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**Model Legislation Requiring a Safety Warning for Sugar-Sweetened Beverages**

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## Report on the Obesity Epidemic and Safety Warnings

This Report examines the current obesity epidemic and the prevalence of chronic disease in the United States. It also analyzes the role of sugar-sweetened beverages (SSBs) as one of the primary contributors to both. Although the United States faces an obesity epidemic clearly identified by scientific research, the study of SSBs remains an emerging science. This Report presents the existing research on obesity, chronic disease, and SSBs; it also outlines one potential strategy to reduce high rates of obesity and diabetes across the United States. This Report is meant to spur discussions about this strategy and other policy and programmatic work to increase access to healthy food and beverage options, and readers should draw their own conclusions about how the obesity epidemic should be addressed.

### The Obesity Epidemic and Chronic Disease

In the United States, more than two-thirds of adults[[1]](#endnote-1) and nearly one-third of youth ages two to 19 years[[2]](#endnote-2) are overweight or obese. Over the last 30 years, obesity and overweight rates have soared in all age groups, but particularly among children: rates have more than doubled for preschoolers and more than tripled for children and adolescents ages six to 19.[[3]](#endnote-3),[[4]](#endnote-4) However, after decades of steady increase, adult[[5]](#endnote-5) and childhood[[6]](#endnote-6) obesity rates have started to level off. In addition, between 2008 and 2011, 18 states reported statistically significant decreases in obesity rates for low-income preschoolers.[[7]](#endnote-7)

Nonetheless, obesity rates remain staggeringly high, especially for low-income people and people of color. African-American and Latino adults have higher obesity and overweight rates than the general U.S. population.[[8]](#endnote-8) Similarly, 21 percent of Latino children and adolescents and 24 percent of African-American children and adolescents are obese, compared with 14 percent of white children.[[9]](#endnote-9) Variation in obesity rates across income is complex, but generally obesity rates decline among both adults and children as income increases.[[10]](#endnote-10),[[11]](#endnote-11)

The rise of obesity and overweight over the last three decades corresponds to increases in calorie consumption. On average, American adults consume as many as 570 more calories per day than they did 30 years ago – an increase of more than 30 percent.[[12]](#endnote-12) Children are also consuming more calories: on average, they consume about 108 more calories per day over the same period, which is an increase of approximately six percent.[[13]](#endnote-13)

This increased calorie consumption has not been offset by increases in physical activity. In fact, less than one-half of adults[[14]](#endnote-14) and less than one-third of adolescents[[15]](#endnote-15) in the United States meet the recommended physical activity guidelines of 150 minutes a week and one hour a day, respectively.[[16]](#endnote-16) A recent analysis of NHANES data suggests that inactivity has been driving the obesity epidemic at least as much as increased calorie consumption.[[17]](#endnote-17) Two other recent studies found that some of the deleterious health effects of fructose could be offset by increases in physical activity (e.g., walking at least 12,000 steps per day).[[18]](#endnote-18)

Overweight children and adults are at greater risk for numerous adverse health consequences, including type 2 diabetes, heart disease, stroke, high blood pressure, high cholesterol, certain cancers, asthma, low self-esteem, depression, and other debilitating diseases.[[19]](#endnote-19)

### Consumption of Sugar-Sweetened Beverages

Sugar-sweetened beverages (SSBs) are beverages that contain added caloric sweeteners (of any kind) and include sweetened fruit juices, fruit drinks,[[20]](#endnote-20) carbonated sodas, sports drinks, energy drinks, and flavored milks.[[21]](#endnote-21) Between 1977 and 2001, calorie intake from SSBs increased 135 percent for all age groups.[[22]](#endnote-22) While overall SSB consumption has decreased in recent years, particularly among children and adolescents,[[23]](#endnote-23) consumption rates remain high. On any given day, roughly half of the American population over age two drinks at least one SSB, and 25 percent consume at least 200 calories from SSBs.[[24]](#endnote-24) One study by the Centers for Disease Control and Prevention found that 63 percent of high school students report consuming at least one SSB daily.[[25]](#endnote-25) In another study, 81 percent of children ages six to 11 consumed at least one SSB on the surveyed day.[[26]](#endnote-26)

The most common SSBs consumed by children and adolescents are fruit drinks and non-diet carbonated soft drinks.[[27]](#endnote-27) Disparities in obesity rates by income and race/ethnicity are mirrored in SSB consumption patterns. African-Americans and Mexican-Americans report consuming more SSB calories than white people for both sexes and most age groups.[[28]](#endnote-28)

Close to 50 percent of SSB calories consumed by all ages are consumed outside the home. Of the SSBs consumed outside the home, 43 percent are purchased in stores, about 36 percent are purchased in restaurants (including fast food restaurants), and about 20 percent are purchased at places like vending machines, street vendors, and cafeterias.[[29]](#endnote-29) SSBs are sold by a wide variety of retail establishments – not just by food retailers. One survey of more than one thousand retail stores in the United States whose primary merchandise was not food found that 20 percent sold SSBs, often within arm’s reach of the cash register.[[30]](#endnote-30),[[31]](#endnote-31)

Although children and adolescents have lower out-of-home SSB consumption rates than adults, as much as 45 percent of the calories from SSBs and fruit juices consumed by youth are consumed outside the home.[[32]](#endnote-32) Adolescents who live near food retailers are more likely to purchase and consume SSBs daily.[[33]](#endnote-33) This association holds true for a variety of retailers, including convenience stores, grocery stores, and restaurants (including fast food restaurants).[[34]](#endnote-34) Adolescents often make these purchases before and after school, both alone and while with friends.[[35]](#endnote-35) Young adolescents are buying and consuming SSBs, too. A study of fourth through sixth grade students who shopped at corner stores before and after school found in a Philadelphia neighborhood that SSBs accounted for over 88 percent of all beverage purchases.[[36]](#endnote-36)

While a range of dietary factors may contribute to obesity, the growing body of evidence shows that the SSBs have become a significant portion of an individual’s calorie intake and daily diet.

### The Role of Sugar-Sweetened Beverages in Obesity

Scientific research linking obesity and sugar-sweetened beverages has emerged over the last decade. Although the majority of studies report a link between the consumption of SSBs and obesity, some studies have found no link between SSB consumption and obesity. As new research continues to emerge, public health professionals must be prepared to consider the most recent scientific findings and adapt policy strategies accordingly.

SSBs have contributed significantly to the increase in calorie intake over the past three decades.[[37]](#endnote-37) Although the majority (59%) of the added sugar calories in the diets of children and adolescents come from foods,[[38]](#endnote-38) SSBs are the single leading source of added sugar in the diets of children, adolescents and adults.[[39]](#endnote-39) SSBs don’t cause a feeling of satiety (and are therefore consumed in addition to, not in place of, other calories) and often lack any nutritional value.[[40]](#endnote-40)

Research has consistently found that SSB consumption is associated with long-term weight gain and increased obesity rates among adults, children, and adolescents.[[41]](#endnote-41),[[42]](#endnote-42),[[43]](#endnote-43),[[44]](#endnote-44) The converse is also true: intervention research suggests that reductions in SSB consumption are significantly associated with weight loss.[[45]](#endnote-45),[[46]](#endnote-46) Associations between soda consumption and overweight have been found in children as young as two years old; one study found that a two-year-old who consumed at least one soda a day had a threefold greater chance of being overweight than a toddler who consumed no soda.[[47]](#endnote-47)

Among adults specifically, SSB consumption consistently correlates with an increased risk of chronic diseases such as diabetes,[[48]](#endnote-48),[[49]](#endnote-49),[[50]](#endnote-50),[[51]](#endnote-51),[[52]](#endnote-52) metabolic syndrome,[[53]](#endnote-53) and heart disease.[[54]](#endnote-54),[[55]](#endnote-55) Diet intervention studies have shown that increasing consumption of sugar-sweetened beverages in otherwise healthy adults increases their risk for cardiovascular disease and diabetes in as little as two weeks.[[56]](#endnote-56) A study of youth with type 1diabetes found that increased consumption of sugar-sweetened beverages correlated with increased risk of developing cardiovascular disease.[[57]](#endnote-57) SSB consumption in children is also associated with dental caries,[[58]](#endnote-58),[[59]](#endnote-59) asthma,[[60]](#endnote-60) decreased milk consumption,[[61]](#endnote-61),[[62]](#endnote-62),[[63]](#endnote-63) and inadequate intake of nutrients, including calcium, iron, folate, magnesium, and vitamin A.[[64]](#endnote-64),[[65]](#endnote-65),[[66]](#endnote-66),[[67]](#endnote-67)

A small number of published studies have reported no statistically significant association between SSB consumption and adverse health outcomes. For example, a meta-analysis of 12 studies of SSB consumption and weight gain among children and adolescents found no significant association.[[68]](#endnote-68) Similarly, a risk analysis found no relationship between BMI and consumption of soda sold in vending machines in schools.[[69]](#endnote-69) Two studies analyzing different federal data sets also reported no negative association between SSB consumption (specifically soda) and calcium intake.[[70]](#endnote-70),[[71]](#endnote-71) Much of the published research reporting no adverse effect of SSB consumption on nutrition and health – including the studies cited herein—is funded by the beverage industry. Studies examining the effect of funding source on reported findings has found potential biases in conclusions reached.[[72]](#endnote-72) For example, one systematic literature review found that studies funded by the food industry were five times more likely to find no association between SSB consumption and weight gain or obesity.[[73]](#endnote-73) While the weight of the current research reports a significant association between SSB consumption and negative health effects, this research is part of an emerging area of science.

As set forth above, many factors contribute to the obesity epidemic, including lack of physical activity, poor overall diet, and consumption of SSBs. No single solution can address all of these factors at once. However, because the current weight of evidence suggests that SSB consumption contributes to high rates of diabetes and other chronic diseases, as well as overweight and obesity among all age groups, policy and programmatic solutions that reduce SSB consumption are potential strategies to address these pressing issues.

### Requiring a Safety Warning to Educate Consumers

As noted above, a collection of strategies is necessary to reduce SSB consumption and address health problems associated with SSB consumption. As part of a multipronged effort to reduce obesity and chronic disease, many communities are exploring a range of approaches to reduce SSB consumption. These approaches include creating health education campaigns, organizing wellness initiatives, limiting sales of SSBs on government property, restricting sales of SSBs in schools, taxing SSB sales, and retail-based strategies such as limiting SSB portion sizes. A discussion of the variety of approaches to restricting SSB consumption can be found on our website at: [*www.changelabsolutions.org/publications/SSB-playbook*](http://www.changelabsolutions.org/publications/SSB-playbook)*.*

A policy requiring a safety warning on SSB containers and packaging would alert consumers of the health effects of sugary drinks. It would also complement other programs and policies by providing consumers with information to make informed choices. The safety warning would be visible to consumers when they are deciding whether to purchase a SSB and would therefore help them consider the health effects associated with consuming these beverages.

#### Public Awareness of the Health Impacts of Consuming Sugar-Sweetened Beverages

There is very little published research about public awareness of the negative health effects of consuming SSBs. One national study found that 91 percent of respondents knew that frequent SSB consumption increases the risk of obesity.[[74]](#endnote-74) However, that same study found that fewer respondents knew that obesity is related to diabetes, heart disease, asthma, hypertension, and cancer.[[75]](#endnote-75) Another survey found that knowledge about the connection between SSB consumption and weight gain varies significantly by race/ethnicity, education, and income; the survey determined that women, non-Hispanic whites, college graduates, and those with higher incomes have the most comprehensive knowledge of this connection.[[76]](#endnote-76)

Research suggests that health knowledge can influence SSB consumption. For example, one study found a negative association between knowledge of daily calorie intake recommendations and SSBs consumed.[[77]](#endnote-77) Another study found that health literacy successfully predicts SSB consumption.[[78]](#endnote-78) A more recent study found that when participants were provided with an effective way to understand the amount of sugar in a SSB (e.g., with sugar cubes as a visual representation rather than sugar just listed in grams), they found SSBs less appealing and were less likely to choose to drink a SSB.[[79]](#endnote-79)

Public opinion polling suggests that Americans would like to know more about the foods and beverages they consume. A 2012 Associated Press poll found that 79 percent of respondents thought that lack of information about what is in food contributes to high rates of overweight and obesity.[[80]](#endnote-80) In the same poll, 83 percent of respondents favored government policies that provide the public with information about how to make healthy diet choices.[[81]](#endnote-81) Another poll found that when Americans purchase food or beverages, they look at four elements of food and beverage packaging on average; expiration date, nutrition facts panel, and ingredients list are the most reviewed information.[[82]](#endnote-82)

#### Efficacy of Health Warning Labels

Scientific evidence demonstrates that health warnings can increase knowledge of health risks and reduce consumption and use of unhealthy products. Evidence also suggests that signs and labels at point of purchase impact buying behavior. These strategies have been part of successful prevention efforts for products such as tobacco and alcohol; however, it is difficult to measure the effect of the warnings independently of the other policy and programmatic efforts implemented concurrently. Nonetheless, studies indicate that prominent health warnings on the face of cigarette packages can increase health knowledge and perceptions of risk, promote smoking cessation among both youth and adults, and discourage nonsmokers from wanting to smoke.[[83]](#endnote-83),[[84]](#endnote-84) Research on alcohol warning labels has shown that pregnant women who drank minimally started drinking less alcohol after seeing a warning label.[[85]](#endnote-85) Studies on point of purchase programs have shown that signs, posters, and shelf tags encouraging healthier food options have resulted in increased sales of healthy food.[[86]](#endnote-86),[[87]](#endnote-87),[[88]](#endnote-88) There is already evidence that point of purchase health warnings impact SSB purchases: one study of black adolescents in Baltimore found that they were significantly less likely to purchase SSBs after exposure to signs about caloric information.[[89]](#endnote-89),[[90]](#endnote-90)

The beverage industry and its supporters routinely emphasize consumers’ personal responsibility to make healthy choices. In response to New York City’s proposed rule limiting portion sizes of SSBs to 16 ounces, several retailers publically responded: McDonald’s tweeted, “We trust our customers to make the choices that are best for them”;[[91]](#endnote-91) the American Beverage Association (ABA) stated, “Individuals are the ones with the power to choose what foods and beverages are right for them”;[[92]](#endnote-92) and the Center for Consumer Freedom created an ironic flyer that read, “You are too stupid to make good decisions about food and beverages.”[[93]](#endnote-93) The beverage industry acknowledges that health information is vital for making good personal choices. For example, the ABA released a statement saying they are “helping consumers make appropriate choices by providing easy access to calorie and nutrition information, promoting physical activity and product innovation.”[[94]](#endnote-94)

Despite making public statements supporting educated consumer choices, the beverage industry has opposed on-package and point of purchase warnings. For example, California law[[95]](#endnote-95) requires businesses to post clear warnings where products are sold that are known to the state to cause cancer or reproductive harm. The ABA issued a “Statement of Critical Issues re Proposition 65 Food Warnings” that raised a number of arguments against requiring on-package or shelf warnings for food, citing feasibility and practical concerns. The ABA also brought up the potential economic impact of requiring the warnings and the possibility that the warning might stigmatize foods that could be safely consumed.[[96]](#endnote-96)

More recently, in response to Senate Bill 1000 (which was introduced in the California Senate during the 2014 legislative session and would have required a warning statement on SSB packaging and at the point of sale)[[97]](#endnote-97), Californians for Food and Beverage Choice (CalBev, an affiliate of the ABA) issued a number of opposition fact sheets, organized lobbying efforts, and testified against the proposed legislation. In its official statement on the proposed law, CalBev cites a number of statistics indicating that the increase in calorie intake for Americans over the past four decades is attributable more to fats, starches, and oils than sugar, and that “calories from soft drinks played an even smaller role in this increase.”[[98]](#endnote-98) CalBev’s website also cites the “Calories Count” initiative, which was launched in 2010 and through which the beverage industry has voluntarily begun to put clear calorie information on the front of every beverage can and bottle.[[99]](#endnote-99)

There is no consensus regarding what type of on-package or point of purchase information would be most effective to educate consumers and help them make informed choices, and the voluntary efforts by the beverage industry should be monitored and evaluated to determine their effect on purchasing and consumption patterns. Likewise, the type of warning statement contemplated by this Model Legislation, if implemented, must also be monitored and evaluated to determine its efficacy.

### Legal Issues

Advocates and public health professionals considering an SSB warning label must be aware of at least two legal issues potentially implicated by a compelled warning label: (1) the impact of the federal Nutrition Labeling and Education Act and (2) protections afforded to commercial speech under the First Amendment to the U.S. Constitution. (Other state and constitutional legal issues must also be analyzed as well, but this Report focuses on these two areas of law, which pose the most significant and complex challenges in the context of this strategy.)

#### Federal Food Labeling Laws

The federal Nutrition Labeling and Education Act (NLEA) gives the U.S. Food and Drug Administration (FDA) authority to require labeling of food products in the United States. It expressly preempts certain state and local requirements related to various aspects of food labeling, including requirements related to the disclosure of allergens, health or nutrient content claims, and nutrition labeling.[[100]](#endnote-100)

A threshold question in determining whether an SSB warning label requirement might be preempted under the NLEA is whether such a warning constitutes “labeling”; under the NLEA, only “labeling” is preempted. A “label” is defined as both “a display of written, printed, or graphic matter upon the immediate container of any article”[[101]](#endnote-101) and a “written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) *accompanying* such article” (emphasis added).[[102]](#endnote-102) It is therefore possible that a warning on the shelf near an SSB would also be considered labeling under the NLEA. However, a warning on a product package is more likely to be considered “labeling.”

Even if a court were to find that an on-package or shelf warning label constitutes “labeling” under the NLEA, federal law only expressly preempts state and local regulations regarding the following:

 **1. Nutrition labeling of food.[[103]](#endnote-103)**

The term “nutrition labeling of food” is not defined by either the NLEA or its implementing regulations. The specific requirements of the FDA regulations governing nutrition labeling suggest that it means the type of quantitative nutrition information required to be disclosed by the NLEA through the Nutrition Facts Panel,[[104]](#endnote-104) which includes the levels of various nutrients—including calories, fat, protein, carbohydrates, and others—and the percent of the Daily Reference Value for various vitamins.[[105]](#endnote-105)

**2. Nutrient content claims and health claims.[[106]](#endnote-106)**

Though “nutrition labeling of food” appears to include only quantitative information, there are two types of qualitative claims specifically included in the NLEA’s preemption provision: (1) “nutrient content claims” and (2) “health claims.” A nutrient content claim is a “claim that expressly or implicitly characterizes the level of a nutrient of the type required to be in nutrition labeling” under the NLEA (e.g., “high in dietary fiber” or “low in sodium”).[[107]](#endnote-107) A health claim is “any claim made on the label or in labeling of a food, including a dietary supplement, that expressly or by implication . . . characterizes the relationship of any substance[[108]](#endnote-108) to a disease or health-related condition” (e.g., “diets high in calcium may reduce the risk of osteoporosis”).[[109]](#endnote-109) Health claims do not include general dietary guidance, such as statements that “address a role of dietary patterns or of general categories of foods” (e.g., fruits and vegetables).[[110]](#endnote-110)

Whether a statement warning about health risks on SSB packaging or at the point of sale would be preempted by the NLEA depends largely on the content of the warning. A carefully crafted statement that avoids the subjects reserved for federal authority (quantitative nutrition information, positive health claims, and nutrient content claims) stands the best chance of surviving a legal challenge; however, this issue would be resolved by a court of law if the law was challenged. It might be argued that a warning label requirement is a preempted “health claim” if it characterizes the relationship between sugar and diseases and health conditions such as diabetes and obesity. However, the NLEA’s implementing regulations provide a comprehensive list of the only health claims that may be made, and each is a claim relating to positive health outcomes or the reduction of disease risk.[[111]](#endnote-111) Whether the term “health claim” also encompasses “negative” health claims would ultimately be left to judicial interpretation or additional regulatory guidance from the FDA.

If an SSB safety warning does fall within the scope of NLEA preemption, it might also fall with an exception to preemption. The NLEA explicitly allows state or local requirements “respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or component of the food.”[[112]](#endnote-112) What constitutes a “warning concerning the safety of the food” is open to some interpretation: the NLEA contains no definition of “safety of the food” nor has the FDA provided interpretive materials on this safety warning exception.

At least two courts have examined whether specific types of safety warnings were preempted by the NLEA, and both cases were class actions seeking to impose civil liability on food manufacturers under state law. Both cases are trial court decisions and therefore would not be binding on future courts. *Mills v. Giant of Maryland* involved the lack of a warning about lactose in milk, and the court ruled that lactose intolerance didn’t implicate “safety” concerns.[[113]](#endnote-113) The other case, *In re BPA*, concerned the chemical BPA, which can be found in baby formula containers.[[114]](#endnote-114) That court noted that regulation of BPA fell under the FDA’s jurisdiction, and the FDA had found it safe. Thus, citing *Mills*, it concluded that there was “no basis upon which to invoke the safety exception to . . . preemption.”[[115]](#endnote-115)

Given the lack of agency guidance or binding judicial interpretation, it is difficult to predict what types of state-mandated warning labels would be permissible. The legislative history of the NLEA offers some guidance by providing examples of the types of warnings the policymakers contemplated. The law’s drafters believed states should be allowed to adopt laws to protect the safety of their citizens, and they alluded to California’s Proposition 65 when discussing the safety warning exception.[[116]](#endnote-116) Proposition 65 is California’s Safe Drinking Water and Toxic Enforcement Act, which requires warnings on products—including foods—that contain chemicals determined by the State to cause cancer or birth defects.[[117]](#endnote-117) The legislative history also suggests that state warnings regarding the possibility of an allergic reaction from a component of a food should not be preempted.[[118]](#endnote-118)

This Model Legislation would require a warning to alert consumers of the potential dangers of consuming beverages with high amounts of added sugars—namely, the risk of diabetes, obesity, and tooth decay, which have all been linked to SSB consumption through extensive research, as set forth above.

This Model Legislation is premised on an interpretation of the term “safety” that goes beyond foodborne illness and environmental toxins to include the health effects of consuming excessive amounts of liquid sugar, even if sugar can be consumed safely in small quantities by most people. This interpretation is suggested by not only the legislative history, but also the common meaning of the term “safety.” Ultimately, this issue may only be decided by a court of law or additional guidance from Congress or the FDA.

#### The First Amendment

The First Amendment to the U.S. Constitution limits the government’s ability to regulate many types of speech, including the government’s ability to require a corporation or business to “speak” (known as “compelled speech”). Requiring an industry to put a safety warning on products or post a warning on business premises would likely constitute compelled commercial speech that would be subject to a certain amount of First Amendment protection.

The law regarding compelled commercial speech is somewhat unsettled, and the outcome in a judicial challenge would depend in part on the particular judge considering the case. However, in a legal analysis of a compelled warning statement, the message itself must first be assessed; the content must be factual and not controversial. Although the government generally cannot require a corporation to express an opinion, it can require – within limits –a corporation to convey factual and uncontroversial information on behalf of the government. Because the compelled speech must be factual and uncontroversial, it is important that the substance of the safety warning is grounded in scientific and medical evidence and avoids expressing an opinion.

When compelled speech is factual and not controversial, the legal test that a court would apply is deferential to legislative determinations; in such cases, the compelled speech must be reasonably related to a legitimate government interest and not overly burdensome for the speaker.[[119]](#endnote-119)

Because judicial opinions differ on how the compelled speech doctrine should be applied, it is unclear whether a court would apply this deferential standard (or a stricter standard) if the warning requirement in the Model Legislation were to be challenged. Again, it would likely depend on the particular state in which the Model is implemented. If a court declines to apply the deferential legal test and instead reviews the law under a more exacting standard, the court is more likely to strike down the law. Regardless, the deferential nature of the compelled speech test, in combination with legal precedent allowing the government to require factual health warning labels for a variety of products – from cigarettes to drugs – suggests that the type of warning statement contemplated by this Model Legislation falls within the scope of factually noncontroversial “speech.”

## Conclusion

The United States faces a growing obesity epidemic that is contributing to chronic diseases such as diabetes, cardiovascular disease, and tooth decay. While there is no single cause for obesity, it is clear that a high calorie diet is a primary cause of obesity, even with physical activity. Research has shown that the consumption of SSBs is a growing part of an individual’s diet, and the high caloric intake from SSBs contributes to obesity and provides little nutritional value. As part of a larger effort, warning label requirements that provide consumers with the information they need to make informed choices can help reduce consumption of unhealthy beverages, reduce calorie intake, and curb development of chronic health conditions. Education has proved to help consumers make informed decisions, and a warning label policy can provide adequate information to educate consumers. Coupled with other policy and program interventions, this policy can form part of a comprehensive diabetes and obesity prevention strategy.

## Model Safety Warning Legislation

ChangeLab Solutions has developed this Model Legislation Requiring a Safety Warning for Sugar-Sweetened Beverages (“Model Legislation”) to articulate a prevention strategy to enhance consumer awareness of the adverse health effects associated with consumption of sugar-sweetened beverages (SSBs). Although this Model Legislation is designed to increase consumer awareness about the health effects of SSBs, reducing calorie intake will not completely offset the effects of a sedentary lifestyle. Advocates should consider policy approaches to increase physical activity as well as policies to reduce consumption of SSBs.

This Model Legislation would require a warning both on SSB packaging and in businesses at the point where an SSB is ordered or purchased to alert consumers of the link between SSBs and diabetes, obesity, and tooth decay. This Model Legislation focuses on SSBs (rather than food) because of the large body of research demonstrating that SSBs are closely associated with obesity and chronic disease; SSBs can be isolated as a distinct category of discretionary calories that can be targeted and reduced. However, policies aimed at reducing sugar intake through foods must be considered alongside policies to reduce SSB consumption. This Model Legislation includes a textual warning, but advocates may also want to consider a visual warning to complement the text.

### Adopting the Model Legislation

This Model Legislation is intended to be used as a template; the blanks should be completed as prompted and other revisions should be made to fit the enacting state’s particular code. Public health advocates will need to determine where this ordinance fits into the existing state code. In some instances, alternate language is offered or blanks are left open for the language to be customized to fit the needs of a specific state. In other instances, the options are mentioned in annotations (“comments”) following the legal provisions. Much of the language in this Model Legislation reflects policy choices and should be customized and adapted to meet the policy goals of the public health advocates in your state.

### Implementing the Model Legislation

Several government agencies will likely be involved in implementing and enforcing the requirements of this Model Legislation. The government will be responsible for providing retailer education and outreach, monitoring compliance, enforcing penalties for violations, and evaluating the impact of the regulation on sales and consumption of SSBs. Implementing this program will therefore include deciding which agencies will handle which tasks. Working with all involved agencies early in the policy adoption process will be critical to the success of the policy. Some of the responsibilities mentioned above can be readily handled by various government agencies in the course of implementing and enforcing other laws; others may require the creation of new processes.

Finally, it is critical to the success of any policy that the responsible agency connect with and educate the affected businesses prior to implementation. The Model Legislation includes educational/outreach components that can be tailored to suit the conditions in your community.

### AN ACT TO REQUIRE SAFETY WARNINGS

### ON SUGAR-SWEETENED BEVERAGES

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]:

**SECTION ONE. See APPENDIX A: Findings.**

**COMMENT on Findings:** Legislation based on this model should include “Findings” of fact that support the purposes of the legislation. The Findings section is part of the ordinance and legislative record, but it usually does not become codified in state statutes. The Findings contain factual information supporting the need for the law – in this case, documenting the health effects of SSB consumption, public awareness of those health effects, and the need for a safety warning for consumer protection. A list of findings supporting this Model Legislation appears in “Appendix A: Findings.” States may select Findings from that list to insert here, along with additional Findings addressing the specific conditions in the particular state.

**SECTION TWO.** [*State Code*] is hereby amended by adding thereto a new chapter to read as follows:

**CHAPTER [*\_\_*]**

**SUGAR-SWEETENED BEVERAGES SAFETY WARNING ACT**

**§\_\_-1. Title of chapter.** This chapter may be cited as the Sugar-Sweetened Beverages Safety Warning Act.

**§\_\_-2. Legislative intent.**

It is the intent of the Legislature, by adopting the Sugar-Sweetened Beverages Safety Warning Act, to protect consumers and to promote informed purchasing decisions by requiring a warning about the dangerous health effects of excessive consumption of Sugar-Sweetened Beverages.

**§\_\_-3. Definitions.**

As used in this chapter, unless the context clearly requires otherwise:

(\_\_) “Beverage Dispensing Machine” means any device that dispenses a Sugar-Sweetened Beverage into an Unsealed Container as a ready-to-drink beverage.

(\_\_) “Caloric Sweetener” means any substance containing calories, suitable for human consumption, that humans perceive as sweet, and includes, without limitation, sucrose, fructose, glucose, other sugars, and fruit juice concentrate. “Caloric Sweetener” excludes “Non-Caloric Sweeteners.”

 (\_\_) “Container” means any receptacle that is intended or used to hold a Sugar-Sweetened Beverage for individual sale to a consumer, such as a bottle, box, can, cup, glass, or pouch.

 (\_\_) “Department” means [ \_\_\_\_\_ ], and any agency or Person lawfully designated by the Department to enforce or implement the provisions of this Act.

 (\_\_) “Distribute” means to sell or otherwise provide a product to any Person for resale to a consumer in the ordinary course of business within this state.

 (\_\_) “Nonalcoholic Beverage” means any beverage that contains less than one-half of one (.05) percent alcohol per volume.

(\_\_) “Non-Caloric Sweetener” means any substance that contains fewer than five (5) calories per serving, suitable for human consumption, that humans perceive as sweet, and includes, without limitation, aspartame, saccharin, stevia, and sucralose.

**COMMENT on definition of “Non-Caloric Sweetener”:**
The Food and Drug Administration (FDA) regulates the use of terms like “no-calorie” and “calorie free” as nutrient content claims. This definition of “Non-Caloric Sweetener” aligns with the FDA’s definition. (21 C.F.R. 101.60.) For a discussion of calorie content claims, see section 101.60 of the following: [*www.access.gpo.gov/nara/cfr/waisidx\_08/21cfr101\_08.html*](http://www.access.gpo.gov/nara/cfr/waisidx_08/21cfr101_08.html)*.*

(\_\_) “Person” means any natural person, partnership, cooperative association, limited liability company, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

 (\_\_) “Powder” means any solid mixture of ingredients that contains Caloric Sweetener, which is intended to be used in making, mixing, or compounding a Sugar-Sweetened Beverage by combining the Powder with any one or more other ingredients.

 (\_\_) “Sale” or “Sell” means any distribution or transfer for a business purpose, whether or not consideration is received.

(\_\_) “Sealed Container” means a Container holding a beverage, which is closed or sealed before a retailer obtains the container for resale.

(\_\_) “Sugar-Sweetened Beverage” and “SSB” mean:

**COMMENT on definition of “Sugar-Sweetened Beverage”:**

The following definition is very broad and intended to include all beverages containing any amount of added Caloric Sweetener, with specific and limited exceptions. The definition can be tailored to meet state needs; which beverages to include is a policy decision.

Beverages that fall within this definition will be required to bear the safety warning pursuant to Section (\_\_-4). The content of the safety warning should correlate to the types of beverages required to bear the warning. For example, because the safety warning relates to the dangers of excessive sugar consumption, all beverages with added caloric sweeteners could be required to bear the warning – any exemptions should be carefully considered. Senate Bill 1000, the warning label bill considered by the California Legislature during the 2014 legislative session, defined “SSB” to include only beverages with 75 or more calories per 12 fluid ounces; this limited definition was intended to target higher calorie beverages that have been the subject of the most research. You could tailor this definition similarly in your jurisdiction.

Subparagraph (2) lists some beverages that are exempt from the regulation. Which beverages to exclude is a policy decision; this list of exemptions can be modified at the discretion of policymakers and public health professionals. If a state exempts any other beverages with added sugars, the basis for the additional exemption should be set forth in the legislative findings and made part of the legislative record.

The default definition of Sugar-Sweetened Beverage includes all beverages with any amount of added Caloric Sweetener; it is not necessary to specifically exempt beverages that do not contain added Caloric Sweetener. For example, plain water, coffee, or tea, with no added Caloric Sweetener do not need to be included in the exemption list. On the other hand, if you would like to exempt flavored milk, you would need to include language to effectuate that exemption (see below).

This definition only applies to nonalcoholic beverages, which is defined. As an alternative to the definition included, the term “nonalcoholic beverages” could be defined to mean those beverages that are not subject to taxation under the State’s alcoholic beverage tax, if applicable.

Some states may prefer to include a specific list of beverage types subject to the regulation. For a comprehensive list of the types of beverages that may merit regulation, see Healthy Eating Research’s *Recommendations for Healthier Beverages*, released in March 2013 and available at*:* [*www.rwjf.org/content/dam/farm/reports/issue\_briefs/2013/rwjf404852*](http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2013/rwjf404852)*.*

1. Any Nonalcoholic Beverage, carbonated or noncarbonated, intended for human consumption, which contains any added Caloric Sweetener.

**COMMENT on milk with added Caloric Sweetener:**Some states may wish to exempt milk with added Caloric Sweetener, such as chocolate or strawberry milk, in order to be in line with school policies or for other reasons.

Many public schools serve these milks to students as part of the National School Lunch program. Under the Healthy, Hunger-Free Kids Act of 2010, the U.S. Department of Agriculture (USDA) updated the meal patterns and nutrition standards for the National School Lunch and School Breakfast Programs, including the fluid milk requirements. The USDA allows school to offer unflavored or flavored fat-free milk and unflavored low-fat (one-percent milk fat or less). [1]

The public health community is divided over whether flavored milk has a net positive impact on health. Research funded by the dairy industry suggests that flavored milk consumption among children is associated with greater calcium intake and lower consumption of other sugar-sweetened beverages, as compared with children who do not drink flavored milk.[2] On the other hand, the Institute of Medicine (IOM) recently found that most Americans, except girls between the ages 9-18, obtain sufficient calcium and vitamin D (both found in milk) from their diets. This same IOM study indicated that more calcium and vitamin D consumption is not necessarily better and cautioned against over-consumption of the nutrients.[3] This guidance, combined with a growing concern about overconsumption of added sugars and calories, leads some in the public health community to argue against encouraging flavored milk consumption, especially among children.

Flavored milks are Sugar-Sweetened Beverages, which are as a whole linked to weight gain and chronic disease. Due to the lack of independent research clearly demonstrating a net positive health impact of flavored milk consumption, this model treats flavored milk as a sugar-sweetened beverage that is subject to the tax. As a matter of policy, you may wish to include an exemption for flavored milk, and if so, consider the following definitions:

“Milk” means any beverage whose principal ingredient by weight is natural liquid milk, which is secreted by an animal and consumed by humans. For purposes of this definition, “milk” includes natural milk concentrate and dehydrated natural milk, whether or not reconstituted.

“Milk substitute” means a plant-based beverage in which the principal ingredients by weight are (i) water and (ii) grains, nuts, legumes, or seeds. For purposes of this definition, “milk substitutes” include but are not limited to soy milk, almond milk, rice milk, coconut milk, hemp milk, oat milk, hazelnut milk, flax milk.

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[1] *See* National School Lunch and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010, 78 Fed. Reg. 39068 (Interim Final Rule, June 28, 2013) (to be codified at 7 CFR 210.11).

[2] Johnson RK, Frary C, and Wang MQ. “The Nutritional Consequences of Flavored-Milk Consumption by School-Aged Children and Adolescents in the United States.” Journal of the American Dietetic Association, 102(6): 853–856, 2002.

[3] Institute of Medicine, Food and Nutrition Board. Dietary Reference Intakes: Calcium, Vitamin D. Washington DC: National Academies Press, 2010.

1. Exceptions. "Sugar-Sweetened Beverage” and "SSB" do not include:
2. A beverage consisting of one hundred (100) percent natural fruit or vegetable juice with no added Caloric Sweetener. For purposes of this paragraph, “natural fruit juice” and “natural vegetable juice” mean the original liquid resulting from the pressing of fruits or vegetables, or the liquid resulting from the dilution of dehydrated or concentrated natural fruit juice or natural vegetable juice;

**COMMENT on Juices:**

Whether to exempt diluted juices from regulation is a matter of policy. States should note the following when deciding whether to exempt diluted juice beverages:\

• Many diluted juice beverages do not contain any vitamins or minerals that would make the beverage healthier. These beverages use the juice as a Caloric Sweetener.

• Diluted juice beverages may contain added Caloric Sweetener in addition to water and other ingredients. If some diluted beverages are exempt, jurisdictions should carefully consider whether diluted juice beverages with Caloric Sweetener should be regulated.[1]

If diluted juice is exempted from regulation, please note that several other sections of this Model Legislation might be affected, and should be amended accordingly (e.g., you might also consider excluding fruit juice concentrate from the definition of Caloric Sweetener.)

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[1] See the FDA’s food labeling regulations pertaining to beverages containing fruit or vegetable juice (21 C.F.R. 101.30), available at: [*www.gpo.gov/fdsys/pkg/CFR-2008-title21-vol1/content-detail.html*](http://www.gpo.gov/fdsys/pkg/CFR-2008-title21-vol1/content-detail.html)*.*

1. A dietary aid, which means a liquid product manufactured for use as:

An oral nutritional therapy for persons who cannot absorb or metabolize dietary nutrients from food or beverages;

A source of necessary nutrition used as a result of a medical condition; or

An oral electrolyte solution for infants and children formulated to prevent dehydration due to illness;

1. Infant formula; and
2. Sweetened medication.

**COMMENT on threshold amount:**Some states may want to exempt lower calorie beverages despite the fact that they contain caloric sweetener, because they are seen as a healthier alternative to higher calorie beverages.

If your state wants to exempt lower calorie beverages from regulation even though they do contain added Caloric Sweetener, the definition of Sugar-Sweetened Beverage can be amended to exclude beverages that fall under a threshold amount of added Caloric Sweetener. To do so, add the following to this list of exceptions:

(e) Beverages containing less than [\_\_\_] grams of added Caloric Sweetener per [\_\_] ounces of beverage.

If you decide to include such a threshold exemption, the exact threshold amount is a policy decision for your jurisdiction. A threshold amount of 4.2 grams of added caloric sweetener per 8 ounces would be the equivalent of one teaspoon of white granular sugar per 8 ounces. It is also important to consider practical and administrative issues if you use this exemption: will the businesses in your state be able to administer the policy effectively and efficiently?

(\_\_) “Syrup” means any liquid mixture of ingredients that contains Caloric Sweetener, which is intended to be used in making, mixing, or compounding a Sugar-Sweetened Beverage by combining the Syrup with any one or more other ingredients.

(\_\_) “Unsealed Container” means a Container into which a beverage is dispensed or poured at the business premises where the beverage is purchased, and includes, without limitation, glasses, cups, and all Containers for fountain drinks.

**§\_\_ - 4. Safety Warning Required for Sealed Containers.**

**COMMENT:** This section requires a safety warning on all SSBs sold in sealed containers, as well as on multipacks and packages of Syrups and Powders. The warning could be preprinted on the container or packaging, or it could be a sticker affixed to the container/package. It is a violation of this section to distribute SSBs, multipacks, Syrups, and Powders without the safety warning, so the onus is on distributors to ensure compliance. However, this section also prohibits retail sales of the products that do not bear the safety warning.

This section establishes mandatory minimum size requirements and the maximum number of characters per inch for the safety warning for SSBs sold in sealed containers. The Department is authorized to adopt regulations to supplement the requirements of this section and to develop new language periodically for a different safety warning (which will be necessary as new research and data emerges on SSBs). When deciding on the extent and type of administrative regulations to leave to the discretion of the enforcing Department, carefully consider the capacity of the Department to adopt regulations in a timely manner.

For SSBs sold in multipacks with additional packaging (such as a 12-pack in a box) and for packages of syrups or powders, the safety warning must be posted on the exterior packaging in addition to each individual container. The exact size and other requirements for the warning statement on multipacks and syrups/powders will be developed by the Department through regulation.

(a) No Person may Distribute, Sell or offer for Sale a Sugar-Sweetened Beverage in a Sealed Container unless the Container bears the following safety warning and otherwise meets all of the requirements of this section:

“STATE OF [\_\_\_\_\_\_\_\_\_\_\_\_] SAFETY WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes and tooth decay.”

**COMMENT:** The language of the safety warning is intended to be consistent with the First Amendment to the U.S. Constitution and the federal Nutrition Labeling and Education Act. It can be tailored by your jurisdiction so long as: (1) the language of the warning does not duplicate the nutrition labeling information required by the federal Nutrition Labeling and Education Act, and (2) the language is firmly grounded in scientific evidence regarding the health effects of SSBs. Both of these requirements are legally important. (Refer to the “Legal Issues” section of the Introduction for additional discussion of the legal issues implicated by the safety warning.)

(b) The safety warning required by this section shall be prominently displayed and readily legible under normal conditions, separate and apart from all other information, and shall be on a contrasting background.

 (c) The first five words of the statement required by this section, (“STATE OF [\_\_\_\_\_] SAFETY WARNING,”) shall appear in capital letters and the entire statement shall appear in bold type.

(d) Size of type and number of characters. The warning statement required by this section shall appear in a font size and using a maximum number of characters (i.e., letters, numbers, marks) per inch, as follows:

(1) For Containers [*eight (8)*] fluid ounces or less, the safety warning shall be in script, type, or printing not smaller than [*one (1)*] millimeter, and there shall be no more than [*forty (40)*] characters per inch;

(2) For Containers of more than [*eight (8)*] fluid ounces and less than [*one (1) or two (2)*] liters, the safety warning shall be in script, type, or printing not smaller than [*two (2)*] millimeters, and there shall be no more than [*twenty-five (25)*] characters per inch;

(3) For Containers of [*one (1) or two (2)*] liters or more, the safety warning shall be in script, type, or printing not smaller than [*three (3)*] millimeters, and there shall be no more than [*twelve (12)*] characters per inch.

**COMMENT:** The specific requirements in subsection (d) for minimum type size and maximum number of characters per inch are identical to the requirements in federal law for warning statements on alcoholic beverages. An alternative approach would be to delete this subsection and not specify the precise requirements in the legislation itself, but rather to have the implementing Department do so via administrative regulation. To use this alternative approach, substitute the following language in subsection (d):

(d) The Department shall promulgate regulations to establish the specific guidelines for the safety warning required by this section, including regulations to establish the size, font, and colors for the safety warning. The Department may require different size safety warnings for different size Containers.

(e) If the safety warning required by this section is not printed directly on the Container, it shall be affixed to the Container in such manner that it cannot be removed without thorough application of water or other solvents.

 (f) No person may Distribute, Sell, or offer for Sale a multipack of Sugar-Sweetened Beverages in Sealed Containers unless the multipack of beverages bears the safety warning required by subsection (a). The safety warning shall be posted conspicuously on at least two sides of the multipack, in addition to being posted on each individual Sealed Container.

**COMMENT:** Subsection (f) would require the safety warning on multipacks (such as a 12-pack) of SSBs, in addition to each individual container.

 (g) No person may Distribute, Sell, or offer for Sale a Syrup or Powder in packaging that is intended for retail Sale in this state unless the packaging of the Syrup or Powder bears the safety warning required by subsection (a). The safety warning shall be posted conspicuously on the front of the packaging of the Syrup or Powder.

**COMMENT:** Subsection (g) would require the safety warning on packages of Syrups and Powders used to make SSBs.

(h) The Department shall promulgate regulations as necessary to administer and implement the requirements of this section. Notwithstanding subsection (a), the Department shall [*periodically*] promulgate regulations to create alternative language for the safety warning required by this section and may require that the alternative language be posted in lieu of the safety warning set forth in subsection (a).

**COMMENT on requiring a warning label on the shelf instead of on product packaging:** As noted above, a law that requires safety warnings to be included directly on SSB containers places the onus on SSB manufacturers and distributors to ensure that the safety warning is included on the original manufacturer’s packaging or on a sticker affixed before the SSB container arrives at a retailer’s business premises.

As an alternative, the law could instead require that the safety warning be displayed not on the product packaging but on the shelving where the products are displayed for sale. Under this approach, the retailer would likely be responsible for affixing the shelf tags with the warning language. Selecting an approach to use is a policy decision that could affect how many consumers see the warning. If the shelf signage approach is used, it is important to specify exactly where the safety warning must be displayed relative to the SSBs and how frequently the warning must appear along the shelf, in addition to the content, color, font, and size of the warning. If the shelf signage approach is used, you will need to delete the word “distribute” from subsections (a), (f), and (g), as a shelf signage requirement does not impact distributors. Public health professionals can contact ChangeLab Solutions for technical assistance on adapting the language of this model legislation to require shelf signs rather than warnings on the products and packaging.

**§\_\_ - 5. Vending Machines; Beverage Dispensing Machines; Point of Sale; Safety Warning Required.**

 (a) Every Person who owns, leases, or otherwise legally controls the premises where a vending machine or Beverage Dispensing Machine is located, or where a Sugar-Sweetened Beverage is sold in an Unsealed Container, shall place, or cause to be placed, a safety warning in each of the following locations:

(1) On the exterior of any vending machine that includes a Sugar-Sweetened Beverage for Sale;

(2) On the exterior of any Beverage Dispensing Machine used by a Consumer to dispense a Sugar-Sweetened Beverage through self-service; and

(3) At the point on the premises where any Consumer would normally order or request a Sugar-Sweetened Beverage in an Unsealed Container, when the Unsealed Container is filled by the Person’s employee or agent rather than the Consumer.

(b) The safety warning required by this section shall use the following language:

“STATE OF [\_\_\_\_\_\_\_\_\_\_\_\_] SAFETY WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes and tooth decay.”

(c) The safety warning required by this section shall be prominently displayed and readily legible under normal conditions, separate and apart from all other information, and shall be on a contrasting background.

(d) The first five words of the statement required by this section, (“STATE OF [\_\_\_\_\_] SAFETY WARNING,”) shall appear in capital letters and the entire statement shall appear in bold type.

(e) The Department shall promulgate regulations to establish the specific guidelines for the safety warning required by this section, including regulations to establish the size, font, colors, and placement of the safety warning. Notwithstanding subsection (b), the Department shall [*periodically*] promulgate regulations to create alternative language for the safety warning required by this section and may require that the alternative language be posted in lieu of the safety warning set forth in subsection (b).

**COMMENT:** This section requires a safety warning on the exterior of vending machines that dispense SSBs and on machines where consumers dispense their own fountain drinks. It also requires the safety warning at the point where a consumer orders a fountain drink that is filled by an employee of the business.

Because of the variation in type and size of machines and points of sale covered by this section, the specific requirements for the font size and overall size of the safety warning are not established in this section. Rather, it calls for the Department to establish the specific requirements through regulations. When deciding on the extent and type of administrative regulations to leave to the discretion of the enforcing Department, carefully consider the capacity of the Department to adopt regulations in a timely manner. You could include specific language in the legislation itself.

The language of the safety warning is set forth in subsection (b) and is intended to be consistent with the First Amendment to the U.S. Constitution and the federal Nutrition Labeling and Education Act. The Department is specifically authorized to periodically develop new language for a different safety warning as new research and data emerges on SSBs, or as otherwise required.

**§\_\_ - 6. Outreach and Education.**

The Department shall develop and conduct a retailer outreach and education program designed to inform businesses about the requirements of this chapter and provide retailers with examples of compliant safety warnings. Any written materials and trainings developed shall be offered in the following languages in addition to English: [\_\_\_\_\_\_\_\_\_\_\_\_\_\_]. Nothing in this section shall create a right of action in any Person against the State or its agents.

**§\_\_ - 7. Evaluation.**

The [Department] shall develop criteria and components for an independent evaluation to assess the impact of the safety warnings required by this Act on Consumer purchasing and consumption patterns [*, and rates of diabetes and obesity*].

**§\_\_-8. Enforcement and Penalties.**

**Comment:** Draft legislation based on this model is not completewithout including enforcement provisions. Realistic and meaningful enforcement is essential. An unenforceable law or a law with trivial penalties that are easily absorbed as the “cost of doing [illegal] business” can be worse than no law at all; an unenforced—or unenforceable—law undermines the legitimacy of the state’s laws in general.

This Model Legislation creates legal duties for both Distributors and Retailers. A range of penalties should be included also to provide flexibility depending on the gravity of violation. For example, a distributor that distributes large quantities of SSBs without the safety warning should be subject to a more serious penalty than a retailer that fails to place the safety warning on a single vending machine. The enforcement provisions contained in this section are provided as an example that can be tailored to the conditions and existing laws in your state.

Because this model requires the safety warning to be placed inside retail establishments that sell SSBs, enforcement will require visual inspection of the retail environment. For that reason, it may be wise to authorize a local enforcement agency, such as a county environmental health department, to enforce this law along with the state. Because local enforcement agencies often inspect food retail establishments to enforce state food retail codes, they can also inspect for the warning statement.

 (a)Each Container, multipack, and package of Syrup or Powder Distributed, Sold or offered for Sale in violation of this chapter shall constitute a separate violation. Each day of a continuing violation of this chapter shall constitute a separate violation.

(b) Primary responsibility for inspections for violations and enforcement of this chapter shall be with the [insert the name of the local enforcement agency , e.g., county *environmental health department*].

**COMMENT:** If state law establishes specific procedures for enforcement of a state law by a local agency, such as a state food retail code, the specific state law could be incorporated here by reference.

 (c) Actions pursuant to this section may be brought by the Attorney General in the name of the people of the State of [*state name*] [*and by any district attorney, by any county counsel or city attorney, or by a city prosecutor in any city or city and county having a full-time city prosecutor*].

**COMMENT:** Depending on which agency or agencies are authorized to enforce the law, you might want to allow civil enforcement actions to be instituted by local prosecuting attorneys in addition to the state Attorney General. If so, include the appropriate bracketed language.

 (d) Any Person who violates any of the requirements of this chapter may be enjoined in any court of competent jurisdiction.

(e) Any Person who has violated any of the requirements of this chapter shall be liable for a civil penalty not to exceed [*two thousand five hundred dollars ($2500)*] per day for each violation in addition to any other penalty established by law. That civil penalty may be assessed and recovered in a civil action brought in any court of competent jurisdiction.

(f) This chapter may also be enforced through an administrative proceeding that complies with [*State Administrative Procedures Act.*]

**§\_\_-9** **Preservation of local authority.**

Nothing in this chapter shall preempt or prohibit adoption and implementation of any policy related to Sugar-Sweetened Beverages by a municipal government or political subdivision of the State [*, except for any policy requiring a safety warning on SSB containers that is inconsistent with this law. A policy shall not be deemed inconsistent with this law if it affords greater consumer protection than this law.]*

**§\_\_-10. Severability.**

If any provision of this chapter, any rule or regulation made under this chapter, or the application of this chapter to any Person or circumstance is held invalid by any court of competent jurisdiction, the remainder of the chapter, rule or regulation, and the application of the provision to other Persons or circumstances shall not be affected. The invalidity of any section or sections or parts of any section of this chapter shall not affect the validity of the remainder of the chapter.

**SECTION THREE**. This act shall take effect and be in force from and after [*date*].

**COMMENT:** It is wise and probably necessary to provide some time for implementation and compliance.

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5. Flegal et al., *supra* note 1at 496. [↑](#endnote-ref-5)
6. Ogden et al., *supra* note 2, at 483. *See also* Sekhobo J, Edmunds L, Whaley S, et al. “Obesity Prevalence Among Low-Income, Preschool-Aged Children — New York City and Los Angeles County, 2003–2011.” Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, 62(2): 17-22, 20, 2013. Available at: [*www.cdc.gov/mmwr/preview/mmwrhtml/mm6202a1.htm*](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6202a1.htm)*.*  [↑](#endnote-ref-6)
7. Sekhobo et al., *supra* note 6. [↑](#endnote-ref-7)
8. Flegal et al., *supra* note 1. [↑](#endnote-ref-8)
9. Ogden et al., *supra* note 2. [↑](#endnote-ref-9)
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119. *Zauderer* *v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626 (1985). *See also* *Ibanez v. Florida Dep’t of Business and Prof. Reg., Bd. of Accountancy*, 512 U.S. 136 (1994); *Milavetz, Gallop & Millavetz, P.A. v. U.S.*, 559 U.S. 229, 249 (2010). Although the Supreme Court has not applied *Zauderer* to compelled commercial disclosures when the government interest is something other than preventing consumer deception, lower federal appeals courts have done so including, most recently, the important D.C. Circuit Court of Appeals. *E.g.*, *American Meat Inst. v. U.S. Dept. of Agriculture*, 2014 WL 3732697 (D.C. Cir. 2014) (and to the extent that the court had used a different approach in applying *Zauderer*,overruling prior cases including *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1214 (D.C. Cir. 2012)); *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 664 (6th Cir. 2010); *Nat’l Ass’n*; N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009); Nat’l Elec. Mfs. Ass’n v. Sorrell, 272 F.3d 104, 113-15 (2d Cir. 2001). Until the Supreme Court decides this issue otherwise, this can be considered the prevailing and accepted trend among lower federal appeals courts. [↑](#endnote-ref-119)