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## Obesity: We've Got to Do a Lot More!

Good afternoon. I'm honored to be part of this panel and this conference which focuses on one of America's greatest health threats.

Considering how many talks you've already heard, I don't think I need to say anything more about the magnitude of the obesity problem. But I would only add that obesity is not the only diet-related health concern. Heart disease, stroke, cancer, and other illnesses are also major problems.

Like an alcoholic who is ready for treatment, the government's first step in fighting diet-related health problems should be to recognize its own culpability. For instance,

- Farm policies are extraordinarily expensive, but utterly fail to promote practices that would result in healthier diets. Indeed, the Department of Agriculture has been mandated to facilitate promotion programs that encourage people to eat foods high in saturated fat.
- In 1981, Congress forced the Federal Trade Commission to abandon its efforts to restrict junk-food advertising on children's television.
- Congress requires that schools offer whole milk as part of lunches and has denied USDA the authority to limit the sale of junk foods in schools.
- The FDA took almost ten years to require trans fat to be listed on food labels, a delay that probably caused at least 50,000 premature deaths. Despite evidence that sugary foods like soft drinks contribute to obesity, the FDA has declined to include refined sugars in the Nutrition Facts label.

One gauge of the seriousness of the government's war against obesity is what the current general of the war is saying. In 2001, when the Surgeon General's "Call to Action" was published, Secretary of Health and Human Services Tommy Thompson said: "it prompts all communities to make changes that promote healthful eating and adequate physical activity. ... I wholeheartedly support *The Surgeon General's Call To Action* ... and I urge all of us to work together to achieve its ambitious and essential vision."

Today, though, Secretary Thompson has trimmed his sails. He has evinced no interest in pressing for regulatory changes, but apparently believes that private jawboning with food companies and handing out awards for good deeds will solve the problem. He said on a recent national TV show: "Once you start giving out awards for a particular company, a particular fast

food industry recipient or a soft drink, I think the other ones are going to say, 'you know, I want the award next time and I'm going to do more to get it.' I think it's much better to be on the positive side than the negative side."

Our government's response to the war on obesity, a condition that contributes to up to several hundred thousand deaths a year, is the equivalent of sending Cub Scouts armed with populus to fight foreign wars. Can you imagine Defense Secretary Rumsfeld saying that the way to fight terrorism is to give awards to the nicest members of the Taliban? Surgeon General Satcher didn't say talk nicely. He said TAKE ACTION!

America's major commitment on the obesity front is not fighting it, but measuring it. Thus, year after year we get new figures on the increased dimension of the problem, but little effort to adopt policies and sponsor programs to reverse the trend. Of course, the reasons are obvious. The food, restaurant, and farming industries would be up in arms if the government ever proposed serious measures...and the right-wing anti-government types, in and out of government, would be up in arms if the government wanted to sponsor well-funded programs. It's OK to spend fifteen to twenty billion dollars on farm programs, but not to protect the public's health.

That said, to be fair, I do want to acknowledge several of the government's initiatives beyond awards.

- NIH is sponsoring research on weight-loss diets, which is certainly useful.
- CDC is pilot testing a media campaign to encourage kids to be more active—but whether the campaign will ever be rolled out nationally—and expanded to include nutrition—is questionable. I suspect that CDC finds it difficult to mount hard-hitting nutrition campaigns, because they would encourage people not just to eat more of certain foods—like vegetables and whole grains—but <u>less</u> of such foods as hamburgers, hot dogs, and soda pop.
- NCI spends about \$4 million a year promoting its 5 A Day campaign to promote better nutrition—a pathetic amount considering the magnitude of the problem. The food industry as a whole spends *billions* of dollars a year promoting unhealthful foods. In fact, typical nationally marketed food products—be they candies or breakfast cereals or soft drinks—are backed by tens of millions of dollars of advertising. Four million dollars won't move the needle.
- FDA has held meetings on food labeling and obesity—but will probably end up proposing only minor, if any, changes. I hope the agency will prove me wrong.
- USDA's Food Triangle and the Dietary Guidelines for Americans are being revised—but the new versions will have about as little impact as the previous ones. After all, the government does virtually nothing to promote the messages in those documents and implement policies that would improve the quality of the

food supply. USDA has always been highly allergic to criticizing foods, like meat and cheese, that contribute to diet-related illnesses, but the current department is even more allergic because of all the top officials who used to work for the beef, pork, and dairy industries.

I don't have the surefire answer to preventing obesity, or treating it. In fact, obesity, like pollution, might be an inevitable consequence of life in wealthy, modern societies where food is cheap and physical activity avoidable. Obesity rates are soaring not just in the U.S., but also in Europe, Japan, and even China. It may be that people would rather be overweight than invest the effort necessary to prevent weight gain, even though that effort could consist largely of eating delicious, healthful foods and engaging in pleasurable activities.

But for the sake of the public's health, I think that government needs to make a serious effort to prevent weight gain and other diet-related health problems. And the government needs to employ tools more effective than the populus which it has used until now. Let me make a few suggestions.

The food label is natural device to use to promote health. Nutrition labeling has been a boon to millions of people who have to watch their sodium, fiber, or saturated fat. But it is complicated and not the easiest device for many people to use. The FDA, Congress, or state government should add three new types of labeling:

- The first would be a voluntary program based on a "good food" symbol. The American Heart Association and similar groups abroad have sponsored "heart-check" programs that use such a symbol. The groups have established criteria for healthful foods and then licensed their symbols to food companies for use on qualifying products. Similarly, the Swedish government has defined criteria for certain categories of food that allow companies to use, for no charge, a special "keyhole" symbol on suitable products. For example, Sweden requires breads to be 100% whole grain and contain a certain amount of fiber, while milk must not contain more than 1% fat. I'd quibble with some of the heart association's and Sweden's criteria, but the concept of those programs is right on target. Anyone—a child, non-English-speaking immigrant, or harried soccer mom—could go shopping and identify some of the best foods by looking for the symbol.
- The second labeling program would target products that are the most conducive to health problems. The FDA and USDA should require foods that are high in saturated and trans fat, sodium, or refined sugars to bear a special alert on the front labels. Such a symbol would alert shoppers that a food is rich in the things that should be consumed less often or in smaller quantity.
- The third improvement would recognize that Americans are getting almost half their calories outside the home—from restaurants, cafeterias, and vending machines—where there is little or no nutrition information. I wouldn't expect

menu boards at McDonald's to provide full nutrition labeling of each item. But it would be easy for fast-food restaurants to list calorie content right next to each item on menu boards and signs. It would be easy for table-service chain restaurants—like Red Lobster or Denny's—to list calories, saturated fat, and sodium next to each item. Indeed, despite the National Restaurant Association's protestations to the contrary, some restaurants, like Baja Fresh and Olive Garden, already provide nutrition information for some of their healthier items. If the capitalist system thrives on informed customers making decisions in a free marketplace, a modicum of nutrition information should be considered essential not just by health officials, but also by *political conservatives*. Bills to achieve restaurant labeling have been introduced in both Houses of Congress and five state legislatures.

No matter how food labeling is improved, however, it can never solve the diet/health problem on its own. Rather, labeling should be viewed as just one element of a comprehensive public health strategy. Some other key elements include:

- barring junk-food ads on children's television. It is simply unfair—both morally and legally—to try to persuade kids to want foods that, over the long run, are bad for their health.
- Also, our public schools should be offering only healthful meals. It is outrageous that school officials, in league with soft-drink, fast-food, and vending-machine companies, encourage children placed in their care for six or more hours a day to eat junk foods. We're seeing some progress on this front at the state and local level, but Congress is beholden to industry lobbyists.
- Government should take action on the Institute of Medicine's concerns about the causation of heart disease by saturated and trans fats. Currently, hamburgers and hot dogs are limited to 30 percent fat. That limit should be reduced by at least one-fourth. On the trans-fat front, the FDA is requiring better labeling, and that will certainly spur many companies to reduce or eliminate trans fat from their products. Frito-Lay, Legal Sea Food, Au Bon Pain, McDonald's, and other companies are moving in that direction—and they seem to be trying to reduce the overall content of trans plus saturated fats. But government can and should do more to protect the public's health. Denmark, for instance, has limited trans fat to two percent of a food's fat content.
- Next, government should be spending not several million dollars a year, but several *hundred* million dollars, on campaigns to encourage people to eat more fruits, vegetables, and whole grains and less meat, soft drinks, and cheese. CSPI has conducted several studies that prove that mass-media and public-relations campaigns can move people from high-fat to low-fat milk. Healthy-eating campaigns work, if done correctly.

There are other things too, like:

- building more swimming pools, bike paths, and basketball courts, especially in poor neighborhoods;
- devising ways in which health insurance would reward healthy lifestyles;
- funding schools to provide much more physical education than they do today; and
- Finally, we need to consider taxing foods that cause health problems. Not the kind of taxes placed on alcohol and tobacco, but smaller taxes that would have little effect on consumption but that could raise substantial revenues for health programs. Just a penny per can tax on soda could raise \$1.5 billion; taxes on foods high in saturated fat could raise more.

All of these approaches have been supported by the World Health Organization in its draft Global Strategy on Diet, Physical Activity, and Health. Unfortunately, while Secretary Thompson has publicly called for action, his office is privately working closely with lobbyists representing the Grocery Manufacturers of America to pressure the WHO Executive Board next week to keep the draft strategy just that – a draft that will sit on a dusty bookshelf in the WHO library in Geneva.

Here in the U.S., I don't expect quick action from Congress. But I do predict that some cities or states will take action on school foods and restaurant menus.

Voluntary action by the food industry will be essential to improving the public's health. ... and several companies have generated a lot of attention by improving the nutritional quality of some of their products. However, they've also introduced unhealthful new products, which may even outnumber the salads and fruit cups. For instance:

- Subway—the "healthy" fast-food joint"—has introduced a wrap featuring bacon and cheese that provides 430 calories and about half a day's worth of saturated fat.
- Au Bon Pain, which bragged about eliminating trans fat from its muffins, is now offering Krispy Kreme doughnuts in some of its restaurants.
- Hardee's has introduced Thickburger sandwiches that provide \( \frac{1}{3} \) or \( \frac{2}{3} \) of a pound of fatty ground beef and as many as 1,200 calories.
- McDonald's salads are welcome, but its McGriddle sandwiches have as much as half a day's worth of fat, saturated fat, and sodium.
- International House of Pancakes has introduced French toast stuffed with cream

cheese, fat new Super Stacker sandwiches, and all-you-can-eat pancakes.

- Denny's is offering its Meatlover breakfast, with two eggs, two sausages, two bacon strips, ham, hash browns, and three pancakes.
- And the National Cattleman's Beef Association is hoping that Americans will eat Cheeseburger fries—which, according to the New York Times, "are made of a meat-and-cheese compound that tastes like a cheeseburger."

No, Virginia, foodmakers are not solely concerned about your health.

To make faster progress on the nutrition front, people concerned about health should avail themselves not only of the legislative branch of government, but also the judicial. As John Banzhaf has said, if the legislators won't legislate, then the litigators will litigate. As you attorneys know, litigation isn't always negative. Litigation can promote change in a very positive way. Many important social changes in our society have been prompted by litigators and plaintiffs willing to suffer public criticism to achieve what is right. Frankly, when the food industry decries the horrors of litigation, I immediately think of McDonald's self-destructive lawsuit against two hippies in London and its more recent \$25 million suit against an Italian food critic who said McDonald's burgers tasted like rubber and its fries like cardboard.

To date, two kinds of lawsuits have been filed. Most of them—perhaps a dozen in the past few years—focus on deceptive labeling or advertising. One successful suit targeted McDonald's for advertising that it used pure vegetable oil, when, in fact, the oil contained a little beef flavoring. McDonald's settled that dispute for \$12.5 million, with \$10 million going to cy pres awards to groups concerned about vegetarianism, children's nutrition, and the like. The size of that settlement really grabbed the attention of corporate executives and Wall Street. Lawsuits also have been filed against Smuckers, Pirate's Booty, Gerber, and others.

Some such lawsuits may be derided for just making lawyers rich, but at a time when government is sitting on its hands, litigation focusing on deceptive practices promotes honesty in the marketplace. However, most of those suits won't have a major role in promoting health.

Other lawsuits might.

Last May, a California attorney sued Kraft Foods for not declaring that Oreos cookies contained trans fat. Trans fat, of course, may be the nastiest thing in the food supply—even worse, by some measures, than saturated fat. The upshot of the case was that Kraft said it would review the Oreos recipe and try to eliminate the trans fat. The lawyer then withdrew his suit. That case wasn't about the money, but about exposing the presence of— and trying to get rid of— trans fat in a popular food consumed by millions of children.

I could envision other lawyers upping the ante on trans fat. Could one not contend that

companies—especially restaurants, which don't have ingredient labeling— whose foods contain significant amounts of trans fat are derelict because they were making products that are more dangerous than they needed to be? They are failing to affirmatively provide a clear and conspicuous disclosure of "material facts"—facts that might affect a purchasing decision by a reasonable consumer.

The most publicized lawsuit was filed in New York City on behalf of teenagers who charged that a constant diet of McDonald's foods caused them to become obese. It scared the bejeebers out of companies by raising the possibility that chain restaurants—and perhaps other companies—could be sued for marketing high-calorie products, like double cheeseburgers and quart-sized Cokes. And don't raise the defense of "everyone knows that's bad for you." That mantra doesn't cover hidden trans fats, calorie counts of a thousand or two thousand, and ingredients that only a chemist could love.

The judge took the McDonald's case very seriously, at one point even providing the plaintiffs' attorney with a blueprint for a better complaint. The plaintiffs ultimately lost, but that suit spurred numerous food purveyors, not just McDonald's, to introduce a few new healthier products and a little more nutrition information. The lawsuit also got companies that market high-calorie foods to run to legislators for protection. Louisiana passed a law banning suits against companies whose products allegedly cause obesity, and similar bills have been introduced in Congress.

• The third important lawsuit was filed about 20 years ago in California state court. It charged General Foods with undermining children's health by advertising high-sugar cereals on child-oriented TV shows. The state Supreme Court ruled that the plaintiffs had standing. After that battle, the parties settled, with General Foods providing a \$2 million cy pres award to establish an organization concerned about children's nutrition. Considering that the Federal Trade Commission and Congress are not about to take on the issue of advertising to kids, I hope that a lawyer in California or elsewhere will use the General Foods case as a roadmap for targeting some of the most inappropriate advertising around.

Considering the major contribution of food to obesity and other major health problems, and considering government's inactivity, I suspect that many more lawsuits will be filed against food processors, broadcasters, fast-food restaurants, and school boards in the next few years. The grounds will vary, from deceptive advertising and labeling, to failure to disclose material facts on labels, to failure to protect children's health in schools, to unfair advertising to young children. All in all, I think this is going to be a thriving area of law. *And it should be*, because the bottom line is that the rate of obesity in children has tripled, more than half of American adults are overweight or obese, and half a million Americans are dying prematurely due to their diet and lack of physical activity. And government and industry are not doing enough on their own to attack the problem.