The Trump administration is intent on wrapping up the renegotiation of the North American Free Trade Agreement (NAFTA) as soon as possible. The NAFTA 2.0 negotiation has proceeded on an accelerated timetable with minimal transparency and consultation with Congress, and virtually no outreach to stakeholders representing the interests of small farmers, consumers or the general public. If an agreement is reached, it would normally be sent to Congress on a take-it-or-leave-it basis under “Fast Track” rules that truncate deliberations and remove much of Congress’ independent authority to review or change the final deal. Fast Track already undermines the democratic process in order to speed up review and approval of trade deals.

Clearly, time is of the essence; it is critical to understand as much as we can about this sweeping international agreement as quickly as possible. With 30 chapters of secret text and closed-door negotiations—and more than 500 corporate advisors with preferential access to negotiators— the final agreement could be as objectionable as the roundly criticized Trans-Pacific Partnership (TPP). Indeed, it could be worse.

Even without seeing the text, we know a lot about where NAFTA 2.0 is headed. According to public reports, the text of the TPP was the starting point for many of the “modernized” NAFTA chapters on topics such as food safety, biotech, mechanisms to harmonize regulations, product standards and labeling, financial services, and energy—with many industry advisors calling for even more extreme corporate protections. In addition to the TPP, we can also look to the Korea-U.S. trade agreement (KORUS), Canada’s recently concluded agreement with the European Union (CETA), industry submissions outlining their priorities and preferred NAFTA outcomes, and USTR actions and reports targeting domestic policies as “non-tariff barriers” to trade.

From these sources, we conclude that it is likely that several provisions of NAFTA 2.0 are aimed at preventing Canada, Mexico and the United States from adopting rules governing how nutrition and product information about junk food is conveyed to consumers.
First, a U.S. proposal restricting or prohibiting mandatory warning symbols on foods and beverages high in fat, salt, calories or sugar is known to be under consideration.

Second, negotiators from the three countries reportedly have agreed to a provision similar to one in the TPP that aims to keep secret details about food additives used in prepackaged foods.

Third, the junk food industry is pushing for new provisions to prevent governments from limiting advertising aimed at children, such as bans on cartoon characters on boxes of sugary cereals.

If these policies are included in NAFTA 2.0, they will effectively prevent all three governments from adopting some of the most effective public health policies to reduce obesity and prevent related health conditions. Additionally, depending on the outcome of negotiations relating to dispute settlement, NAFTA could provide new opportunities for both governments and the junk food industry to challenge mandatory food labeling and marketing policies.

**PROHIBITING HEALTH-RELATED WARNING LABELS ON JUNK FOOD**

Due to a leak, we know that policies aimed at reducing obesity through mandatory warnings on sugary drinks and packaged foods are being targeted in NAFTA 2.0. After the story was broken by consumer advocates in Mexico, The New York Times published confidential details on part of one chapter relating to prepackaged food and beverage labeling. The Times reported the U.S. wants to prevent any warning symbol, shape or color that “inappropriately denotes that a hazard exists from consumption of the food or nonalcoholic beverages.” At a Congressional hearing the top U.S. trade official, Ambassador Robert Lighthizer, both confirmed the essentials of The Times article, and defended the policy, saying food label warnings have been used to “create a protectionist environment.”

The claim of protectionism is specious. The food and drink industry is global, and labeling laws don’t single out U.S. companies for attention. The top ten biggest food and drink companies are headquartered in Switzerland, Belgium, France, Netherlands, the United Kingdom and the U.S. Front-of-package warning labels employing easy-to-decipher text and symbols are part of a multi-faceted strategy to tackle the global obesity epidemic. They have been endorsed by the World Health Organization and other public health experts, and their effectiveness is backed up by solid research and experience. The labels work by educating consumers at the point of purchase so they seek out healthier food, leading manufacturers to reformulate their products to avoid the warning labels, thus increasing the availability of foods lower in fat, salt, sugar and calories.

The U.S. has been attempting to undermine labeling rules at the World Trade Organization (WTO) for years. Prior U.S. administrations have joined with other countries, representing the interests of the prepackaged food industry, to use the WTO’s Technical Barriers to Trade (TBT) committee meetings to pressure other countries to water down their junk food labeling policies. Ecuador, Chile, Indonesia, Peru and Thailand have all faced criticisms in the TBT committee over their nutrition labeling policies. The USTR has also used its annual National Trade Estimate reports, which purport to identify improper restraints on trade, to call out these policies. The 2017 report raises concerns about nutrition labeling in both Chile and Peru. It appears that having failed to completely stop these measures in the WTO—although succeeding in delaying, weakening and blocking policies in several countries including Israel—the Trump administration is now using NAFTA to change the rules to further advance corporate interests over public health concerns.

**KEEPING FOOD ADDITIVE INFORMATION SECRET**

The TPP annex “Proprietary Formulas for Prepackaged Foods and Food Additives” placed additional restrictions on governments developing technical regulations related to additives, such as labeling rules, and enshrined in that agreement new provisions protecting the secrecy of information related to processed food formulas. According to news reports, NAFTA
The NAFTA text could make it more difficult to gather sufficient information about these additives secret. Some of these additives, like artificial trans-fat, have been around for years and their negative consequences for health are well-known (trans-fat continues to be allowed in food even though the Food and Drug Administration has concluded that it causes eight deaths a day and costs billions in added health care costs). But details about many other additives remain cloaked in secrecy. NRDC found that 56 companies failed to disclose safety determinations for 275 newer chemicals. It also identified several additives listed on food packaging and considered safe under the GRAS policy despite known or suspected health impacts ranging from allergic reactions, interaction with common medications and links to leukemia, testicular tumors, and delayed bone formation.

The NAFTA text could make it more difficult to gather information about many other additives.

Undermining Policies to Limit Advertising That Targets Children

Restrictions on advertising are part of a comprehensive policy to reduce obesity rates and improve nutrition. Chile's junk food labeling rules go beyond requiring warning symbols; they also restrict advertising aimed at children under the age of 14 for foods considered high in calories, saturated fat, sugar and sodium. For example, the use of cartoon characters on cereal boxes is prohibited. In 2013, a South Africa law went into effect prohibiting pictures, photographs or drawings of infants, young children or even forms that resemble them, such as humanized animals, on food for infants and children. The law was adopted to implement a 1981 World Health Organization code developed to protect infant health by regulating the marketing of breast milk substitutes. Several countries restrict or ban television marketing of junk food to children, including Ireland, Mexico, Norway, Taiwan and the U.K. Quebec was the first government to restrict junk food advertising to children, passing a law in 1980 banning fast food marketing aimed at children under 13 in print and electronic media. Quebec now has the lowest child obesity rate in Canada.

These laws have been strongly opposed by the food industry, which has challenged the provisions banning cartoon characters and baby pictures in particular as trademark infringements. These complaints have been pursued both under domestic law and in international fora including the WTO. After years of attacks by Gerber Products Company, Guatemala's Supreme Court exempted imported baby food products from the country's infant formula labeling law, which prohibited the use of pictures of babies on food for children under two years of age. As in South Africa, Guatemala's law sought to implement the WHO infant food advertising code. Gerber, citing the WTO's General Agreement on Tariffs and Trade (GATT) and other trade measures, argued the labeling law was a trade restriction aimed at U.S. goods that denied Gerber use of its trademark (a baby picture) in violation of intellectual property law. Chile's more recent law banning cartoon characters is likewise being challenged in domestic courts by food and beverage companies claiming violations of trademark law. These food labeling disputes are the latest chapter in a long history of industry challenges to plain packaging laws, including years-long disputes over Australia's tobacco labeling laws brought by tobacco companies in private investor-state arbitration (ISDS) and by mostly tobacco-growing governments before the WTO. These cases ultimately have been resolved in favor of Australia, but cost millions to defend and deterred other countries from adopting similar policies.

These industry complaints have made their way into the NAFTA negotiations. The North American Market Working Group of the U.S. Food and Agriculture Dialogue for Trade, a coalition of agricultural groups and food companies—many of which also serve on USTR industry advisory committees—has urged USTR to include several policies friendly to the junk food industry in NAFTA 2.0. The Working Group has demanded new provisions in NAFTA that go
beyond the TPP text—the industry coalition calls them “improvements”—to further protect “trademarked U.S. brands, brand names, icons, logos, mascots and other identifying marks and labels,” including provisions:

- “Promoting language that protects confidential business information.
- That include WTO-plus provisions to protect lawfully registered and legally trademarked brands, brand names, icons, logos, mascots, and other identifying marks and labels from de facto confiscation or restrictions, including the application of unjustified SPS and/or TBT measures.
- Preventing restrictions on marketing, promotion, branding and quantity of formulations within a brand.”

Given that the USTR has itself repeatedly raised objections to these kinds of advertising restrictions (the 2017 National Trade Estimate report claimed that Chile’s cartoon bans “have resulted in delays, shortages, and repackaging that have cost U.S. firms millions of dollars in lost sales and other expenses”), it is quite possible that USTR is seeking provisions in NAFTA that reflect the industry demands. As discussed above, we know that other demands of the Working Group, including food additive secrecy provisions and new restrictions on front-of-package warning labels, have been put forward by USTR in the NAFTA negotiations.

THE CONSEQUENCES OF NAFTA’S RESTRICTIONS ON FOOD LABELING

Canada, Mexico and the United States are each experiencing public health crises linked to some of the highest obesity rates in the world—rates that continue to rise. Diseases associated with obesity and poor nutrition include diabetes, high blood pressure, heart disease, type 2 diabetes, stroke, arthritis and some forms of cancer, and lead to premature deaths and the unnecessary expenditure of billions of dollars by families, health care systems and state and federal governments. The ready availability of highly-processed foods and sugary drinks, and the increasing consumption of these products—promoted by reduced tariffs and other free trade policies implemented through the original NAFTA—has been closely associated with this rapid rise in obesity. Yet, rather than acknowledging these negative health consequences and seeking to address them in the new “modernized” NAFTA 2.0, negotiators are hurtling toward completing a deal that will exacerbate the obesity epidemic, and foreclose some of the most effective ways to address it. Moreover, unlike a domestic law or regulation, these provisions would be nearly impossible to reverse.

These are not hypothetical issues. Even as the NAFTA talks move toward undermining its authority to do so, the Canadian health agency has initiated rule-making to address high obesity rates by requiring junk food warning labels and proposed restricting the marketing of unhealthy foods and beverages to children. Advertising techniques that Canada is considering banning or limiting include both traditional media as well as digital platforms, and may include packaging and labeling, use of characters and celebrities, and branding (including logos, symbols, words or images associated with a food product).

In Mexico, the government is under pressure to adopt front-of-package junk food warning labels and is being sued by consumer groups over the ineffectiveness of its nutrition labeling. The complicated format of Mexico’s industry-approved current nutrition labels actually promotes sugar consumption and requires higher math to decipher.

In the U.S., where the federal government has been slow to seriously consider mandatory front-of-packaging food warnings, states and localities have led the charge to address the growing obesity crisis, trying everything from mandatory recess and farm-to-school food purchasing, to menu calorie labeling and...
sugary drink taxes. Legislation to require warning labels on sugary drinks was introduced in Hawaii and New York in 2017. State attorneys general have a long history enforcing laws prohibiting deceptive trade practices including false and misleading advertisements. They have successfully challenged food and beverage marketers that make unsupported food nutrition claims—such as a short-lived Kellogg marketing claim that Cocoa Krispies “support your child’s immunity”—and tobacco advertising aimed at children, including the use of the cartoon Joe Camel character. There is no reason to believe that state legislatures, governors and attorneys general won’t continue their efforts to address obesity and other public health issues through nutrition labeling and marketing policies.

WHAT CAN WE DO?

While the texts remain secret, we know that the junk food industry has pushed hard for, and the U.S. government is receptive to, new provisions in NAFTA that would derail stepped-up efforts in all three NAFTA countries to tackle the obesity crisis and improve nutrition. The junk food industry is invoking a tried and true strategy, following in the footsteps of the tobacco industry, which for years effectively used trade agreements to block labeling and advertising rules. Even though Canada’s top NAFTA negotiator has said he won’t agree to the U.S. anti-labeling text, his informal comments were made only after the U.S. demands were widely-publicized and attacked by consumer groups. Despite strong opposition to the proposed anti-labeling text, including letters from leading consumer, food and public health organizations requesting that the U.S. back away from the labeling policy, the USTR has not publicly stated that it will do so. In response to a letter signed by IATP, USTR unsatisfactorily stated “we will review your concerns in detail.” What else is buried in this agreement? Congress and the public need to demand transparency and accountability from the USTR and President Trump, and make sure that the renegotiated NAFTA isn’t even worse than what came before.

ENDNOTES

13. Ibid., p. 11, and footnote 45.
14. Ibid., p. 9-10. These substances included Epigallocatechin-3-gallate (EGCG), Gamma-amino butyric acid (GABA), a neurotransmitter, Sweet lupin protein, fiber and flour, and Theobromine.