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America's Energy Dependency: Will Government Regulation of Caffeine Bring the Caffeine Companies to a Crash?

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AMERICA'S ENERGY DEPENDENCY: WILL GOVERNMENT REGULATION OF CAFFEINE BRING THE CAFFEINE COMPANIES TO A CRASH?

ABSTRACT

In light of Americans' growing love affair with caffeinated products, this Note considers not only the possibility of future regulation of those products, but also the effect that regulation would have on caffeinated product-producing companies. While there is no certainty that such regulation is in our future, the regulation of market-similar products like tobacco and alcohol, and regulations abroad on heavily caffeinated drinks, suggest American regulation of caffeinated products to be a distinct possibility. This would be a serious concern for caffeine companies, who could face reduced access to target markets as a result of FDA-imposed limitations, whether by age restriction or another similar measure. In light of this potential regulation, the next question then becomes: what can companies do to help combat foreseeable FDA regulation or governmental legislation of the caffeine industry? Can businesses in this industry predict the market effect of regulation, and thereby take effective action, by comparing regulation of market-similar products such as tobacco and alcohol?

Part I of this Note discusses the medical effects of caffeine on humans, both adults and children. Part II discusses the probability of future government regulation and the subtle hints of impending regulation. Part II also briefly examines other countries' laws and regulations of caffeine consumption. Part III discusses and predicts the effects regulation would have on producers of caffeinated products by contrasting the caffeine industry with the tobacco industry, and looks at the effects of tobacco regulations placed on tobacco producers. Part IV discusses the effects of future regulation on caffeine-dependent Americans. Part V discusses the potential avenues businesses may take to fend off diminishing profits that would result from government regulation. Finally, this Note concludes that while businesses' financial statements will be hurt by government regulation, businesses will be able to defend their profit model by incorporating the proffered solutions discussed in Part V.

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INTRODUCTION

Energy. A core necessity in our busy, minute-by-minute planned lives. It heats the coals of this country's economy by turning the wheels of commerce for a life that we have created. We create energy in very different ways and for very different purposes. Energy gives our cars the power to go from Point A to Point B as fuel combusts in our engines. Homes across the country use energy from nuclear power plants, hydroelectric power plants, and windmills to power thousands of items, some as simple as a child's night-light. That same energy helps us enjoy our portable electronics. It is fair to say that our country depends on energy to work, to build, and to continue to run. But there is one important type of energy that allows us to turn our car's ignition on, switch on those night-lights, and type on our laptops. This energy is usually produced by the consumption of nutritional foods and drinks. Sometimes, though, this energy comes from food and drink products that are virtually nutritionally empty, consumed solely for their creation of instant energy. For example, approximately fifty-four percent of the adult population in the United States drinks coffee daily.¹ But the interesting part is that the coffee itself is not what people are so dependent on, nor is it the pleasure of sitting down to drink a hot beverage on a cold morning. No, it is one particular ingredient that drives this fifty-four percent of adults to make an extra stop on their way to work. This ingredient is caffeine.²

Coffee accounts for over fifty percent of the world's caffeine consumption.³ In 1981, caffeine consumption was estimated at 120,000 tons—about seventy milligrams a day for each individual.⁴ Each cup of coffee contains between fourteen and three hundred thirty-three milli-

¹ *Coffee Consumption Statistics in the United States*, COFFEE RESEARCH, <http://www.coffeeresearch.org/market/usa.htm> (last visited Mar. 25, 2012); see also Rome Neal, *Caffeine Nation*, CBS NEWS (Feb. 11, 2009, 8:56 PM), <http://www.cbsnews.com/stories/2002/11/14/sunday/main529388.shtml>.

² Betty Kovacks, *Caffeine*, MEDICINET.COM, <http://www.medicinenet.com/caffeine/page2.htm> (last visited Mar. 25, 2012) (suggesting that caffeine, although not clinically listed as an addictive substance, can be a substance on which one can become dependent); see also Angela Stewart, *Scientists Find Coffee Really Is Addictive*, SEATTLE TIMES (Oct. 3, 2004, 12:00 AM), http://seattletimes.nwsourc.com/html/health/2002052772_coffee03.html (stating that the American Psychiatric Association, which publishes the Diagnostic and Statistical Manual for Mental Disorders (DSM), does not officially recognize caffeine as addictive, but believes further research is warranted).

³ Richard M. Gilbert, *Caffeine Consumption*, in *THE METHYLYXANTHINE BEVERAGES AND FOODS: CHEMISTRY, CONSUMPTION, AND HEALTH EFFECTS* 185, 187 (Gene A. Spiller ed., 1984).

⁴ *Id.* at 207.

grams of caffeine or more.⁵ A more recent study indicates that eighty-five percent of the adults in the United States consume caffeine on a daily basis⁶ through the consumption of coffee, tea, and sodas.⁷ Caffeine intake is increasing and dependency on it is growing each year.⁸ More and more individuals are relying on caffeine to get them through their busy days. Consumption, however, is not limited to adults.

According to the *Journal of Pediatrics*, about seventy-five percent of children, ages five to twelve, consume caffeine each day.⁹ Studies indicate that “children age[s five] to [seven] consumed an average of [52] milligrams of caffeine per day ... [while t]he figure was 109 mg each day—the equivalent of almost three 12-ounce cans of soda—for children ages [eight] to [twelve].”¹⁰ With caffeine intake rising from increased soda consumption,¹¹ not just in adults but also in children,¹² one must ask whether the government is going to step in and, if so, when? This is certainly a daunting prospect, especially for those whose business relies on the success of caffeinated-drink production.

Whether the government should step in to regulate the caffeine consumption of both adults and children, or impose limited regulation on certain caffeinated drinks,¹³ has become quite the topic of discussion.¹⁴

⁵ R.M. Gilbert, J.A. Marshman, M. Schwieder & R. Berg, *Caffeine Content on Beverages Consumed*, 114 CAN. MED. ASS'N J. 205, 207 (1976).

⁶ Salynn Boyles, *Is Caffeine Bad for Your Heart?*, WEBMD, <http://www.webmd.com/mental-health/news/20020801/is-caffeine-bad-for-your-heart> (last visited Mar. 25, 2012); see also Astrid Nehlig, *Are We Dependent upon Caffeine and Coffee? A Review of Human and Animal Data*, 23 NEUROSCIENCE & BIOBEHAVIORAL REVS. 563, 564 (1999).

⁷ Boyles, *supra* note 6.

⁸ See *supra* notes 1 and 6 and accompanying text.

⁹ *Caffeine Consumption Common Among Children, Study Finds*, AM. MED. NEWS, <http://www.ama-assn.org/amednews/2011/01/03/prbf0103.htm> (last visited Mar. 25, 2012).

¹⁰ *Id.*

¹¹ See Johns Hopkins Bayview Med. Ctr., *Use and Common Sources of Caffeine*, CAFFEINEDDEPENDENCE.ORG, http://www.caffeinedependence.org/caffeine_dependence.html (last visited Mar. 25, 2012).

¹² See *Caffeine Consumption Among Children and Adolescents*, NAT'L COUNCIL ON STRENGTH & FITNESS, <http://www.ncsf.org/enev/articles/articles-CaffeineConsumptionChildrenAdolescents.aspx> (last visited Mar. 25, 2012).

¹³ For example, the ever-growing variety of energy drinks.

¹⁴ David Kesmodel, *Buzz Kill? Critics Target Alcohol-Caffeine Drinks*, WALL ST. J. (Aug. 3, 2009), <http://online.wsj.com/article/SB10001424052970203674704574328322293679870.html>; see also *FDA Calls 7 Caffeine-Alcohol Drinks Unsafe*, CNN NEWS (Nov. 17, 2010), <http://www.cnn.com/2010/HEALTH/11/17/alcohol.caffeine.drinks/index.html> (discussing the U.S. Food and Drug Administration's statement to several manufacturers of caffeine-alcohol drinks that the products are a “public health concern” and cannot remain on the market).

This question is especially relevant following the recent introduction of alcohol-caffeine, or alcohol energy drinks.¹⁵ With the joint force of eighteen state attorneys general, these alcohol-caffeine drinks soon became illegal.¹⁶ A line was crossed when these alcohol-caffeine drinks hit the market. The question, though, remains as to whether some of the other caffeinated beverages on the market should be limited as well. While the possibility of greater caffeine regulation is an important and unexplored issue, this Note is not arguing for caffeine regulation or even for the implementation of stricter guidelines with respect to individual caffeine consumption. Instead, based on the potential for greater caffeine regulation in an increasingly caffeine-dependent America, this Note will discuss whether and to what extent the businesses that depend on caffeine consumption in the United States will be affected, and suggest practices those businesses could adopt to reduce the likelihood of government initiatives to regulate the sale of caffeinated products.

Part I of this Note discusses the medical effects of caffeine on humans, both adults and children. Part II discusses the probability of future government regulation and the subtle hints of impending regulation. Part II also briefly examines other countries' laws and regulations of caffeine consumption. Part III discusses and predicts the effects regulation would have on producers of caffeine products by contrasting the caffeine industry with the tobacco industry, and looks at the effects of tobacco regulations placed on tobacco producers—primarily cigarette companies. Part IV discusses the effects of future regulation on caffeine-dependent Americans. Part V discusses the potential avenues businesses may take to fend off diminishing profits resulting from potential government regulation. Finally, this Note concludes that while businesses' financial statements will be hurt by government regulation, they will be able to defend their profit model by incorporating the proffered solutions discussed in Part V.

¹⁵ See *supra* notes 13 and 14 and accompanying text.

¹⁶ Meredith Wadman, *US Clamp-Down on Alcoholic Energy Drinks*, NATURE: INT'L WEEKLY J. OF SCI. (Nov. 18, 2010), <http://www.nature.com/news/2010/101118/full/news.2010.622.html>. Acknowledging the outrage of several state attorneys general, members from the scientific community sent a letter detailing the scientifically confirmed danger resulting from the use of caffeine in alcoholic beverages. Letter from Amelia M. Arria, Ph.D., and Mary Claire O'Brien, M.D., to Attorneys General Richard Blumenthal, Mark Shurtlef & Alicia G. Limtiaco (Sept. 21, 2009), available at <http://www.fda.gov/downloads/Food/FoodIngredientsPackaging/UCM190372.pdf>.

I. MEDICAL EFFECTS

The notion that “too much of *anything* is not good for you” is rooted in common knowledge,¹⁷ and could certainly be said to apply to caffeine. The variety of medical conditions that arise from caffeine intake, in both children and adults, is shocking in both number and severity.

Researchers have explained the effects of caffeine on cognitive performance, mood, and energy.¹⁸ It is true that caffeine improves “these functions when administered in moderate doses.”¹⁹ However, when one considers the studies detailing the various harmful effects of caffeine intake, in small and large amounts, for both children and adults,²⁰ a case could certainly be made for government regulation. The government might be unwilling to take steps immediately, because several studies on the negative effects of caffeine consumption have been criticized. At least one producer of caffeinated products has disputed the conclusions of these studies, suggesting at base that their findings are skewed.²¹ Though a defense against caffeine regulation is imaginable, the government was not persuaded when tobacco and alcohol companies wanted regulation-free markets,²² so criticism is unlikely to fend off the government forever.

Taking a closer look at the medical harms bolsters the invitation for government regulation, as the rest of this Part will explore in three sections: first by looking at the effects of caffeine on children, second, the effects on teenagers, and third, the effects of caffeine intake on adults.

As previously discussed,²³ the *Journal of Pediatrics* revealed that children ages five to seven, on average, consume over fifty milligrams of caffeine daily, while children ages eight to twelve consume an average of

¹⁷ RACHEL KUBERSKY, EVERYTHING YOU NEED TO KNOW ABOUT EATING DISORDERS 50 (rev. ed. 1999) (emphasis added).

¹⁸ See, e.g., Harris R. Lieberman, *The Effects of Ginseng, Ephedrine, and Caffeine on Cognitive Performance, Mood and Energy*, 59 NUTRITION REVS. 91, 91 (2001), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1753-4887.2001.tb06995.x/pdf> (discussing the effects of caffeine on human performance).

¹⁹ *Id.*

²⁰ See *infra* notes 35–44 and accompanying text.

²¹ *Caffeine Is a Naturally Occurring Substance That Has Been Enjoyed by People for Thousands of Years*, VIVARIN, <http://www.vivarin.com/about.php> (last visited Mar. 25, 2012) (stating that claims such as “[c]affeine is not safe,” “[c]affeine is an addictive drug,” or that caffeine causes some medical conditions are all myths and are untrue).

²² See *infra* text accompanying notes 90–97. These “regulation-free” markets are speaking to the respective times when tobacco and alcohol were not regulated by government intervention.

²³ See *supra* text accompanying notes 9–10.

over one hundred milligrams daily.²⁴ The latter is equivalent to approximately three cans of twelve-ounce soda per day.²⁵ Several statistical studies indicate that caffeine consumption by children is increasing.²⁶ In the past thirty years, children and adolescents' caffeine intake has increased by seventy percent.²⁷ They are the "fastest growing population of caffeine users,"²⁸ and many children have access to and are consuming large quantities of caffeine.²⁹ Actually, some adults cannot recall drinking so much caffeine and wonder why parents believe giving caffeine to their children, even in small doses, is safe.³⁰ One small study conducted on the effects of caffeine on school-age children actually provides support for caffeine being helpful to children,³¹ as the results indicated that "caffeine enhanced performance on a test of attention and on motor task."³² However, while this might encourage some parents to provide their children with this drug, the detriments far outweigh the benefits. Of the children tested, those given the caffeine had a higher self-reported feeling of severe anxiousness.³³ This undesirable effect might very well lead to further complications down the road.³⁴

Another recent article emphasized once again that "although once relatively restricted to use among adults, [caffeinated] drinks are now consumed regularly by children."³⁵ Children's "primary vehicle" for caffeine

²⁴ *Supra* notes 9–10 and accompanying text.

²⁵ *Supra* notes 9–10 and accompanying text.

²⁶ See, e.g., Jennifer L. Temple, *Caffeine Use in Children: What We Know, What We Have Left to Learn, and Why We Should Worry*, 33 *NEUROSCIENCE & BIOBEHAVIORAL REVS.* 793, 793 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC269625/>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Supra* notes 9–10 and accompanying text.

³⁰ Eric Berger, *Kids Sure Do Drink a Lot of Caffeine These Days*, *SCIGUY* (Dec. 16, 2010), <http://blogs.chron.com/sciguy/2010/12/kids-sure-do-drink-a-lot-of-caffeine-these-days/> (explaining how he was only given a "Coke here or there, but [that] it wasn't a daily thing").

³¹ Gail A. Bernstein, et al., *Caffeine Effects on Learning, Performance, and Anxiety in Normal School-Age Children*, 33 *J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY* 407, 414 (1994).

³² *Id.* at 407.

³³ *Id.* at 413.

³⁴ For example, children facing severe anxiety may experience "physical symptoms" such as "rapid heartbeat, dizziness, shortness of breath[,] ... muscle tension[,] ... diarrhea" and a variety of other manifestations of the anxiety. See, e.g., *Anxiety Disorders in Children and Adolescents*, ST. LOUIS BEHAVIORAL MED. INST., http://www.slbmi.com/anxiety_center/childhood_anxiety_disorders.htm (last visited Mar. 25, 2012).

³⁵ Temple, *supra* note 26.

is soda,³⁶ which contains large quantities of sugar.³⁷ When caffeine is paired with sugar, caffeine becomes incorporated and attached to sugar's characteristic as a "known 'natural reward' that activates similar reward pathways as drugs of abuse, such as cocaine, amphetamine, and nicotine."³⁸ The article does not suggest that soda leads to such a path, but merely contrasts the effects of sugar with other drugs. It does suggest, however, that while caffeine may not be as harmful to adults, children may be another story.³⁹

Another concern caffeine consumption brings is sleeplessness.⁴⁰ Because childhood and adolescence are periods when brain development takes place, sleep is an invaluable resource.⁴¹ WebMD, a popular on-line source of medical information, recommends that children between one and four weeks old obtain anywhere from fifteen to eighteen hours of sleep per day.⁴² More importantly, they suggest that children ages seven to twelve get ten to eleven hours of sleep per day.⁴³ Proper amounts of sleep are necessary for children to "maximize growth and development."⁴⁴ With the high intake of caffeine by children, obtaining the suggested amount of sleep may be unachievable.⁴⁵ Therefore, caffeine could hinder brain development and physical growth in children.⁴⁶ Developmental effects are not the only concerns with caffeine intake in children, but they are significant enough for this Note to conclude that the government has sufficient reason to implement caffeine regulation, at least for children.

The negative effects, however, do not stop with children. Very similar concerns are prevalent for the impact of too much caffeine on young

³⁶ *Id.* at 803.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 794. The smaller, still-developing digestive systems of children are not as capable of handling high amounts of caffeine as are adult digestive systems. *Id.*

⁴⁰ *Id.* at 805.

⁴¹ Temple, *supra* note 26 at 805.

⁴² *How Much Sleep Do Children Need?*, WEBMD, <http://www.webmd.com/parenting/guide/sleep-children> (last visited Mar. 25, 2012).

⁴³ *Id.*

⁴⁴ Temple, *supra* note 26.

⁴⁵ Charles P. Pollak & David Bright, *Caffeine Consumption and Weekly Sleep Patterns in US Seventh-, Eighth-, and Ninth-Graders*, 111 J. PEDIATRICS 42, 42, 45 (2003); see also Rebecca L. Orbeta et al., *High Caffeine Intake in Adolescents: Associations with Difficulty Sleeping and Feeling Tired in the Morning*, 38 J. ADOLESCENT HEALTH 451, 452 (2006); Diana J. Whalen et al., *Caffeine Consumption, Sleep, and Affect in the Natural Environments of Depressed Youth and Health Controls*, 33 J. PEDIATRICS PSYCHOL. 358, 359 (2008).

⁴⁶ See Temple, *supra* note 26.

adults.⁴⁷ A study from *The Journal of Pediatrics* explains that “[t]he potential harm[s to young adults], caused by [energy drinks with high caffeine concentrations], include heart palpitations, seizures, strokes, and even sudden death.”⁴⁸ While sodas are a large part of teen caffeine consumption,⁴⁹ energy drinks are also a major contributor to their caffeine intake.⁵⁰ Use of energy drinks by college students has been linked with risky substance use and sexual risk-taking.⁵¹ Moreover, caffeine intake in young to mature adults may be to blame for “increase[d] anxiety and impair[ed] sleep.”⁵² Students use energy drinks for several reasons. Many consume it to complete homework assignments late at night,⁵³ to study during “all-nighters,”⁵⁴ and to socialize.⁵⁵ Notwithstanding the reasoning behind the use of caffeinated beverages, the effects of anxiety and impaired sleep are consistent.⁵⁶

⁴⁷ *Id.*

⁴⁸ Lindsey Tanner, *Energy Drinks Can Be Dangerous for Teens, Report Says*, MSNBC.COM (Feb. 14, 2011, 9:47 AM), http://www.msnbc.msn.com/id/41577256/ns/health-childrens_health/t/energy-drinks-can-be-dangerous-teens-report-says.

⁴⁹ *Caffeine*, TEENSHEALTH, http://kidshealth.org/teen/drug_alcohol/drugs/caffeine.html (last visited Mar. 25, 2012) (“Teens usually get most of their caffeine from soft drinks and energy drinks.”); see also Alia Butler, *Pop vs. Water Consumption in Teens*, LIVESTRONG (Nov. 30, 2010), <http://www.livestrong.com/article/321794-pop-vs-water-consumption-in-teens/>; *Soft Drinks Undermining Americans' Health*, CTR. FOR SCI. IN THE PUB. INTEREST (Nov. 3, 1998), <http://www.cspinet.org/> (follow “Newsroom” hyperlink at bottom of Homepage; then follow “Newsroom Archive” under “CSPI Newsroom” box; then follow “1998” hyperlink under “Quick Links” box; then follow “Soft Drinks Undermining Americans' Health” hyperlink).

⁵⁰ Brenda M. Malinauskas et al., *A Survey of Energy Drink Consumption Patterns Among College Students*, 6 NUTRITION J. 1, 1 (2007), available at <http://www.biomedcentral.com/content/pdf/1475-2891-6-35.pdf> (discussing the usage of energy drinks amongst college students).

⁵¹ University of Buffalo, *Energy Drinks Linked to Risk-Taking Behaviors Among College Students*, SCIENCEDAILY (Jul. 25, 2008), <http://www.sciencedaily.com/releases/2008/07/080724150438.htm>.

⁵² A. Smith, *Effects of Caffeine on Human Behavior*, 40 FOOD & CHEMICAL TOXICOLOGY 1243, 1243 (2002), available at <http://intraspec.ca/Effects-of-caffeine-on-human-health.pdf>.

⁵³ Natalie Butz, *Stressed Students Driven to Drink: Energy Drinks Remain Popular, Despite Health Risks*, 81 THE ELM (Mar. 12, 2011), available at <http://elm.washcoll.edu/index.php/2011/03/stressed-students-driven-to-drink-energy-drinks-remain-popular-despite-health-risks/> (discussing students resorting to energy drinks to help cope with the limited time to complete school work).

⁵⁴ *Id.* (discussing the “all-nighters” that students combat with energy drinks).

⁵⁵ Malinauskas, *supra* note 50, at 3.

⁵⁶ Smith, *supra* note 52.

Although children and young adults consuming caffeinated drinks are of concern to the medical profession,⁵⁷ behavioral effects on all ages are a consideration as well. Large doses of caffeine can cause “[a]dverse behavioral effects”⁵⁸ in adults, such as anxiety and decreased sleepiness at night.⁵⁹

It is important to note, of course, that views differ⁶⁰ as to whether caffeine brings about such detrimental effects for the children, young adults, and adults who consume it. The point, however, is not that differing views exist, but rather that much research has produced conclusions asserting the deleterious consequences of caffeine consumption. In light of considerable and consistent support for these conclusions, this Note will use them as the basis for a discussion of potential government regulation of the caffeinated products currently on the market.

II. GOVERNMENT REGULATION MIGHT BE IN OUR FUTURE

A quick online search for the harmful effects of caffeine consumption, primarily via energy drinks, on young children yields a plethora of relevant results. In sum, caffeine consumption by children is rising,⁶¹ and has increased by seventy percent in the past thirty years.⁶² These statistics offer more support for government intervention, because as the population of consumers grows, more people become exposed to the harmful effects of caffeine.

Though the Food and Drug Administration (FDA) has cracked down on alcohol-caffeine drinks,⁶³ there is room for further regulation on caffeine consumption.⁶⁴ The popularity of energy drinks has skyrocketed since the introduction of Red Bull in the United States in 1997.⁶⁵ Since then, hundreds of other brands and types of caffeinated-drinks have en-

⁵⁷ See, e.g., Bernstein, *supra* note 31, at 414; Butz, *supra* note 53; Temple, *supra* note 26 and accompanying text.

⁵⁸ Smith, *supra* note 52, at 1247.

⁵⁹ *Id.*

⁶⁰ See *supra* notes 21–22 and accompanying text.

⁶¹ Temple, *supra* note 26, at 793.

⁶² *Id.*

⁶³ *Supra* note 14 and accompanying text.

⁶⁴ There must be room if so many children are being harmed by the negligence of the uninformed parent giving his or her child three twelve-ounce cans of soda per day, if not more.

⁶⁵ Chad J. Reissig et al., *Caffeinated Energy Drinks—A Growing Problem*, 99 DRUG & ALCOHOL DEPENDENCE 1, 1 (2009).

tered the market,⁶⁶ some of which have been banned by the FDA because of public safety concerns.⁶⁷ This was the case with caffeinated alcoholic drinks, particularly because the FDA felt that the simultaneous consumption of caffeine and alcohol was simply a dangerous combination. The Center for Disease Control and Prevention (CDC) explains that this type of product is popular amongst youths, primarily college students.⁶⁸ The danger these drinks pose comes from the masking effect of the caffeine on “the depressant effects of alcohol.”⁶⁹ Essentially, those drinking energy drinks with alcohol experience only limited effects of the alcohol, a phenomenon that causes the drinker to misconstrue his or her tolerance, and ultimately results in the intake of more alcoholic beverages.⁷⁰ Thus, the consumption of alcohol and energy drinks increases the risk of alcohol-attributable harms.⁷¹ Furthermore, applying the logic the FDA used in banning caffeine-alcohol drinks, regulation might be implemented in order to stop the recreational use of this dangerous combination by students and bartenders.⁷² States like Montana have enacted statutes that classify caffeinated alcoholic drinks as liquor, thus limiting the locations of its sale.⁷³

However, some argue that the FDA's regulation of alcoholic energy drinks should constitute but a first step toward greater caffeine regulation,⁷⁴ and state governments are responding to this call. Following an incident in which three middle school students were taken to the “emergency room due to complaints of racing heart rates and body sweats” after sharing a can of Redline, some school boards have contemplated entirely banning energy drinks on campus.⁷⁵ Another local government initiative to regulate caffeinated beverages arose in Long Island, New York, where Lynne Nowick, a county official, introduced a bill to prohibit young adults

⁶⁶ *Id.* at 3.

⁶⁷ *See, e.g.,* Kesmodel, *supra* note 14.

⁶⁸ *Fact Sheets: Caffeinated Alcoholic Beverages*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/alcohol/fact-sheets/cab.htm> (last visited Mar. 25, 2012).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² The example is describing the linkage between college students and those who drink energy drinks.

⁷³ *See* MONT. CODE. ANN. § 16-1-106(8) (2009), *available at* <http://data.opi.mt.gov/bills/mca/16/1/16-1-106.htm>.

⁷⁴ Dan Dixon & Rob McKenna, Op-Ed., *More Needs to Be Done Than Simply Banning Alcohol Energy Drinks*, SEATTLE TIMES (Nov. 21, 2010, 4:00 PM), http://seattle.times.nwsourc.com/html/opinion/2013477732_guest22mckenna.html.

⁷⁵ Georgia Lund, *The Effects That Energy Drinks Have on Children*, ASSOCIATED CONTENT (Apr. 18, 2008), http://www.associatedcontent.com/article/715823/the_effects_that_energy_drinks_have.html.

nineteen years and under from purchasing drinks containing an excess of eighty milligrams of caffeine.⁷⁶ Nowick believes these drinks are dangerous and harmful to young adults,⁷⁷ and she is not alone. News agencies are beginning to support what they believe to be necessary regulation.⁷⁸

Moreover, the regulatory efforts of other countries could indirectly provide guidance to the United States government. In Sweden, for example, well-known grocery store ICA recently fell in line with other grocery stores by implementing a fifteen-year-old age minimum on the purchase of all energy drinks.⁷⁹

Such initiatives to curb caffeine consumption both domestically and abroad should serve as a wakeup call to the businesses that sell high-caffeine-content products. Should the FDA join this movement by further regulating the sale of such products, the market could become overwhelmingly competitive, and potentially unstable.

III. EFFECTS OF REGULATION ON THOSE WHO PRODUCE CAFFEINATED PRODUCTS

In 1999, approximately eighteen billion dollars were spent on coffee alone.⁸⁰ With children's consumption of caffeine increasing approximately seventy percent over the past thirty years,⁸¹ companies dealing in caffeinated products have begun to depend on this burgeoning market of caffeine consumers. And, with regard to energy drinks, many companies market their products to children and young adults.⁸² Yet if age-limiting legislation is passed resembling the policies adopted by ICA and other grocery

⁷⁶ *Official Would Ban Energy Drinks for Kids*, UNITED PRESS INT'L (Dec. 8, 2010), http://www.upi.com/Top_News/US/2010/12/08/Official-would-ban-energy-drinks-for-teens/UPI-71531291838687/. Of course, following this statement, the manufacturers object. The American Beverage Association (ABA) argues that "[a]ny proposed ban on energy drinks is without merit Energy drinks contain about half the caffeine in a similar size cup of coffeehouse coffee. To be consistent, coffeehouses would have to start checking IDs before serving customers coffee." *Id.* It is interesting to see how the ABA believes carding someone for age-verification is an extreme burden on those that serve the product. It seems this association ignores the same process of carding for alcohol.

⁷⁷ *Id.*

⁷⁸ See Dixon & McKenna, *supra* note 74 (arguing that the FDA's regulation of alcoholic energy drinks should constitute but a first step toward greater caffeine regulation).

⁷⁹ Hairy Swede, *Energy Drinks and Age Limits—Self-Imposed Swedish Regulation*, A SWEDISH AM. IN SWEDISH-AMERICA (Dec. 7, 2009, 1:40 PM), <http://welcometosweden.blogspot.com/2009/12/energy-drinks-and-age-limits-self.html>.

⁸⁰ *Coffee Consumption Statistics in the United States*, *supra* note 1.

⁸¹ Temple, *supra* note 26, at 793.

⁸² *Id.*

stores in Sweden,⁸³ these companies would be forced to change their marketing strategy, either by finding new groups to appeal to or by marketing more aggressively to their older consumer base. Beyond caffeinated beverages, caffeinated gum and mints marketed to children might also be subject to regulation.⁸⁴ Indeed, due to the alarmingly high average intake of caffeine by children,⁸⁵ it is likely that children's products will be the first regulated.

Ultimately, absorbing hits to their growing youthful customer base is a legitimate reason for businesses to worry about caffeine regulation. If increased regulation is aimed towards the young adult population, it is fair to say that companies producing high-caffeine content products marketed to this group will suffer. Caffeine companies could glean a fair understanding of the consequences of such regulation by noting the results of age restrictions placed on market-similar products⁸⁶—especially tobacco—in the United States and abroad.

In 1977 and 1995, Finland banned the purchase of tobacco by minors.⁸⁷ After the 1995 ban, tobacco purchases by fourteen-year-old daily smokers dropped from ninety percent to sixty-seven percent, and purchases by sixteen-year-old daily smokers dropped from ninety-four percent to sixty-two percent.⁸⁸ One study concluded that “[l]egislation appears to have permanently changed tobacco sales practices and decreased purchases from commercial sources [in Finland].”⁸⁹

In the United States, the evolving nature of the tobacco industry is fascinating to follow. The World Health Organization (WHO) estimates that in 1995, U.S. Tobacco companies “donated more than \$32 million in political contributions” in order to protect their investment.⁹⁰ Yet regulation of advertising, including cigarette packaging, possibly contributed to a de-

⁸³ See *supra* note 79 and accompanying text.

⁸⁴ Temple, *supra* note 26.

⁸⁵ See *supra* notes 9–10 and accompanying text.

⁸⁶ By market-similar products, this Note intends to suggest a similarity between the reactions to tobacco and alcohol when they were first introduced. Additionally, caffeinated products tend to be thought of as products for the adult population, similar to tobacco and alcohol, though all are consumed by young adults, and sometimes children, legally or not.

⁸⁷ A.H. Rimpela & S.U. Rainio, *The Effectiveness of Tobacco Sales Ban to Minors: The Case of Finland*, 13 TOBACCO CONTROL 167 (2004).

⁸⁸ *Id.* at 170.

⁸⁹ *Id.* at 173–74.

⁹⁰ JUDITH MACKAY & MICHAEL ERIKSEN, *THE TOBACCO ATLAS* 62 (World Health Organization 2002), available at <http://whqlibdoc.who.int/publications/2002/9241562099.pdf> (last visited Mar. 25, 2012).

crease in revenues after 1980 for U.S. Tobacco companies.⁹¹ In fact, between 1981 and 1991,⁹² adult smoking rates decreased by at least twenty percent.⁹³ It is easy to imagine a similar scenario playing out for caffeinated drinks marketed to teens and children. The difficulty of regulation comes not only from the profit loss due to the restrictions themselves, but also from the necessary increases in advertising costs for having to change advertising strategy and inclusion of disclosures. Each year, the tobacco industry spends millions of dollars more on advertising and promoting its products than it spent the previous year.⁹⁴ Between 2000 and 2001, the six largest cigarette companies increased their advertising and promotional expenses by seventeen percent.⁹⁵ The WHO suggests that U.S. Tobacco Companies use such promotional methods to combat tobacco control.⁹⁶ If the caffeine industry has to bear similar regulatory limitations on advertising times and places, it could suffer similar effects.

Of course, tobacco companies might be able to maintain their business despite such strong regulations on packaging, age limitations, and advertising, among other things, given the addictive characteristic of cigarettes. The industry's customers are therefore more likely to be *repeat* customers. Comparing this to the caffeine industry, the question then becomes whether the largest companies producing caffeinated products would similarly be able to sustain their business through a reliance on repeat customers upon federal imposition of an age or advertising restriction on the industry. As previously discussed, caffeine is not characterized, at least not officially, as being so highly addictive that one is unable to control his or

⁹¹ See John P. Nelson, *Advertising Ban in the United States*, ECON. HISTORY, tbl.2 (May 21, 2004), available at http://econ.la.psu.edu/papers/AdBans_Critical.pdf.

⁹² This is assumed as a general time period when several advertising bans went into effect. See *id.* at 9–10.

⁹³ See MACKAY & ERIKSEN, *supra* note 90, at 25. Keep in mind that it is hard to prove that anti-drug campaigns did not have an effect in decreasing smoking rates. This was a time period of high regulation and the rates did go down, so it is also hard to discard the effect of regulation. The regulation effectively required tobacco companies to disclose the harmful effects of their products on the product's packaging. *Id.*

⁹⁴ FED. TRADE COMM'N, CIGARETTE REPORT FOR 2001 tbs.2, 2A & 2B (2003), available at <http://www.ftc.gov/opa/2003/06/2001cigrpt.shtm>.

⁹⁵ See *id.* at 1 (discussing how advertising and promotional spending for the six largest tobacco companies increased from 9.59 billion dollars spent in 2000 to 11.22 billion dollars in 2001, possibly as a result of continuous and increasingly stringent regulation).

⁹⁶ See WORLD HEALTH ORG., TOBACCO COMPANY STRATEGIES TO UNDERMINE TOBACCO CONTROL ACTIVITIES AT THE WORLD HEALTH ORGANIZATION 30, available at http://www.who.int/tobacco/en/who_inquiry.pdf (last visited Mar. 25, 2012).

her desire for its effects.⁹⁷ Without the guarantee of an addicted consumer base, the companies affected by regulation on caffeine products would have to find a way to capture the market before they can legally sell to that specific segment or age group.

Despite claiming in 2007 that Starbucks recognizes itself as a “family destination,” then-Starbucks spokesperson Brandon Borrman gave assurances that Starbucks had no plans to market to children.⁹⁸ Borrman went on to recognize, however, that the under-eighteen group had nonetheless become a part of the company’s customer base.⁹⁹ That same year, Seattle-based Starbucks¹⁰⁰ began to “consider[] whether to add new drinks or drink sizes that [would] better meet the needs of kids or teens.”¹⁰¹

Today, a specifically designated Kids’ Menu with drinks that bear a striking resemblance to “adult” drinks can be found on the Starbucks website.¹⁰² While none of the “Kids” drinks contain caffeine,¹⁰³ if child customers take the drinks to go, they will likely receive the same popular, easily recognizable Starbucks To-Go cups¹⁰⁴ as their caffeine-consuming parents. With that simple exchange, Starbucks may well have made the child a *future* customer more likely to return when he or she has grown up. Further, there are parents that allow their children, even those as young as four-years-old, to drink caffeinated beverages.¹⁰⁵ These “customers” must also be a factor within the profit model of the caffeine products industry. Because of the availability of caffeine, whether purchased by the

⁹⁷ See Kovacks, *supra* note 2. Some argue that sugar has its own addictive qualities, but that we are not per se addicted to sugar. See *supra* notes 35–41 and accompanying text (discussing the slight addictive characteristic of sugar and comparing its effects to that of other, more potent, substances such as cocaine and nicotine).

⁹⁸ Meg Marco, *Attention: Starbucks Is Officially a Family Destination*, THE CONSUMERIST (Sept. 12, 2007), <http://consumerist.com/2007/09/attention-starbucks-is-officially-a-family-destination.html>.

⁹⁹ Allison Linn, *Starbucks Rethinks Stance on Young Customers*, MSNBC.COM (Sept. 10, 2007), http://www.msnbc.msn.com/id/20608492/ns/business-consumer_news/; see also Marco, *supra* note 98.

¹⁰⁰ In no way does this Note intend to imply that Starbucks conducts its business in order to “capture” or “hook” the lower age groups.

¹⁰¹ See Linn, *supra* note 99.

¹⁰² *Kids’ Drinks and Others*, STARBUCKS, <http://www.starbucks.com/menu/catalog/product?drink=kids-drinks-and-other> (last visited Mar. 25, 2012).

¹⁰³ *Id.*

¹⁰⁴ Len Press, *In Tribute to Starbucks 35*, PRESSVISION’S BLOG (Sept. 12, 2010), <http://pressvision.wordpress.com/2010/09/12/in-tribute-to-starbucks-35> (discussing the different Starbucks To-Go Cup sizes).

¹⁰⁵ Linn, *supra* note 99 (describing a four-year-old receiving a chai tea latte from his mother on a bi-monthly basis).

parent or purchased by the child, and because Starbucks holds itself to be a “family destination,”¹⁰⁶ there is good reason that regulations might target corporations like Starbucks to protect the safety interests of children under a certain age from caffeine’s harmful effects.

Regulation of caffeinated products might look to alter energy drink solicitation on college campuses as well. One-third of Americans aged twelve to twenty-four regularly consume energy drinks.¹⁰⁷ The government has reason to step in and make a change as evinced by caffeine’s harmful effects.¹⁰⁸ This foreseeable regulation would cause much hardship for the energy drink companies, for in 2008, that age group accounted for 3 billion dollars in annual sales in the United States alone.¹⁰⁹

One major example of a successful energy drink company is Monster Energy Corporation, the maker of Monster Energy Drink. For years, representatives from this company have visited college campuses around the country with hopes of “marketing” its products¹¹⁰ by offering free cans of Monster Energy Drink.¹¹¹ As the company was giving out their Nitrous Energy Drink, one witness described “[seeing] students flock[] to the stand grabbing *free* energy drinks, myself included.”¹¹² Clearly, there is a demand for energy drinks. Students seem to enjoy drinking them.¹¹³ This enjoyment could be influenced by the extreme sports previewed in their

¹⁰⁶ Marco, *supra* note 98.

¹⁰⁷ Tara Parker-Pope, *Taste for Quick Boost Tied to Taste for Risk*, N.Y. TIMES (May 27, 2008), <http://www.nytimes.com/2008/05/27/health/27well.html>.

¹⁰⁸ *Supra* notes 48, 58–59 and accompanying text.

¹⁰⁹ Parker-Pope, *supra* note 107.

¹¹⁰ For an example of Monster focusing its marketing efforts on college students, see *infra* note 115 and accompanying text.

¹¹¹ Kelly Wood, *Monster Energy at SEU*, GETTING STARTED (November 3, 2010), <http://kewood10.wordpress.com/2010/11/03/monster-energy-at-seu/>.

¹¹² *Id.* (emphasis added). From personal experience, the author remembers Monster Energy coming to an N.C. State University football game and freely handing out full packs of Monster Energy Drinks of a variety of flavors. The author saw people carrying away several cases of twenty-four-pack Monster Energy Drink. The company loses nothing (but the product cost) because they get their name out and know that you will likely be having a good time. Thus, drinking Monster Energy Drink becomes inexorably intertwined with the good memories from that sporting event and night.

¹¹³ Conversely, there is documentation of areas where Monster is not so well received. At Clark College, a student describes energy drinks as a “necessary evil” because they help when you need them, but you do not really want to use them. The students at this school felt healthier food products should be handed out for free, not the “necessary evil” energy drinks. Margarita Topal, *Monster Invades Campus to Mixed Reviews*, THE INDEP. (Oct. 19, 2010), <http://www.clark-independent.com/life/monster-invades-campus-to-mixed-reviews-1.1715606>.

commercials,¹¹⁴ or the benefits of energy drinks alone. In fact, Monster holds “Focus Group Research” to find new and better ways to market their products to college-aged students.¹¹⁵

Visiting college-sponsored events is not the only crevice Monster has wiggled itself into. Four years ago, Monster entered into a contract with Sigma Nu, a fraternity at Duke University.¹¹⁶ Monster promised to provide Sigma Nu with at least twenty cases of Monster a month in exchange for the fraternity's support in providing the drink at parties and displaying Monster gear.¹¹⁷ Understandably, this is a powerful move¹¹⁸ for Monster. If, however, regulatory limitations are imposed that prohibit serving energy drinks alongside alcohol, such as at college fraternity parties, Monster will be the one who kicks the bucket. One can imagine that college students are unlikely to cancel the keg deliveries and only allow energy drinks at their parties.

Admittedly, regulation of caffeinated products is still merely speculation. But speculation does not mean that it is unimaginable, and in fact it is practical and possibly foreseeable, because there are enough reasons for regulation¹¹⁹ and enough ways to successfully regulate the high caffeine intake of this country.¹²⁰ For the foregoing reasons, companies would be greatly affected by any such regulations.

IV. EFFECTS OF REGULATION ON THOSE WHO CONSUME CAFFEINE

Countless Americans—both young and old—depend on caffeine to fuel their days, this intake primarily delivered through the consumption of coffee. Of studies on the effects of caffeine on the human body, some state

¹¹⁴ See, e.g., *supra* notes 111–12.

¹¹⁵ Jessah Ayala, *Monster Energy Drink: Focus Group Research* (Apr. 29, 2007), <https://webpace.utexas.edu/jga335/sts311/monsterfocus.html> (discussing the goals of the research group and how the research was to be conducted near The University of Texas campus).

¹¹⁶ Zak Kazzaz, *Monster Energy Drink Pumps Up Sigma Nu*, THE CHRON. (Sept. 24, 2006), <http://dukechronicle.com/article/monster-energy-drink-pumps-sigma-nu> (discussing the agreement between Monster Energy and Sigma Nu and the terms of future sponsorship).

¹¹⁷ *Id.*

¹¹⁸ This helps Monster penetrate a target market and affords it very cheap advertisement, as they are only incurring the cost of having to provide free cans. If people like it, they will go and buy their product.

¹¹⁹ See *supra* Part I (discussing medical effects on children and young adults after the consumption of high and low amounts of caffeine).

¹²⁰ For instance, regulation could entail preventing the vending of alcoholic drinks and energy drinks simultaneously.

that caffeine is actually beneficial, as it provides mood function improvement.¹²¹ Though caffeine can have negative effects, such as acute anxiety,¹²² there are also certain benefits to consuming a cup of coffee, excluding decaf, such as improved work efficiency. Offices around the country provide a “refueling” station for their employees¹²³ as a means to fight afternoon fatigue. There is an inference missing here, though. One might wonder how regulation of caffeine, which will likely be placed on the younger crowd, will affect the mature adult in the workplace.

It is arguably common knowledge that many, if not a majority of corporate offices provide access to a coffee maker for employee use.¹²⁴ Knowing this, alongside the results of a study indicating that “moderate doses of caffeine (200–300 milligrams) often produce enhanced feelings of well-being, improve concentration, and increase arousal and energy,”¹²⁵ it is imaginable that regulations on the industry might have a major impact on workplace efficiency.¹²⁶ This problem would arise indirectly, through a supply and demand imbalance. If caffeine-product manufacturers are unable to meet their high costs of overhead because of the now-limited customer base, they will likely have to do one of two things: (1) reduce their overhead expenses; or (2) increase their prices. If prices go up, some consumers will reduce their caffeine intake in response to the high prices, and some businesses will forgo their offer of free coffee to employees, as it is not an expense necessary to operate the business, and instead just provide the maker. Regulation on any age group is thus likely to affect all age groups, because the company selling caffeinated products, in the end, is the one who is the most affected.

¹²¹ Temple, *supra* note 26, at 793 (“[M]oderate doses of caffeine (200–300 mg) often produce enhanced feelings of well-being, improve concentration, and increase arousal and energy.”).

¹²² Smith, *supra* note 52, at 1244.

¹²³ Mary MacVean, *The Keurig Question: What to Do with Those Used Coffee Cartridges?*, L.A. TIMES, (Jan. 13, 2012), http://latimesblogs.latimes.com/home_blog/2012/01/keurig-environmental-impact.html (“Keurig, a major player in the one-cup coffee business, reports that research it commissioned indicated that 13% of all U.S. offices have one of its brewers.”).

¹²⁴ *Id.* This can also be inferred from the many companies that market their coffee makers for office use. See, e.g., *The Keurig Coffeemaker—How to Buy Your First Keurig Coffeemaker*, KEURIG COFFEE MAKERS, <http://www.keurigcoffeebrewer.com/keurig-coffeemaker.html> (last visited Mar. 25, 2012).

¹²⁵ Temple, *supra* note 26.

¹²⁶ On a side note, the same effect might be had on high school students prohibited from drinking an energy drink to stay awake through a class. Schools could be put under pressure when they begin to realize grades are slowly dropping.

It has been argued in many medical journals that some caffeinated drinks are marketed solely to children and young adults.¹²⁷ In their commercials, the energy drink companies preview extreme sports and fun activities to entice the viewer into believing the energy drink will allow them to similarly take part.¹²⁸ Some students believe energy drinks are a necessary, unfortunate “evil” that is needed for late nights and the tiring days of school.¹²⁹ Before energy drinks were around, there was likely nothing but long, hard work hours to complete the late-night homework assignments.¹³⁰ Nonetheless, the demand and this feeling of necessity exist and should be acknowledged. College students will certainly be unhappy about having to pull all-nighters without energy drinks if regulation so requires, because concentrating with heavy eyes can prove very difficult. Thus, one sees the need for energy drinks and their “necessary” existence.

There are many different types of consumers that would be affected by foreseeable government regulation. The suggestions in the next Part are preventive measures for foreseeable caffeine regulation. The suggestions are aimed to help businesses maintain their corporate structure and to better equip them to stand strong against possible government regulations of caffeine-inclusive products.

V. SOLUTIONS AND PREVENTIVE MEASURES FOR FORESEEABLE GOVERNMENT REGULATION

As discussed in Part III of this Note, many businesses will be affected by caffeine regulation if it is adopted. This Part suggests several ways for companies and businesses to take active and preventive measures to protect their business from the effects of foreseeable regulation of the caffeine industry that could limit the total market pool of available customers. In other words, children and teenagers might become off-limits.¹³¹

First, companies may decide to actively profess that they are not marketing to children by offering “kid-friendly” options on their menus. A

¹²⁷ See, e.g., Temple, *supra* note 26, at 794, 802.

¹²⁸ *Id.* at 794.

¹²⁹ See Topal, *supra* note 113 and accompanying text.

¹³⁰ Of course, it can be understood that as technology and other inventions come about, we become more accustomed to them until we become completely dependent on them, such as the computer or the camera. Before these things were invented, people did not need electronics to write a letter and did not require a hard drive to hold a good memory.

¹³¹ This is particularly by limiting consumption of caffeine by children and adults. See *supra* Part I (discussing the potentially harmful medical effects on children after the consumption of caffeine).

good example of this is Starbucks,¹³² which now offers a legitimate Kids' Menu. All items are free of caffeine and surprisingly healthy.¹³³ This type of marketing will help insulate a company's customer base, not only because the children are hooked on the brand early,¹³⁴ but also because it makes it an easy stop for parents to buy something for themselves and also for their kids. This allows customers, at least those with children, to make *efficient* refueling stops at a store.¹³⁵

A slight modification of this business suggestion might also help the companies that depend on grocery stores for product distribution. Instead of offering products individually, companies can bind two products together, such as one non-caffeinated product for the children and one caffeinated for the adults, to act as a promotional pack that is absent a price increase. This would bring the adult product into the homes of many.¹³⁶ This could help promote brand image and instill the company's name in the minds of the children, for when they get older and ready to purchase the products tailored to adults.

Second, for coffee shops, or other caffeine businesses with a physical location of business, marketing in a more streamlined fashion towards one gender might help sustain a stronger customer base. Hooters is a role model the industry might look to as an example. The company says that their waitresses must be female in order to maintain their desired business image.¹³⁷ Hooters has argued that, "Hooters Girls have the same right to use their natural female sex appeal to earn a living as do super models Cindy Crawford and Naomi Campbell."¹³⁸

Already, some in the caffeine business have followed suit. In Detroit, a two-store drive-through coffee shop called The Hot Spot Coffee has added

¹³² *Supra* note 100 and accompanying text.

¹³³ *See Kids' Drinks and Others, supra* note 102 and accompanying text (discussing the Starbucks Kids' Menu options and briefly discussing the nutritional facts).

¹³⁴ *See supra* text accompanying notes 102–06.

¹³⁵ This may not work as well for grocery store purchases, but if the product is good it may help.

¹³⁶ Of course, this suggested modification assumes that the customers that buy the product package will have children. Research can be done to specifically target the grocery stores where families constitute the largest portion of the consumer base. This would increase the likelihood of the promotional drink being given to children. If children like the drink, there will be reason for the parents to purchase it in the future.

¹³⁷ MARI FLORENCE & ED FORTSON, *SEX AT WORK: ATTRACTION, ORIENTATION, HARASSMENT, FLIRTATION, AND DISCRIMINATION* 250–51 (2001).

¹³⁸ *Id.* at 251.

bikini baristas to their corporate business model.¹³⁹ One of the baristas, Brenda, describes the new wardrobes as not overtly sexual, but instead as “sexy/flirty/fun.”¹⁴⁰ The coffee shop saw its sales double overnight.¹⁴¹ In fact, sales were so good that the owners have decided to open another location, after they obtain the town’s approval.¹⁴²

Third, companies can find new uses for their products that apply to a different marketing group. When a company does not have to modify, renew, or restart a product, it is able to save a considerable amount of money. 5-Hour Energy is a good example of a company that has exhibited success with this notion. 5-Hour Energy was first marketed as a four-calorie energy boost for “that 2:30 feeling.”¹⁴³ Later, the company began to move marketing efforts to the morning consumer segment.¹⁴⁴ The marketing campaign was an attempt to shift people from making, drinking, and hassling with coffee in the morning to a quick 5-Hour Energy drink that took less than four seconds to consume.¹⁴⁵ Moreover, 5-Hour Energy aims its product solely at adults,¹⁴⁶ unlike other energy supplements with the intense bike riding and extreme sports previews,¹⁴⁷ which enables their products to be marketed as the everyday pick-me-up, rather than targeting certain activities.

The above suggestions are a few examples from the large variety of changes that can and should be implemented by companies in the caffeinated product industry in order to protect themselves from suffering economic loss as a result of potential, and foreseeable, governmental regulation of this industry. The companies that do take this advice and prepare

¹³⁹ United Press International, “*Bikini Baristas*” Increase Coffee Sales, UPI.COM (July 31, 2010), http://www.upi.com/Odd_News/2010/07/31/Bikini-baristas-increase-coffee-sales/UPI-64691280605782/.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* A point should be made about their insistence on gaining approval through the town’s legitimate processes, that is, town hall meetings. When a business is on good terms with the people of the town, the business is more likely to be supported by those same people. See Herman B. Leonard, Professor, Harvard Bus. Sch., Address on Corporate Social Responsibility at Hotel Equatorial in Kuala Lumpur (May 8, 2008), available at <http://charlesrivercentre.com/brochures/CSR-20080421-NC.pdf>. If the people are unhappy with your decision to bring your specific business to their town, they are going to be reluctant to support the business in any way. *Id.*

¹⁴³ 5-HOUR ENERGY, <http://www.5hourenergy.com/askenergyguy.asp> (last visited Mar. 25, 2012).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Temple, *supra* note 26, at 794.

for regulation will be in a better position to combat possible profit-loss due to the decrease of customers who purchase their products and help the company maintain its financial strength.

CONCLUSION

Regulation of the caffeine industry is foreseeable in the near future because of the many medical concerns associated with an individual's consumption of caffeine.¹⁴⁸ At one point in time, alcohol was also available to children, and the government felt it was necessary to restrict children's alcohol consumption.¹⁴⁹ Should the federal government apply similar logic, regulation of the caffeine industry would be deemed needed, and thus foreseeable

Under this assumption, many of the companies in the caffeinated product industry may be negatively affected by age restrictions or advertising content regulation. In Part V of this Note, suggestions are provided for the purpose of helping prevent adverse negative effects of this regulation. With the tobacco industry's ability to rebound from similar regulation, it is hard to ascertain if the caffeine industry will have the same success, as caffeine does not possess the same level of addictive qualities as tobacco.¹⁵⁰

If the companies in the caffeine industry take into consideration and implement coping measures such as those detailed in Part V of this Note, they will be more likely to survive the future regulatory impact, whether it be an age restriction, advertisement ban, or some other form of regulation on the caffeine industry.

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¹⁴⁸ See *supra* Part I.

¹⁴⁹ This is evidenced by the existence of current age requirements for alcohol purchases. See National Minimum Drinking Age Act, 23 U.S.C. § 158 (1984).

¹⁵⁰ Kovacks, *supra* note 2.

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