grant the government and its revolvers immunity through "MyPyramid's emphasis on activity [which] plays right into the food industry's hands"¹⁴¹ by allowing Big Food to "deflec[t] blame

¹³⁵ *National School Lunch Program Fact Sheet*, USDA, Aug. 2012, <http://www.fns.usda.gov/cnd/lunch/AboutLunch/NSLFactSheet.pdf>.

¹³⁶ *Id.*

¹³⁷ Herman, *supra* note 4, at 288.

¹³⁸ *Id.*

¹³⁹ SIMON, *supra* note 24, at 146.

¹⁴⁰ *Id.* at 147.

¹⁴¹ *Id.*

for incessantly promoting unhealthy products"¹⁴² and by "point[ing] to the nation's couch potato tendencies."¹⁴³ Consequently, there is a complete failure to attribute blame to those who deserve it.¹⁴⁴

The 2005 dietary guidelines were outlined in "Steps to a Healthier You"¹⁴⁵ in the shape of a pyramid, depicting a stick figure walking up the stairs (see Figure 1). This was the last of a series of pyramid-shaped illustrations of the dietary guidelines. Several problematic foods remain a part of the illustration and the funds by the food and beverage lobby correlate with those foods. Meat, for example, is heavily emphasized as a protein-rich food; only two vegetarian versions are shown, peanut butter and beans. This may be in part due to the \$3,020,000 that the meat processing and products lobby invested in 2005.¹⁴⁶ Under these circumstances, the food pyramid may reflect the food industry's interests rather than those of consumers.

News channel NBC reported that on June 2, 2011, "First Lady Michelle Obama . . . unveiled the new healthy diet icon: A simple dinner plate, divided according to food group, meant to make it clear what and how much is healthy to eat."¹⁴⁷ The 2010 illustration of a plate is no better than its pyramidal predecessor. One of the most disturbing "food groups" on this illustrated version of the dietary guidelines is the glass of milk on the side of the plate.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *MyPyramid*, *supra* note 128.

¹⁴⁶ *Meat Processing and Products: Industry Profile, 2005*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/induscode.php?id=G2300&year=2005>.

¹⁴⁷ *Food Pyramid Dumped for 'My Plate'* (MSNBC television broadcast June 6, 2011), *available at* <http://www.msnbc.msn.com/id/43253092/ns/>

Milk is big business for Big Food. Milk and dairy have always played an important role on the dietary guidelines and the science to prove how detrimental milk and dairy consumption truly has been swept under Big Food's rug.¹⁴⁸ In 2010, when the recommendations for MyPlate were drafted, the dairy lobby collectively reported \$5,595,885.00, 58 lobbyists and 31 revolvers.¹⁴⁹ One cannot help but wonder whether MyPlate also works as a pie chart representing the amount of money invested by food lobbies (see Figure 2).



Figure 2 The 2010 Dietary Guidelines illustrated as a plate with a glass of milk.

Joseph Keon explains that several advisory committee members directly received funds from the National Dairy Council, which is yet again proof "that the USDA's primary job is not to encourage healthful eating . . . but rather to promote American agricultural products."¹⁵⁰ "One of every seven

health-diet_and_nutrition/t/food-pyramid-dumped-my-plate/#.T4LvhZpWrPQ.

¹⁴⁸ KEON, *supra* note 58, at 11.

¹⁴⁹ *Dairy: Industry Profile, 2010*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/indusclient.php?id=A04&year=2010>.

¹⁵⁰ KEON, *supra* note 58, at 11.

grocery dollars purchases some form of cow's milk."¹⁵¹ In direct correlation with the increase in dairy consumption is the onset of several chronic food-related illnesses. Thus, the dairy industry's advertisements and lobbying efforts directly impact what people eat and, correspondingly, how nutrition affects their health.

B. BIG FOOD'S DAMAGE IS DONE—THE AMERICAN DIET AND OBESITY EPIDEMIC

Dietary recommendations issued by the FDA and USDA in harmony with Big Food's propaganda have devastating consequences for public health. As long as the Food Pyramid's key message "eat less" is muted by the food industry's lobby power and control over consumer protection agencies, obesity rates will continue to rise and the American public will get sicker and sicker.¹⁵² "International scientists, who are less likely to be brainwashed by American Big Food propaganda than their American colleagues, report that consumption of foods high in saturated and industrially produced trans fats, salt, and sugar is the cause of at least 14 million deaths or 40% of all deaths every year from [non-communicable diseases]."¹⁵³ For example, over-consumption of salt causes up to "30% of all cases of hypertension."¹⁵⁴ Despite Big Food's undermining of the scientific bases for the dietary

¹⁵¹ *Id.* at 9 ("According to the [USDA], the average American consumes approximately thirty ounces of milk, cheese, and butter a day—or six hundred pounds of dairy products a year").

¹⁵² See generally HARRIS, *supra* note 6, at 101.

¹⁵³ Non-communicable diseases include diabetes, cancer, heart disease, and obesity-related health complications. These diseases are also called chronic food-related illnesses.

¹⁵⁴ Robert Beaglehole et al., *Health Policy, Priority Actions for the Non-communicable Disease Crisis*, 377 LANCET 1438, 1446 (2011) (internal citations omitted).

guidelines, it is well established that obesity can be fatal¹⁵⁵ and that eating less could, in fact, save lives. The *American Journal of Obesity* reports that "Americans are gaining weight"¹⁵⁶ and it is time for the dietary guidelines to recommend a true eat-less-response to America's increasingly sick consumers, thus Big Food's abuse of the dietary guidelines is fueling the damage to public health.

Improving the dietary recommendations could reverse much of the damage that will be discussed in the subsequent subparts 1–3 to public health, the environment and America's democracy. In addition to reversing pollution and diseases, food governmentenomics could be changed from a Big Food-oriented government where the food market-share has been privatized by the influence of food industrialists by the agribusinesses and snack and fast food companies, to significant savings of government funds and the promotion of public health. According to Binkley and Jekanowski, scientists who study obesity prevalence, it "is also a factor in the nation's burgeoning health care bill."¹⁵⁷ Supporting public health could ultimately lead to decreased health care costs and improved and sustainable agriculture, which has led to increased profitability in several other nations, such as Finland, as discussed below. Taking the measures to stop Big Food from bullying the FDA and USDA into boosting the industry's profit could thus have wide-reaching benefits for the nation as a whole.

Current USDA-issued dietary guidelines fail at their most basic purpose—preventing disease by promoting healthy nutrition.¹⁵⁸ In fact, this

¹⁵⁵ J.K. Binkley, J. Eales & M. Jekanowski, *The Relation Between Dietary Change and Rising U.S. Obesity*, 24 INTL. J. OBESITY 1032, 1032 (2000).

¹⁵⁶ *Id.* at 1032.

¹⁵⁷ *Id.*

¹⁵⁸ Herman, *supra* note 4, at 291 (2010) ("The Guidelines underperform because they fail to distinguish between foods that prevent and cause disease"); Willett & McCullough, *supra* note 129, at 76 ("Dietary guidelines

failure is due to the arbitrary, industry-created values on which the USDA builds the guidelines. The Food Pyramid is a decision anchor for consumers, but it is set up to support the industry instead of public health.¹⁵⁹ Big Food was only able to establish this arbitrary base value of allegedly healthy food choices through the conflict-of-interest loopholes. Consequently, unhealthy food choices, such as milk and meat,¹⁶⁰ became distorted reference points for American consumers and were, nonetheless, embedded in the Food Pyramid.

1. PUBLIC HEALTH

Obesity has become an epidemic.¹⁶¹ The explosion of obesity rates can be linked to Big Food's actions because it pushes for policies that promote increased snack and fast food consumption and brainwash health practitioners so that they do not tell patients to stop eating junk food. According to Paul Rozin, cultural psychologist and associate director of the Solomon Asch Center for the Study of Ethnopolitical Conflict at the University of Pennsylvania, Big Food's policies caused a "shift of many food risks from acute ([such as] food poisoning) to long term ([such as] links between diet

are generally designed to promote overall good health, which would include reducing the major causes of morbidity and mortality in a population.").

¹⁵⁹ See Dan Ariely, George Loewenstein & Drazen Prelec, *Coherent Arbitrariness: Stable Demand Curves Without Stables Preferences*, 118 Q. J. ECON. 73, 101 (2003) ("the effect of the arbitrary anchor shows that, while people are adjusting their valuations in a coherent, seemingly sensible, fashion to account for duration, they are doing so around an arbitrary base value").

¹⁶⁰ See generally CAMPBELL & CAMPBELL, *supra* note 19, at 311; KEON, *supra* note 58, at 10.

¹⁶¹ The UN High-Level Meeting on Non-Communicable Diseases (NCDs) in September, 2011 called for immediate and long-term actions to combat the alarmingly explosive obesity epidemic, which is spiking to unprecedented highs in the U.S. See Beaglehole et al., *supra* note 155, at 1447.

and heart disease or cancer)"¹⁶² because "there are mismatches between our biological predispositions and the new food environment that we have created."¹⁶³ As Dr. Campbell explains in *The China Study*, this "disease of affluence"¹⁶⁴ is directly linked to obesity, including various forms of cancer, heart disease, autoimmune diseases, and wide-ranging effects on bone, kidney, eye and brain diseases. The list of diet-related chronic diseases is very long.¹⁶⁵ America's top three causes of death, heart disease, breast cancer, and prostate cancer, all correlate with the increased obesity epidemic caused by the incessant propaganda of American agribusinesses and food industrialists.

The dietary guidelines fail to acknowledge how a diet rich in animal protein and high in fat could lead to obesity, and thus consumers continue to blindly follow Big Food's propaganda without being aware of the diet-related risks. Dr. Campbell's extensive 30-year studies proved that the risk of cancer proliferation and diet-related diseases increase once a five percent threshold of dietary animal protein is surpassed.¹⁶⁶ In other words, eating more than a combined total of five percent of meat, eggs, fish, and dairy, may trigger cancer growth. Even the *American Journal of Clinical Nutrition* is carefully

¹⁶² Paul Rozin, *The Meaning of Food in Our Lives: A Cross-Cultural Perspective on Eating and Well-Being*, 37 J. NUTRITION EDUC. BEHAV. 107, 108 (2005).

¹⁶³ *Id.*

¹⁶⁴ See generally CAMPBELL & CAMPBELL, *supra* note 19.

¹⁶⁵ Diet-related autoimmune diseases include: Graves' disease (hyperthyroidism), rheumatoid arthritis, thyroiditis (hypothyroidism), vitiligo, pernicious anemia, glomerulonephritis, multiple sclerosis, type 2 diabetes, systemic lupus erythematosus, Sjogren's disease, myasthenia gravis, polymyositis/dermatomyositis, Addison's disease, scleroderma, primary biliary cirrhosis, uveitis, chronic active hepatitis, osteoporosis, acute renal colic, Parkinson's disease, and Alzheimer's disease. CAMPBELL & CAMPBELL, *supra* note 19, at 184, 204, 211, 219–21.

¹⁶⁶ *Id.* at 120.

conceding that an increased amount of dairy correlates with breast cancer prevalence.¹⁶⁷ About 1 million women die every year of breast cancer, 20 percent of them in the United States.¹⁶⁸ A study published in *Neuroepidemiology* in 1992, demonstrates that milk consumption, in addition to a diet composed of high-fat animal protein, corresponds with the prevalence of multiple sclerosis.¹⁶⁹ However, the USDA and FDA fail to acknowledge the correlation and milk is still featured as a separate allegedly irreplaceable food group on MyPlate.gov. Nonetheless, a change in dietary guidelines is urgently needed to stop the epidemic of obesity and diet-related diseases in the U.S.¹⁷⁰

Researchers and scientists who support the warnings of the obesity epidemic must be heard. At a symposium titled "Modifying the Food Environment: Energy Density, Food Costs, and Portion Size," scientists from the American Society for Nutritional Sciences blamed Big Food and the food environment it has created for the current obesity epidemic.¹⁷¹ Diet-related chronic diseases, such as obesity, cancer, heart disease, multiple sclerosis,

¹⁶⁷ Patricia G. Moorman & Paul D. Terry, *Consumption of Dairy Products and the Risk of Breast Cancer: a Review of Literature*, 80 AM. J. CLINICAL NUTRITION 5, 5 (2004).

¹⁶⁸ *Id.*

¹⁶⁹ D. Malosse, H. Perron, A. Sasco & J.M. Seigneurin, *Correlation Between Milk and Dairy Product Consumption and Multiple Sclerosis Prevalence: A Worldwide Study*, 11 NEUROEPIDEMIOLOGY 4–6 (1992).

¹⁷⁰ Ahmed, *supra* note 2, at 565 (internal citations omitted).

¹⁷¹ Symposium, *Modifying the Food Environment: Energy Density, Food Costs, and Portion Size*, American Society for Nutritional Sciences, 135 J. NUTRITION 898, 898 (2005) ("The current food environment effectively promotes energy intakes, whereas the physical environment limits opportunities for energy expenditure. . . . agricultural policies, food supply trends, food distribution and marketing practices, and the eating environment are responsible for the current obesity epidemic.") (internal citations omitted).

asthma, lupus, and diabetes,¹⁷² pose "the greatest threat to global health in the 21st century; they cause 70 percent of deaths in the United States."¹⁷³ Consumer protection agencies, such as the FDA and USDA, should warn the public of the threat of the obesity epidemic and its associated diseases. It is time for the FDA and USDA advisory committees to understand "the mechanisms by which whole grains and legumes might improve glycemic control [to] facilitate the formulation of more specific dietary recommendations aimed at reducing risk of developing diabetes as well as treating those who have diabetes, than is possible at present"¹⁷⁴ and to revise

¹⁷² It is well-known that Type 2 Diabetes Melitus (T2DM) is associated with nutrition, but as long as the FDA and USDA do not prevent Big Food from adding the addictive substances to foods, from advertising unhealthy foods as good food choices, and from marketing their products incessantly, it is unlikely that the T2DM onset due to overnutrition will come to a stop. See B.J. Venn & J.I. Mann, *Cereal Grains, Legumes & Diabetes*, 58 EUR. J. CLINICAL NUTRITION 1443, at 1451 (2004). "[T]here is little doubt that diets containing substantial intakes of whole grain foods, fruit, vegetables and legumes are associated with an improvement in insulin sensitivity and other indicators of carbohydrate metabolism including improved glycemic control in people with diabetes." (internal citations omitted). *Id.*

¹⁷³ Herman, *supra* note 4, at 285 (internal citations omitted).

Heart disease is easily the world's deadliest disease. In 2005, it killed 864,480 Americans, more than cancer, accidents, chronic lower respiratory disease, and diabetes, combined, and the costs of treating heart disease are a global financial burden. In 2004, cancer caused 13 percent of all deaths globally, killing 7.4 million people, and it is the second leading cause of death in the United States. *Id.*

¹⁷⁴ The practices of stripping foods from nutrients to then enrich them and market them as healthy foods is dangerous and contributes to the T2DM onset. Venn & Mann, *supra* note 172, at 1444–51 ("[R]efining whole foods

the dietary guidelines accordingly. Moreover, federal laws must make these revisions possible.

2. PRIVATIZING A HUMAN RIGHT AND INFRINGING UPON FREEDOM OF CHOICE

While Big Food still depends on consumers' decisions to buy their food, food producers monopolize the market and eradicate consumers' free choice of what to eat.¹⁷⁵ "Virtually all the chicken sold in America—more than 99 percent, according to Bill Roenigk, vice president of the National Chicken Council—comes from factory-farm production similar to that used by Tyson Foods."¹⁷⁶ Thus, American consumers support factory farming and irresponsible farming practices with their purchases while also jeopardizing their own health because the industry monopolized the supply—and shapes the market through advertisements and government manipulation. The lobbyists have disarmed even the federal consumer protection agencies. Big Food-sponsored research grants are steadily pounding away at any attempts to advance consumer protection. Furthermore, by suppressing free speech through food disparagement statutes, or veggie libel laws,¹⁷⁷ and by coercing supermarkets into offering almost exclusively factory farmed eggs to limit consumers' alternatives to buy free range locally farmed eggs, for example, is a burden on democracy. The legislature must step in to protect consumer

may be implicated in the aetiology of T2DM stems from observations that the frequency of diabetes increased in populations as unprocessed or lightly processed foods were replaced by refined products.") (internal citations omitted).

¹⁷⁵ See generally NESTLE, *supra* note 127.

¹⁷⁶ PETER SINGER & JIM MASON, *THE ETHICS OF WHAT WE EAT : WHY OUR FOOD CHOICES MATTER* 21–22 (2006) (internal citations omitted).

¹⁷⁷ Steier, *supra* note 119, at 185–86 ("These veggie libel laws are legislative products of the externalized costs of unsustainable food production practices.").

autonomy and the free flow of information for balanced and honest dietary guidelines.¹⁷⁸

III. SOLUTIONS

As Big Food's propaganda became part of the dietary guidelines, the accompanying unsustainable food production practices and unethical behavior also became the norm in the food policy-making process. Lobbyists have spread misconceptions regarding the basis of a healthy diet for decades. The 2005 and 2010 dietary guidelines incorporate those false beliefs and fail to prevent diet-related diseases. In response to Big Food's manipulative practices, which started in the 1970's, the federal advisory committee members reacted with similarly unconscionable dietary guidelines whose "reaction depend[ed] on the social norms implied by the observed dishonesty and also on the saliency of dishonesty."¹⁷⁹ Big Food's saliency is immense due to the food governmentenomics strategies it has been using for several decades.

This part suggests ways to close these loopholes by reintroducing higher ethical standards, stricter requirements to qualify as advisory committee members, and unforgiving disclosure mandates. These proposals will allow health practitioners to evaluate the current arbitrary food recommendations and issue balanced and scientifically sound dietary guidelines in the future.¹⁸⁰

¹⁷⁸ Ahmed, *supra* note 2, at 566 ("Personal autonomy allows for rational and fully informed individuals to eat what they please, even if it is harmful. Food law supports the preservation of consumer autonomy and information in several ways.").

¹⁷⁹ Francesca Gino, Shahar Ayal & Dan Ariely, *Contagion and Differentiation in Unethical Behavior*, 20 PSYCHOL. SCI. 393, 397 (2009).

¹⁸⁰ Willett & McCullough, *supra* note 129, at 77 ("Dietary Guidelines should be evaluated for their ability to predict the occurrence of major illness, and such analyses can help refine these guidelines.").

**A. THE CURRENT LOOPHOLES—WHY THE LAWS ARE
INSUFFICIENT TO PREVENT BIASED RECOMMENDATIONS**

Big Food abuses loopholes that result from overly specific and simultaneously incomplete federal statutes.¹⁸¹ For example, 7 U.S.C. § 5341 assigns the establishment of dietary guidelines to the DHHS and the USDA,¹⁸² but leaves some of the control over food safety to the FDA.¹⁸³ As a result of this fragmented food safety and nutrition agency design, there is no single government entity in charge to police the foods that are supposed to be evaluated for the dietary guidelines, which leaves much uncertainty as to who should enforce the agencies' responsibilities. It is likely that food industry lobbyists and revolvers further cause splits to fragment and destabilize these agencies to secure their control. Big Food abuses the resulting uncertainty for its own profit.¹⁸⁴ According to Jeff Hermann, the law "tries to specify in great detail every type of prohibited conflict, and in so doing, it effectively permits all of those it fails to specify."¹⁸⁵ Big Food takes advantage of these indeterminate loopholes.

Current laws are insufficient to prevent Big Food's abuse of the loopholes associated with the establishment of dietary guidelines. According to Jeff Herman, there are four theoretical measures that could prevent Big Food's abuse of the loopholes:

[1] mandatory confidential disclosures of interests, pursuant to the Ethics in Government Act of 1978 (EIGA); [2] the criminal prohibition of financial interests in 18 U.S.C. § 208; [3] ethical standards of conduct,

¹⁸¹ Herman, *supra* note 4, at 298.

¹⁸² *Id.*

¹⁸³ *See generally* NEIL D. FORTIN, FOOD REGULATION: LAW, SCIENCE, POLICY, AND PRACTICE (2009).

¹⁸⁴ *Id.* at 305.

¹⁸⁵ *Id.*

pursuant to Executive Orders and regulations by the Office of Government Ethics (OGE); and [4] the Federal Advisory Committee Act (FACA).¹⁸⁶

None of these measures, however, effectively achieves the goals they are supposed to accomplish. The mandatory confidential disclosures under the Ethics in Government Act of 1978 (EIGA) are ineffective in preventing conflicts of interest among federal advisory committee members because "the minimal threat of public disclosure is not likely to dissuade many people"¹⁸⁷ and the ethical standards invoked barely apply to committee members who only serve for a short time in committees that change every five years. Moreover, 18 U.S.C. § 208 prohibits the advisory committee members from having "financial interests" in the guidelines. However, because "financial interests" are not defined, these prohibitions are rendered useless. Ethical sanctions under Executive Order 12,731 on the "Ethical Conduct for Government Officers and Employees"¹⁸⁸ are not enforced, because "a violation would be virtually impossible to prove."¹⁸⁹ Finally, the Federal

¹⁸⁶ Herman, *supra* note 4, at 299.

¹⁸⁷ *Id.* at 300.

¹⁸⁸ Exec. Order No. 12731, 55 Fed. Reg. 42547 (Oct. 17, 1990).

¹⁸⁹ Herman, *supra* note 4, at 302. Jeff Herman further explains:

So long as members support their recommendations with scientific evidence, it will appear they were motivated by their duty to the Committee and to science, not by a desire for personal or corporate gain. . . . [T]his standard cannot effectively prevent conflicts from influencing government action, as it actually permits the conflicted member to appear on the Committee; it only bars one particular manifestation of that conflict after his or her appointment. Instead, a preferable ethical standard would prevent individuals with conflicts from ever serving on the Committee.

Advisory Committee Act (FACA) is also imprecise and therefore subject to loopholes, rendering the legislation ineffective. Incomplete legislation fails to protect the government from Big Food's abuse.

The most powerful solution to this problem is legislation to close the loopholes.¹⁹⁰ In subsections 5(b)(2) and (3), FACA¹⁹¹ requires a fair balance of advisory committees but fails to specify how this fair balance may be achieved.¹⁹² Consequently, the federal advisory committees establishing the dietary guidelines pursuant to 7 U.S.C. § 5341 consists of several food industry revolvers who taint the committee's objectivity in evaluating the scientific bases for the dietary guidelines. To stop transfers from Big Food to the federal agency advisory committees and to eliminate the potential for conflicts-of-interest, I first suggest an amendment to 7 U.S.C. § 5341 that establishes strict qualification requirements for federal advisory committee members that will advise the USDA and the Department of Health and Human Services (DHHS) on dietary guidelines. These proposed amendments should preserve greater independence and objectivity in the committee. Second, disclosure requirements of prior affiliations for any advisory committee nominees, and requirements for balanced research are to be used as basis for the dietary recommendations as part of the requirements under 7 U.S.C. § 5341. Third, amendments to the FACA that should enable the United States Office of Government Ethics (OGE) to police the advisory committees for conflicts of interest. Finally, changes to 18 U.S.C. § 208 eliminate some of the current loopholes that Big Food abuses.

Id. (internal citations omitted).

¹⁹⁰ Herman, *supra* note 4, at 285–86 ("Congress should make it more difficult for those with ties to the food and drug industries from serving on the Advisory Committee, as current laws are inadequate to do so. This requires a new prohibition of apparent conflicts of interest and some procedural safeguards.").

¹⁹¹ Federal Advisory Committee Act, 5 U.S.C. APP. 2 §§ 1–16.

¹⁹² Herman, *supra* note 4, at 303 (internal footnotes omitted).

**B. RECREATING BALANCE OF INTERESTS THROUGH
LEGISLATIVE ACTION**

**1. COMPOSITION OF THE ADVISORY COMMITTEES—
AMENDMENT TO 7 U.S.C. § 5341**

The specifications set forth in the proposed amendment are designed to create a committee of highly-qualified and impartial professionals so that the most important aspects of a healthy diet may be evaluated objectively. In order to ensure that the committee members remain unencumbered by the types of conflicts-of-interest described above, the qualification requirements include publications in peer-reviewed journals. Such requirements would tend to only qualify professionals who remain active within their fields and pursue alternative and creative approaches to preventive health care through nutrition. Six of the 15 committee members shall be physicians, three shall be other health care practitioners, two shall be agriculture and environmental scientists, and three shall be ethical and legal advisors.

The group of physicians established in the suggested amendment in 7 U.S.C. § 5341(a)(3) (see Appendix 1), include one of each of the following medical specialties: a general internist, a geriatrician, a pediatrician, an endocrinologist, a cardiologist, and a gastroenterologist. These professionals represent practitioners that treat the most common diet-related diseases, namely diseases that are related to the heart, the gastro-intestinal system, and to diabetes. Specialists for each respective field of medicine will serve on the committees to assure that the dietary guidelines do not aggravate risk factors that develop diet-related diseases while also helping to make dietary recommendations that prevent such diseases.

Three of the six physicians on the advisory committee according to the proposed amendments are generalists who attend to preventative measures and nutrition needs of the main age groups. (A division of age groups could, for example, include infants, toddlers, school children, teenagers, young adults, adults, seniors.) While the general internist focuses the committee members' attention to health concerns of average consumers, such as the prevention and treatment of high cholesterol, hypertension, and diabetes, the geriatrician and pediatrician may focus on the specific recommendations that shall be adapted to the needs of the elderly population and to children to

prevent the same diseases. Moreover, children and the elderly population require higher and different amounts of vitamins, and the dietary guidelines should reflect their needs. Consequently, these three generalists will tailor the dietary recommendations to the needs of different age groups to prevent diet-related diseases.

The role of the endocrinologist on the advisory committee will be to customize the dietary recommendations to a low glycemic index, high fiber diet that prevents insulin resistency.¹⁹³ The licensed endocrinologist on the committee shall also hold a Master of Science degree in nutrition or nutrition science. This additional qualification will assure that the endocrinologist serving on the committee has extensive expertise in nutrition therapy and preventive medicine to help the 22 million Americans with pre-diabetes, the precursor to type-2 diabetes,¹⁹⁴ or with metabolic syndrome, the combination

¹⁹³ For a discussion on the glycemic index, see NESTLE, WHAT TO EAT, *supra* note 198, at 313–15. For further discussion on the glycemic index as it relates to the suprametabolic syndrome, see MARK HYMAN, ULTRA-METABOLISM 44–48 (2006). For a discussion on the correlation between diet and diabetes, see CAMPBELL & CAMPBELL, *supra* note 19, at 145–55.

¹⁹⁴ The American Association of Clinical Endocrinologists (AACE) Legislative Fact Sheet supports the legislative and regulatory updates available on the AACE website, which show that the professional organization of endocrinologists actively lobbies for better diabetes awareness and care. Members of these organizations are likely to welcome the opportunity to participate in the revision of the dietary guidelines in line with the AACE's goal to treat and prevent diabetes. The American Association of Clinical Endocrinologists (AACE) *Legislative Fact Sheet*, THE AM. ASS'N OF CLINICAL ENDOCRINOLOGISTS, <http://www.aace.com/files/2011-Diabetes-Initiative-Fact-Sheet.pdf> (last visited Apr. 23, 2012); AACE *Legislative and Regulatory Updates*, THE AM. ASS'N OF CLINICAL ENDOCRINOLOGISTS, <http://www.aace.com/advocacy/leg> (last visited Apr. 23, 2012).

of diabetes and heart disease risk factors due to obesity.¹⁹⁵

The licensed cardiologist will be able to provide the expertise necessary to draft the revised dietary guidelines with the goal of heart disease prevention in mind. The American College of Cardiology is already familiar with the FDA committee hearings and lobbying practices.¹⁹⁶ Thus, a licensed clinical cardiologist and member of the American College of Cardiology may be able to anticipate where the dietary guidelines go astray and help steer the focus back to disease prevention through nutrition. Heart disease is one of the non-communicable diet-related diseases and causes 40% of deaths in America every year.¹⁹⁷ A plant-based wholefoods diet can help to prevent the onset of these diseases and deaths.¹⁹⁸ Cardiologists, such as Dr. Dean Ornish, founder and president of the Preventive Medicine Research Institute in Sausalito, California, and Clinical Professor of Medicine at the University of California, for example, drew attention to the importance diet has on heart disease.¹⁹⁹ Dr. Caldwell B. Esselstyn, Jr. from The Cleveland Clinic in Ohio also suggests that heart disease can be prevented and reversed through a plant-based whole foods diet.²⁰⁰ The cardiologist on the committee will

¹⁹⁵ See FORTIN, *supra* note 183.

¹⁹⁶ The Am. Coll. of Cardiology, *Food and Drug Administration*, CARDIO SOURCE, <http://www.cardiosource.org/Advocacy/Issues/Food-and-Drug-Administration.aspx> (last visited Apr. 23, 2012).

¹⁹⁷ CAMPBELL & CAMPBELL, *supra* note 19, at 111–33.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* See also Dean Ornish, MD, PREVENTIVE MED. RESEARCH INST. (PMRI), http://www.pMRI.org/dean_ornish.html (last visited Apr. 23, 2012).

²⁰⁰ CAMPBELL & CAMPBELL, *supra* note 19, at 111–33. See also CALDWELL B. ESSELSTYN JR., PREVENT AND REVERSE HEART DISEASE (2007).

collaborate with the other physicians on the committee to design heart-healthy dietary guidelines.²⁰¹

The gastroenterologist, specializing in disorders and diseases of the gastrointestinal (GI) system,²⁰² will provide expertise about the diseases affecting the GI system for the advisory committee. Many of the diseases within a gastroenterologist's expertise include diet-related diseases, such as inflammatory bowel disease, ulcerative colitis, Crohn's disease, celiac disease, colorectal cancers, stomach ulcers, irritable bowel syndrome, diverticulitis and many more. A greater understanding of these diseases will help the committee to fine-tune the dietary recommendations in order to decrease the risk to aggravate any of these disorders.

Apart from the six physicians, a clinical nutritionist and physiologist shall also serve on the committee. While the nutritionist has a comprehensive understanding of the practical aspects of human nutrition, the physiologist has expertise in the metabolism of nutrients. Together with the physicians, these experts can focus on preventive and remedial nutrition therapy, the practical aspects of what people like and can afford to eat, as well as how the nutrients are absorbed. Such a comprehensive and thorough analysis will allow the advisory committee to issue specific and balanced dietary guidelines.

To assure that the dietary recommendations are customized to the needs of consumers who take prescription medications, a pharmacist shall also serve on the advisory committee. A pharmacist is specially trained to understand the interactions between drugs and certain nutrients, such as alcohol and antibiotics, and will help the other committee members

²⁰¹ The term "heart-healthy" was coined by various advertisement campaigns, such as the heart-healthy labels on cereals. *See Topics—Heart Health*, CHEERIOS, <http://www.cheerios.com/Topics/Heart-Health#?p=2&c=> (last visited Apr. 24, 2012); *see generally* NESTLE, *supra* note 6, at 39–40.

²⁰² The gastrointestinal system, from the mouth to the entire alimentary canal, comprises the upper and lower human GI tracts and the organs involved in the digestive process, such as the stomach and the gall bladder.

understand the complexity of physiological interactions of foods and drugs on the human body. Where the pharmacist's expertise overlaps with those of the cardiologist and endocrinologist, the other members will become especially important in evaluating the best dietary recommendations for the general public and specific target groups, such as children and the elderly. The pharmacist's input is crucial to the composition of a balanced advisory committee because the elderly population and people at risk of heart disease or diabetes often take a wide range of medication.

Due to the impact that the dietary recommendations will have on public health and the environment, an agricultural scientist and an environmental scientist shall also be part of the committee. Because the availability of food greatly depends on agribusinesses, an agricultural scientist will serve on the advisory committee to help the other members to understand the interplay of the food supply, agricultural systems, and available foods. Examples of such advice may extend from veterinary science about the food animals, to agronomy,²⁰³ to plants for human consumption. The agricultural scientist will be able to explain the risk factors of pesticides and food processing, including food packaging. This information will help the other advisory committee members tailor their recommendations to the realities of the American food supply.

The environmental scientists will be charged with predicting the sustainability of the food production for the foods that will be included in the dietary recommendations, so that the recommendations will not cause unwarranted depletion of the planet's resources or pollute the environment unnecessarily. Conversely, environmental science includes certain aspects of ecology, biology, edaphology,²⁰⁴ (soil science) and atmospheric science,

²⁰³ Agronomy is "a branch of agriculture dealing with field-crop production and soil management." *Agronomy Definition*, MERRIAM-WEBSTER ENGLISH DICTIONARY, <http://www.merriam-webster.com/dictionary/agronomy>.

²⁰⁴ Edaphology is the science of soil composition, development, management, and cultivation.

which are all greatly affected by the food production system and agriculture. The environmental scientist will thus be able to evaluate the dietary recommendations in terms of sustainability, pollution, and general environmental factors.

The environmental and public health impact of the American food production extends beyond the U.S., making the obesity epidemic is of global concern.²⁰⁵ Therefore, a member of the United Nations Food and Agriculture Organization²⁰⁶ shall also serve on the committee to assure that the American recommendations will not negatively impact the rest of the world.²⁰⁷ This member of the task force will combat the obesity epidemic and the global initiative against non-communicable diseases.

To assist the committee in negotiations, an administrative lawyer and an ethics advisor on the committee shall also serve on the committee. These professionals will further help the committee to understand the scope of the ultimate USDA-issued guidelines, ethical obligations, and the consequences of the dietary recommendations. The lawyer will also help in negotiations between the advisory committee members and help in the drafting of the recommendations. Finally, the ethical advisor will overlook the recommendations for ecologic issues and the humane treatment of food animals, as well as the adaptability of the food recommendations for various cultural religious groups with dietary restrictions. Including ethical advisors in food policy committees follows the model of the European Food Safety Authority (EFSA),²⁰⁸ the Bureau of European Policy Advisors (BEPA),²⁰⁹

²⁰⁵ See Beaglehole et al., *supra* note 154, at 1438–47.

²⁰⁶ See generally FOOD & AGRIC. ORG. OF THE UNITED NATIONS, <http://www.fao.org>.

²⁰⁷ See generally VANDANA SHIVA, EARTH DEMOCRACY: JUSTICE, SUSTAINABILITY, AND PEACE (2005); VANDANA SHIVA, STOLEN HARVEST: THE HIJACKING OF THE GLOBAL FOOD SUPPLY (2000).

²⁰⁸ See generally EUROPEAN FOOD SAFETY AUTHORITY (EFSA), <http://www.efsa.europa.eu/>.

and the World Health Organization (WHO),²¹⁰ all of which have ethics delegates to assure sound decision making. The combination of these different professionals will converge in the composition of a well-balanced, independent, and objective advisory committee making recommendations for dietary guidelines.

2. BALANCED RESEARCH BASES FOR DIETARY RECOMMENDATIONS

Sound scientific bases are vital for balanced dietary recommendations and comprise the building blocks for, and the tools of, the advisory committee members.²¹¹ However, the current version of 7 U.S.C. § 5341(a)(2) fails to define "balanced and sound research." Therefore, I propose the following amendment to mandate a three-pronged division of research materials for the use of the advisory committees issuing dietary recommendations to specify what "sound research" is:

The committee issuing the information and guidelines shall use as a basis for the scientific and medical knowledge at most one third of each of the following combined or separate groups:

(i) of industry, corporate, or otherwise privately funded sources, reports, studies, or data;

(ii) of university-funded and university-conducted research, reports, studies, or data; and

²⁰⁹ See generally *Ethics Links*, BUREAU OF EUROPEAN POLICY ADVISORS (BEPA), http://ec.europa.eu/bepa/european-group-ethics/ethics-links/index_en.htm (last updated Feb. 2, 2012).

²¹⁰ See generally WORLD HEALTH ORGANIZATION (WHO), ETHICS AND HEALTH, <http://www.who.int/ethics/en/index.html>.

²¹¹ 7 U.S.C. § 5341(a)(2) (2012).

(iii) of independent clinical data, reports, studies, or data from institutions or individuals that have no financial or professional interest in any industry, corporation, or other private party under subsection (a)(2)(i),²¹²

The resulting separation of scientific sources will prevent Big Food from tampering with the research and will force the advisory committee members to consult a wider range of studies and reports. If the three categories overlap, "[p]eriodical evaluations of the committee's compliance . . . shall be conducted by the United States Office of Government Ethics (OGE)"²¹³ to ensure compliance with the objective and balanced principles underlying these provisions. Dr. Harris explains that looking at the way foods have been sorted by nutrient-to-weight ratios distorts the understanding of nutrition density in foods.²¹⁴ Without these distortions, or by looking at the nutrient density ratios of certain foods, green leafy vegetables and nuts prove to be much more nutritiously valuable than any of the snack and fast foods or the dairy and meat choices, which the current dietary guidelines showcase. By rebalancing the research to evaluate foods for the dietary recommendations, the advisory committee members will, hopefully, rediscover alternative ways to analyze the available data to reach scientifically sound and complete bases for the revised dietary guidelines. Part of this balance would be the correct interpretation of nutrient-to-weight and nutrient-to-calorie ratios that Big Food's propaganda has distorted for the past three decades.²¹⁵

The advisory committee's minutes and research materials are public records, it is therefore important to allow a variety of sources to be included in the discussions surrounding the dietary recommendations. The mandated combinations of industry and corporate or otherwise privately-funded sources, university-funded and university-conducted research, and

²¹² *Infra* Appendix 1.

²¹³ *Id.*

²¹⁴ HARRIS, *supra* note 6, at 92–97.

²¹⁵ *Id.*

independent clinical data, reports, studies, or data from institutions or individuals that have no financial or professional interest in any industry, corporation, or other private party will provide the advisory committee members with a broad array of sources for objective evaluation. The proposed amendment to 7 U.S.C § 5341(b)(1) sets forth the documents that shall become part of the public record which will be disclosed along with the advisory committee meeting minutes (see Appendix 1). As a result of the detailed statutorily required report, the public record supporting the dietary recommendations will provide the basis and justifications for the recommendations, which may serve as public education tools and check on the impartiality of the committee at the same time. Therefore, subsection IV specifically mentions the national data for diet-related diseases and obesity. Contextualizing the recommendations with their immediate disease-prevention objectives will, potentially dissuade corruption of the recommendations.

3. BEYOND DISCLOSURE PRIOR TO APPOINTMENT— ELIMINATING WAIVERS

Another proposal to eliminate as much risk of corruption of the advisory committee as possible is the extensive disclosure requirements for nominees of committee members. In an ideal world, committee nominees would disclose their industry ties to prove that they are not revolvers and that no conflict of interest would exist if they were appointed to the committee. In reality, however, the government allows revolvers to hide in loopholes because revolvers help increase government funding.²¹⁶ Therefore, disclosure requirements are insufficient and rigorous qualification criteria must be established for advisory committee members in an effort to exclude those scientists and physicians who are conflicted by setting the threshold of academics rather high (see Appendix 1).

Instead of requiring mere disclosure, an amendment to the FACA § 2(b)(3)(4) to create a rebuttable presumption that every nominee for the

²¹⁶ HARRIS, *supra* note 6, at 105.

federal advisory committees has a conflict of interest, so that the nominee must rebut the presumption and prove his impartiality. Such a waiver of the conflict of interest will only be possible under two strict conditions:

[I]f (i) at a hearing before the United States Office of Government Ethics, the employee can rebut the presumption by a preponderance of the evidence that the financial interest disclosed under subpart (b)(1) does not cause a conflict of interest; and

(ii) a panel of at least five members of the United States Office of Government Ethics conclusively determines that no conflict of interest exists.²¹⁷

The proposed amendment thus empowers the OGE to police advisory committees and terminate them if the OGE finds that "one or more members of the advisory committee [act] in contravention of their fiduciary duties to the public."²¹⁸ In addition, the OGE will periodically review the advisory committees' operations to ensure compliance with the rules set forth in the applicable statutes.²¹⁹ This process is in line with the fundamental American government principles of checks and balances and separation of powers. Thus, assuming a conflict of interest exists will prevent revolvers from hiding in the loopholes created by overly specific and imperfect statutes, unless proven otherwise. An amendment to 18 U.S.C. § 208 in line with the proposed additions to the FACA § 2(b)(3)(4) shall further deter revolvers from serving on advisory committees.

The rebuttable presumption that a conflict exists was necessitated by the failure of mere disclosure requirements in deterring revolvers from corrupting government agencies. The landmark case of *Physicians Comm. for Responsible Med. v. Glickman*, 117 F. Supp. 2d 1 (D.D.C. 2000), where the

²¹⁷ See amended 18 U.S.C. § 208(b)(1) in Appendix 2.

²¹⁸ See amended 5 U.S.C. App. 2 § 2(b)(3) in Appendix 2.

²¹⁹ See amended 5 U.S.C. App. 2 § 2(b)(4) in Appendix 2.

plaintiff, Physicians Committee for Responsible Medicine, sought USDA disclosure of the materials used by an advisory committee proves that mere disclosure is insufficient in deterring revolvers from corrupting the recommendations. The FACA and, by association the Freedom of Information Act (FOIA) under 5 U.S.C. § 552 failed to prevent revolvers from abusing the loopholes. Further proof for this failure is the decade of revolver activities and lobbying rates since *Physicians Comm. for Responsible Med. v. Glickman* was decided. Disclosure is mandatory according to the United States Court of Appeals District of Columbia Circuit²²⁰ but it remains largely ineffective.

Mere disclosure of potential conflicts of interest is not enough to prevent corruption of the advisory committees, it is important to appoint only members with no ties to the industry. In an interview, Michele Simon explained that experts should have

ZERO ties to industry. That's near impossible these days but so be it. In my view no expert that's taking money from the food industry should serve on an advisory committee, period. End of story. Disclosure is not sufficient, we know about the ties now, so that hardly helps.²²¹

Correspondingly, screening procedures have been implemented, but have failed in their attempts to stop revolvers from spreading Big Food's propaganda at the FDA and USDA. Even FDA attorney Cooper conceded that "[i]f an individual FDA employee could not exercise self-restraint on such matters of [conflicts of interests], he or she does not belong at the

²²⁰ *Food Chem. News v. Dep't of Health & Human Servs.*, 980 F.2d 1469, 1468 (D.C. Cir. 1992) (holding that "an agency is generally obligated to make available for public inspection and copying all documents that are made available to or prepared for or by an advisory committee").

²²¹ E-mail from Michele Simon (Apr. 5, 2012) (on file with author).

FDA—or elsewhere in the Government."²²² Though the nature and intent of all nominees must be disclosed without exceptions so that the general public has complete information disclosure, such disclosure requirements have remained fruitless to-date. Daniel Meron, who suggested complete disclosure of DHHS members at his address at the 50th FDLI/FDA Annual Educational Conference on April 12, 2007,²²³ explains that "U.S. law is focused on current interests and relationships and fails to adequately recognize that a person's past can create conflicts of interest just as likely to corrupt official actions."²²⁴ Consequently, advisory committee selection criteria have to go beyond mere conflict of interest screening processes.

4. PROOF THAT IT WORKS: FINLAND'S ROLE MODEL

American consumers are susceptible to Big Food's propaganda is the fact that there is no traditional American diet. Implementing a healthier diet is significantly more difficult in the United States, compared to other countries, such as Greece, where the Mediterranean diet is imbedded in the country's culture. Nevertheless, according to Jeff Herman, "that is an obstacle to better health that can be overcome."²²⁵ He explains that "Finland has set an example for the rest of the world" by changing the national diet and thereby improving public health.²²⁶ Although Finnish men had the highest mortality rate worldwide and the average life expectancy was extremely low in both men and women, the Finnish government corrected these numbers around within twenty years.²²⁷ Through collaboration with the World Health Organization (WHO), the Finnish government "[got] people to smoke less, exercise more,

²²² Cooper, *supra* note 34, at 802.

²²³ Daniel Meron, *Legal Developments Relevant to FDA Authority*, 62 FOOD & DRUG L.J. 441, 444 (2007).

²²⁴ *Id.*

²²⁵ Herman, *supra* note 4, at 293 (internal citations omitted).

²²⁶ *Id.*

²²⁷ *Id.*

eat more fruits and vegetables, and eat less salt and saturated fat, especially from dairy sources."²²⁸ As a result, Herman reports that "the mortality rate from heart disease fell 62.4 percent, and the mortality rate from cancer fell 39.9 percent"²²⁹ for men. Conversely, for women, "the mortality rate from heart disease fell 65.9 percent, and the mortality rate from cancer fell 15.6 percent."²³⁰ The "life expectancy for men rose 6.4 years, from 66.4 to 72.8, and life expectancy for women rose 5.6 years, from 74.6 to 80.2."²³¹ These statistics provide encouraging and compelling reasons for the U.S. government to follow in Finland's footsteps and to change its dietary guidelines. Closing the loopholes and rebalancing the federal advisory committees in the U.S. to revise the dietary guidelines would be a significant first step.

Even though legislative action may be a slow method of correction, Finland's model supports the theory that government-sponsored public education campaigns can be a powerful tool to bring about positive changes in the meantime. Theoretically, as Herman correctly notes, "the food industry still has a chance to work with the public health community, professional organizations, and governmental organizations—both national and international—in a manner that promotes, not combats, public health."²³² For example, in order to prevent agribusinesses from foreclosure due to decreased sales in response to the public education campaign, the Finnish government helped former dairy farmers to switch to berry farming.²³³ This example illustrates how public education campaigns can motivate consumers to change the demand in the food market, which will eventually encourage the food industry to make promising changes, such as switching dairy farmers to

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Herman, *supra* note 4, at 293 (internal citations omitted).

²³¹ *Id.*

²³² Brownell & Warner, *supra* note 8, at 277.

²³³ *Id.*

berry farming. In doing so, the supply of nutritionally-deficient hormone-spiked milk in Finland was replaced by vitamin- and antioxidant-rich berries, which, in turn, became more widely available and were consumed more. The resulting benefits for public health decreased disease and mortality rates and surely lowered public health care costs. Food governmentenomics transformed from a vicious to a virtuous cycle promoting health and wholesome nutrition.

Public education campaigns have yielded no results in the U.S. as a result of Big Food's stifling reactions. In the United States, "more emphasis on awareness of the consequences of obesity is needed, for, until consumers have the determination to make required lifestyle adjustments, knowledge of the causes is likely to be of little avail."²³⁴ Once American eaters begin to vote with their carts and choose healthier foods, both Congress and eventually the food industry may reshape the market in response to demand.

CONCLUSION

The proposed amendments to FACA, 7 U.S.C. § 5341, and 18 U.S.C. § 208, as well as the composition of the federal advisory committees will effect profound change on dietary recommendations as well as their underlying research basis. In addition, the proposed amendments will eradicate ineffective disclosure requirements and eliminate the possibility to waive conflicts of interest for advisory committee members. These amendments would also improve the nutrition-related risks of heart disease, cancer, and other non-communicable diseases. They will allow American consumers to recognize and choose more wholesome and healthy diets. Consumer choices will then reshape the demand of the food market and, thus, force agribusinesses and Big Food to adapt to a more sustainable and environmentally friendly food production. Implicit in the ability to make better food selections is the ability to reclaim the fundamental freedom of choice—placing Americans' health within their own hands instead of those of the Big Food industry.

²³⁴ Binkley, Eales & Jekanowski, *supra* note 155, at 1037.

However, fear of lost profits may cause these amendments to be suffocated by Big Food lobbyists and revolvers before the bill even reaches the legislature. Yet, if the end results (restructuring the food supply to extend the life spans of American consumers) were realized by lobbyists, they would also understand that their role in improving public health could increase their client base while remaining a major player in the food industry. Simply removing the unhealthy foods and replacing them with wholesome products from sustainable farming could boost profits by creating product diversification and by maintaining a healthier client base.

Realigning the composition of the advisory committees and the scientific bases for the dietary recommendations will eliminate potential conflicts of interest. Granting waivers to federal advisory committee members introduces the ability to police these committees and prevent government officials from breaching their fiduciary duties to American consumers. Once established by the food industry, the concept of independent and objective committees should spread through the entire executive branch. Once the independent committees are introduced, they will be more likely to make independent and critical decisions for the public good rather than for the private sector. Ultimately, the removal of the conflicts of interest creates a standard for all executive committees and allows the government to function according to Abraham Lincoln's original principle, "government of the people, by the people, for the people" instead of, "government by Big Food for Big Food."

APPENDIX 1

United States Code Annotated

Title 7. Agriculture

Chapter 84. National Nutrition Monitoring and Related
Research

Subchapter III. Dietary Guidance

7 U.S.C. § 5341 ESTABLISHMENT OF DIETARY GUIDELINES

(a) Report

(1) In general

At least every five years the Secretaries shall publish a report entitled "Dietary Guidelines for Americans." Each such report shall contain nutritional and dietary information and guidelines for the general public, and shall be promoted by each Federal agency in carrying out any Federal food, nutrition, or health program.

(2) Basis of guidelines

The information and guidelines contained in each report required under paragraph (1) shall be based on the preponderance of the scientific and medical knowledge which is current at the time the report is prepared. Periodical evaluations of the committee's compliance with the following division of research materials shall be conducted by the United States Office of Government Ethics (OGE). The committee issuing the information and guidelines shall use as a basis for the scientific and medical knowledge at most one third of each of the following combined or separate groups:

- (i) of industry, corporate, or otherwise privately funded sources, reports, studies, or data;
- (ii) of university-funded and university-conducted research, reports, studies, or data; and

- (iii) of independent clinical data, reports, studies, or data from institutions or individuals that have no financial or professional interest in any industry, corporation, or other private party under subsection (a)(2)(i);
- (3) The members of the federal advisory committee on dietary guidelines shall be composed of the following fifteen members:
- (a) One General Internist, who, for the purpose of this statute, shall be defined as a licensed physician specialized in and board certified in the U.S. by the American Board of Medical Specialties in internal medicine, and who has published at least five medical papers about nutrition science or nutrition therapy in peer-reviewed medical journals;
 - (b) One Geriatrician, who, for the purpose of this statute, shall be defined as a licensed physician specialized in and board certified in the U.S. by the American Board of Medical Specialties in geriatrics;
 - (c) One Pediatrician, for the purpose of this statute, shall be defined as a licensed physician specialized in and board certified in the U.S. by the American Board of Medical Specialties in pediatrics, and who has published at least five medical papers about nutrition science or nutrition therapy in peer-reviewed medical journals specifically relating to the nutrition of children and adolescents;
 - (d) One Endocrinologist, for the purpose of this statute, shall be defined as a licensed physician specialized in and board certified in the U.S. by the American Board of Medical Specialties in endocrinology, and who holds a Master of Science degree from an accredited university in the U.S. in nutrition;
 - (e) One Cardiologist, for the purpose of this statute, shall be defined as a licensed physician specialized in and board certified in the U.S. by the American Board of Medical Specialties in cardiology; and who has published at least five medical papers about nutrition

science or nutrition therapy as they relate to heart-health in peer-reviewed medical journals;

- (f) One Gastroenterologist, for the purpose of this statute, shall be defined as a licensed physician specialized in and board certified in the U.S. by the American Board of Medical Specialties in gastroenterology, and who has published at least five medical papers about nutrition science or nutrition therapy relating to diet-related diseases or food allergies in peer-reviewed medical journals;
- (g) One Nutritionist, who for the purpose of this statute, shall be defined as a licensed nutritionist holding a Master of Science degree and a Ph.D. in nutrition or nutrition science from an accredited university in the U.S., and who has published at least five medical papers about nutrition science or nutrition therapy relating to diet-related diseases in peer-reviewed medical journals;
- (h) One Pharmacist, who for the purpose of this statute, shall be defined as a licensed pharmacist holding a Master of Science degree and a Ph.D. in nutrition or nutrition science from an accredited university in the U.S., and who has published at least five medical papers about the interactions of food and medicine in peer-reviewed journals;
- (i) One Agricultural Scientist, who for the purpose of this statute, shall be defined as a person holding a Master of Science degree and Ph.D. in agricultural science or agronomy from an accredited university in the U.S., and who has published at least five articles or papers relating to agriculture in peer-reviewed journals, and who can demonstrate a comprehensive understanding in biosafety and sustainable agriculture;
- (j) One Environmental Scientist, who for the purpose of this statute, shall be defined as a person holding a Master of Science degree and Ph.D. in environmental science or ecology from an accredited university in the U.S., and who has published at least five articles

or papers relating to agriculture and food production in peer-reviewed journals;

- (k) One Physiologist, who for the purpose of this statute, shall be defined as a person holding a Master of Science degree and Ph.D. in biology from an accredited university in the U.S., and who has published at least five articles or papers relating to human physiology;
- (l) One Administrative Lawyer, who for the purpose of this statute shall be defined as a person holding a J.D. from an accredited law school in the U.S. licensed to practice law by the American Bar Association, and who is specialized in the branch of public law specifically related to administrative law, regulatory law, or legislation, and who has published at least five articles in law reviews, law journals, or other scholarly journals focusing on legal issues related to consumer protection, products liability, torts, or food law;
- (m) One representative from the Food and Agriculture Organization of the United Nations (FAO), who for the purpose of this statute shall be defined as a person who is listed by the United Nations as a task force secretary; and
- (n) One Ethical Advisor to the federal advisory committee, who for the purpose of this statute shall be defined as a person holding a Master of Arts degree and a Ph.D. in philosophy or ethics specialized in applied ethics as it relates to food or animal law;

(b) Approval by Secretaries

(1) Review

Any Federal agency that proposes to issue any dietary guidance for the general population or identified population subgroups shall submit the text of such guidance to the Secretaries for a sixty-day review period and the federal advisory committee issuing the dietary guidance shall include with the dietary guidance

- (i) detailed explanations and justifications for each recommendation issued;
- (ii) one set of projections for disease prevention and health promotion that the recommendation in (b)(1)(i) supports;
- (iii) a report and data sets for diet-related diseases nation-wide of the past year of the population's general and specific adherence to the previously issued guidelines; and
- (iv) national data for rates of and deaths due to obesity, cancer, heart disease, diabetes, autoimmune disorders, and allergy rates assessments projected to result from the population's adherence to the guidelines;

(2) Basis of review

(A) In general

During the sixty-day review period established in paragraph (1), the Secretaries shall review and approve or disapprove such guidance to assure that the guidance either is consistent with the "Dietary Guidelines for Americans" or that the guidance is based on medical or new scientific knowledge which is determined to be valid by the Secretaries. If after such sixty-day period neither Secretary notifies the proposing agency that such guidance has been disapproved, then such guidance may be issued by the agency. If both Secretaries disapprove of such guidance, it shall be returned to the agency. If either Secretary finds that such guidance is inconsistent with the "Dietary Guidelines for Americans" and so notifies the proposing agency, such agency shall follow the procedures set forth in this subsection before disseminating such proposal to the public in final form. If after such sixty-day period, either Secretary disapproves such guidance as inconsistent with the "Dietary Guidelines for Americans" the proposing agency shall—

- (i) publish a notice in the Federal Register of the availability of the full text of the proposal and the preamble of such proposal which

shall explain the basis and purpose for the proposed dietary guidance;

(ii) provide in such notice for a public comment period of thirty days; and

(iii) make available for public inspection and copying during normal business hours any comment received by the agency during such comment period.

(B) Review of comments

After review of comments received during the comment period either Secretary may approve for dissemination by the proposing agency a final version of such dietary guidance along with an explanation of the basis and purpose for the final guidance which addresses significant and substantive comments as determined by the proposing agency.

(C) Announcement

Any such final dietary guidance to be disseminated under subparagraph (B) shall be announced in a notice published in the Federal Register, before public dissemination along with an address where copies may be obtained.

(D) Notification of disapproval

If after the thirty-day period for comment as provided under subparagraph (A)(ii), both Secretaries disapprove a proposed dietary guidance, the Secretaries shall notify the Federal agency submitting such guidance of such disapproval, and such guidance may not be issued, except as provided in subparagraph (E).

(E) Review of disapproval

If a proposed dietary guidance is disapproved by both Secretaries under subparagraph (D), the Federal agency proposing such guidance may, within fifteen days after receiving notification of such disapproval under

subparagraph (D), request the Secretaries to review such disapproval. Within fifteen days after receiving a request for such a review, the Secretaries shall conduct such review. If, pursuant to such review, either Secretary approves such proposed dietary guidance, such guidance may be issued by the Federal agency.

(3) Limitation on definition of guidance

For purposes of this subsection, the term "dietary guidance for the general population" does not include any rule or regulation issued by a Federal agency.

(4) "Identified population subgroups" defined

For purposes of this subsection, the term "identified population subgroups" shall include, but not be limited to, groups based on factors such as age, sex, or race.

(c) Existing authority not affected

This section does not place any limitations on—

- (1) the conduct or support of any scientific or medical research by any Federal agency;
- (2) the presentation of any scientific or medical findings or the exchange or review of scientific or medical information by any Federal agency; or
- (3) the authority of the Food and Drug Administration under the provisions of the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 *et seq.*]. . . .

APPENDIX 2

United States Code Annotated

Title 18. Crimes and Criminal Procedure

Part I. Crimes

Chapter 11. Bribery, Graft, and Conflicts of Interest

18 U.S.C. § 208 ACTS AFFECTING A PERSONAL FINANCIAL INTEREST

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest— Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply—

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, if

(i) at a hearing before the United States Office of Government Ethics, the employee can rebut the presumption by a preponderance of the evidence that the financial interest disclosed under subpart (b)(1) does not cause a conflict of interest; and

(ii) a panel of at least five members of the United States Office of Government Ethics conclusively determines that no conflict of interest exists;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies; or

~~(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or~~

~~(4)~~ (3) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights—

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States, if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c)(*unaltered*)