

Forum

**Enticing Business to Create a Healthier
American Diet: Performance-Based Regulation
of Food and Beverage Retailers**

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The American public could enjoy a much healthier diet if we enticed food and beverage retailers (stores and restaurants) to substantially reduce the calories, added sugar, sodium, and saturated fat that pass through their cash registers—say, a 25 percent reduction in sugar, salt, and fat and a 10 percent reduction in calories. Rather than ordering firms to make specific changes in what they sell, this strategy—called performance-based regulation—leaves industry to figure out what is the best way to transform the American diet in a positive way. Because it calls for real changes in outcomes, this regulatory strategy could be far more effective than information disclosure policies that rely on consumer choices, and because it does not require adding extra cost to the price of food and beverages, it could be politically far more attractive than taxing unhealthy foods. Appealing to both conservative and liberal values, instead of relying on the professional expertise of public health regulators, performance-based regulation enlists America's large food retailers to serve the public good—or suffer substantial financial penalties for failing to do so.

I. THE AMERICAN DIET: A PUBLIC HEALTH PROBLEM

Today's American diet is unhealthy. Of course, many individuals eat very well, are quite fit, and in fine health. But public health officials, medical leaders, and nutrition scientists agree that, overall, our national diet is poor. The mainstream consensus is that people consume too many calories, and, in particular, our diet contains too much added sugar, saturated fat, and sodium (U.S. Department of Agriculture [USDA] and Department of Health and Human Services 2010). The most visible consequence of our overindulgence is the shocking level of obesity in America, a condition that pervades all ages, races, and social classes, although obesity is an even greater problem

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for racial and ethnic minorities (U.S. Centers for Disease Control and Prevention [CDC] 2013a). Whether or not what is termed obesity (i.e., a high body mass index) is by itself unhealthy (Guthman 2011), most experts agree that excess consumption of added sugar and saturated fat brings with it a host of negative health consequences, including high blood pressure, diabetes, heart disease, and so on (CDC 2013b). These in turn lead to burdened lives and an estimated more than 300,000 deaths per year, making poor-diet-caused obesity the second most preventable cause of death (second to tobacco use) (Mokdad et al. 2004; Allison et al. 1999). Although also not without controversy, excess sodium consumption, via the salt added to processed and restaurant food, is widely thought to be an enormous source of disease, albeit less visibly so, leading to another 100,000 early deaths per year according to a Report of the American Medical Association (Bibbins-Domingo et al. 2010; Dickinson and Havas 2007; but see, Storm, Yaktine, and Oria 2013). Besides harming consumers and their families, Americans as a whole pay for these bad health consequences in the form of the ever-increasing costs of medical care these victims require.

II. PERFORMANCE-BASED REGULATION SOLUTION AS COMPARED WITH OTHERS

What should be done? A new policy approach relies on a strategy called "performance-based regulation" (Coglianese, Nash, and Olmstead 2003; May 2003). Performance-based regulation would set dietary outcome targets to which individual regulated enterprises would be held. My proposal calls initially for aggregate reductions of 25 percent in the amount of added sugar, salt, and saturated fat, plus a 10 percent reduction in total calories, in the total package of food and beverage items that pass through the cash registers of retailers (both stores and restaurants). The regulated enterprises then would have to decide, behind the scenes, how to achieve those dietary outcome targets in the most efficient way. Failure to achieve their regulatory targets would subject food and beverage retailers to substantial financial penalties.

Performance-based regulation is not a new invention. The approach has been applied in other contexts, for example, to improve public education or to address climate change. The innovation here is envisioning how such a regulatory approach could be applied to improving the American diet. As discussed below, while performance-based regulation can have its own problems, there is reason to believe that, on balance, it might be a very promising strategy for addressing the current challenges facing the American diet.

Note the sharp contrast between my proposal and the positions taken by others regarding this enormous public health problem. Many conservatives argue that our unhealthy national diet reflects a failure of personal responsibility and, therefore, the solution requires simply urging people to take individual actions to eat in a healthier way and make sure their children do

the same (Berry, Gollust, and Niederdeppe 2012). To them, government intervention yields an undesirably intrusive “nanny state.” But this outlook ignores the fundamental reality that underlies the field of public health: reliance on isolated individual changes in behavior does not solve health problems in aggregate (Gostin 2008). After all, cutting the national rate of cigarette smoking by more than half required significant public policy changes (like increased taxes, broad limits on where people can smoke, and antitobacco industry public advertising) not purely reliance on targeted messages encouraging individual behavior change (Pierce et al. 1998). A taste for sweet, salty, and fatty foods begins in childhood, and therefore it is not reasonable to blame immature minors for their inappropriate consumption patterns. Furthermore, our “diet industry” remains profitable precisely because so many of those who use its services fail to achieve (or fail to achieve and maintain) healthy eating patterns.

In response to the conservative “do nothing” attitude, a number of policy changes have been put on the table by public health advocates and some have already been adopted (Nestle 2007). These include tax sugar-sweetened beverages (Pomeranz 2013; Brownell and Frieden 2009); ban the use of trans fats in processed and restaurant food (Ban Trans Fats 2013); require clearer and more vivid disclosure of calories, fat, sugar, and salt on food packages (Pomeranz 2011) and restaurant menus (Pomeranz and Brownell 2008); limit the ability of food stamps users to purchase unhealthy foods (McGeehan 2011); restrict the advertising of junk food to children (Parsons 2013); preclude fast food restaurants from giving away toys with other than healthy meals (ChangeLab Solutions 2013); improve the quality of food served in our schools (Food and Nutrition Service 2012); sue junk food sellers in court for misleading advertising (Center for Science in the Public Interest 2007); locate grocery stores selling healthy food in today’s urban food deserts (Edelman 2010); restrict the portion size in which sodas are sold (Nunes 2013); restrict the ways that junk food is marketed within retail stores (Glanz, Bader, and Iyer 2012); and so on. Because so many of these strategies are fairly new, right now we do not have a clear sense of what impact these policies are having or might have. In effect, we are simultaneously carrying out several experiments hoping to improve the American diet, and researchers are monitoring these policy changes in hopes of learning which, if any, of them work (not an easy task where multiple interventions are taking place) (Healthy Eating Research 2013).

This array of policies advocated by others reflects different underlying hypotheses. Tax policies are based on the idea that behavior change is best driven by forcing junk food to carry higher prices. Required disclosures and forbidden marketing efforts rest on the assumption that a better informed (and not misinformed) public will make healthier choices. Banning certain products or ingredients (or limiting their purchase) draws on the scientific expertise of government officials who can be counted on to know that some foods are simply bad for us. By contrast, insistence by politicians that our schools deliver healthier foods draws on the belief that the experts who are

currently entrusted with feeding our children in a healthy way have failed us. But regardless of their starting point, each of these initiatives aims to improve the American diet through government action. Hence they all share the view that it will not suffice to rely on market forces and voluntary acts of corporate social responsibility to achieve socially desirable public health goals.

I agree that we cannot rely simply on the private acts of consumers and sellers. But notice how this solution does not depend specifically on price effects or better informed consumers; nor does it turn on having government experts reshape our diet item by item. This proposal does not tell the regulated parties precisely what they must do in support of improved public health. Nor does it formally constrain any individual shopper's or diner's food choice. But it does impose important constraints on businesses that are designed to achieve significant public health goals. That is the central vision behind performance-based regulation.

III. THE GENERAL CASE FOR PERFORMANCE-BASED REGULATION

Performance-based regulation (sometimes called outcomes-based regulation) has been proposed and tried in places like the building industry, the auto industry, and the energy sector. It is the central feature of the bipartisan (although generally thought not very successful) No Child Left Behind (NCLB) (2001) program in public education. Performance-based regulation has been proposed in the "climate change" context through the "cap and trade" approach, an example of performance-based regulation under another label. The main idea underlying this approach is that regulation that focuses on outcomes can be more effective than old fashioned "command and control" regulation.

Command and control approaches tell the regulated actor (often but not always a private enterprise) particular things that must be done or may not be done, with government regulators drawing on professional expertise to create detailed requirements. Its success depends both on (1) the government agency being able to correctly identify requirements (e.g., side air bags and antilock brakes) that will lead to the desired social outcome (e.g., fewer accidents and reduced injuries when they do occur) and (2) widespread compliance with the regime by those being regulated. Outcomes-based regulation, by contrast, tells the regulated parties what they are to accomplish (e.g. more miles per gallon of gasoline used, higher test scores in math and English, fewer carbon emissions) and leaves it to the regulated party to decide what is the best way to achieve those goals. These, of course, are not the only two options (Aalders and Wilthagen 1997). For example, various other sorts of somewhat cooperative arrangements between government and business have been proposed and adopted, sometimes under the banner of "management regulation" (Coglianese and Lazer 2003; Ayres and Braithwaite 1992). But whereas the latter tend to require process change within enterprise, performance-based regulation calls for changes in the specified outcomes (Gilad 2010).

Arguments for basing regulation on performance goals combine concerns that (1) government often does not know what works best and is often behind the technological curve of new developments; and (2) effective policing of compliance with detailed regulations is fraught with problems like too few inspectors, corruption, difficulties in determining whether many specific requirements have actually been met, and high costs were efforts made at serious implementation. Performance-based schemes depend, of course, on our being able to specify what results we want, being able to design targets to capture those desired results, and being able to reliably measure whether the regulated parties have achieved those targets. There are also, as we will see, potential concerns about unintended consequences and noncompliance, although this too is of concern with respect to conventional command and control schemes (Koski 2007).

Performance-based regulation is intuitively appealing when we know what social objectives we want to achieve, but we are unsure about how to get there. If nothing else, performance-based regulation provides a pathway to innovative and diverse strategies for accomplishing the required goals that, through this sort of regulation-induced competition, can generate best practices that can then be adopted by the industry as a whole (Gunningham and Rees 1997). The performance levels imposed must be realistic but ambitious, or else the regulation will either achieve little or will be scorned by the regulated firms that will give up and just pay the penalties imposed by noncompliance (Thornton, Gunningham, and Kagan 2005).

IV. USING PERFORMANCE-BASED REGULATION TO IMPROVE THE AMERICAN DIET

Consider the proposal to regulate our nation's *large food retailers*. For these purposes, large food retailers include huge enterprises with national multi-product chain stores, like Walmart, Target, Walgreens, and Costco; small food stores attached to national chain gasoline stations and regional or national chain grocery stores, like Safeway, Wegmans, Trader Joe's, and Whole Foods; plus chain restaurants including both fast food sellers, like McDonalds, Taco Bell, and Wendy's, and longer-stay restaurants, like Applebee's, Outback Steakhouse, and Olive Garden. Although these enterprises are heterogeneous in some respects, they are all large and together account for a massive share of the food we buy.

In an earlier article, I proposed using performance-based regulation of retailers to deal specifically with America's excessive salt consumption (Sugarman 2009), and in a more recent op-ed I raised the idea of applying it to reduce our national consumption of sugar (Sugarman 2012). Here, I propose greatly expanding that strategy as a means to improve the American diet overall. How would it work?

A. RETAILER PERFORMANCE GOALS: FEWER CALORIES SOLD AND REDUCED SALES OF ADDED SUGAR, SODIUM, AND SATURATED FAT

This proposal would oblige our nation's large retailers of the sort described above to reduce the amount of calories, added sugar, sodium, and saturated fat that pass through their cash registers on an annual basis. The overall industry reduction proposed is an annual calorie decrease of 2 percent and a 5 percent annual decrease in the particular troublesome ingredients (added sugar, sodium, and saturated fat) for each of five years. By the end of the period, the regulated firms as a group should be selling one-quarter less added sugar, sodium, and saturated fat and 10 percent fewer calories than at the start of the program. These reductions, if achieved and maintained (or even expanded) in future years, would transform the American diet by reducing the overall number of calories, added sugars, sodium, and saturated fat consumed by Americans as a whole. To be sure, what is sold in stores or restaurants does not precisely equate with what is consumed. And so it is imaginable that lowered sales of certain ingredients could also result in less waste so as to yield no change in consumption of the regulated components. But this is quite unlikely (and if it were to happen to any significant extent, that change could be offset by requiring larger reductions by retailers).

It is vital to note that this plan does not rely on changing individual consumer behavior one person at a time. The plan can be successful at improving the American diet even if many individuals make no dietary changes under the plan. Note well that rather than targeting the obesity rate, the plan aims to reduce the overall number of calories, sugar, sodium, and saturated fat consumed by Americans in the aggregate.

B. SOME OF THE FINE PRINT: ADMINISTRATIVE DETAILS

There are a number of important administrative details to consider that will be explored here. First, the emphasis proposed is on *added* sugar, and so, natural sugar in fruit, for example, should be exempted from the sugar-reduction portion of the regulatory regime. However, added sugar would have to be broadly defined to include, for example, high fructose corn syrup. Also, the required fat reduction should not apply to healthier fats such as those found in nuts. These are some of the many crucial details that would have to be worked out in the design of any actual plan.

The goal here is not to defend precisely which ingredients or nutrients would be the object of the regulation, although added sugar, sodium, and saturated fat are widely pointed to as the basic categories of our dietary excess (World Health Organization 2011). Were scientific experts to conclude, for example, that the plan should start with added sugar alone, its potential application to sodium and saturated fat could be put off (Lustig 2009). Nor is the goal here to defend a specific annual calorie reduction amount, although the increase in our average calorie intake has been at least

10 percent in the years coinciding with the obesity explosion (Duffey and Popkin 2011), and so that explains the initial recommendation of a 2 percent reduction each year for five years. It should suffice for now to work with plausible targets that are roughly what one would expect public health policymakers to adopt.

The legislature could adopt this proposal in broad terms and then assign the job of filling in the plan's details to an appropriate administrative agency. Assume for now that this would be done by the U.S. Congress as a national plan (although there is no reason why this regulatory reform needs to start in the United States). Although the current federal responsibility for regulating food and beverages is strewn across a large number of bodies, if we are to stick with existing agencies, experience suggests that it probably makes most sense to assign the responsibility to the Food and Drug Administration (FDA) (rather than, for example, the USDA or the Federal Trade Commission).

America's twenty largest retailers alone account for more than 60 percent of the food we purchase in traditional food stores, and Walmart sales alone approach nearly 20 percent of the food sold in stores (USDA 2013). More than 10 percent of the calories Americans consume are sold by fast food restaurants (Fryar and Ervin 2013); and Subway, McDonalds, and Yum! Brands (Taco Bell, KFC, Pizza Hut, and more) together account for a substantial share of all the fast food sales and have more than 50,000 outlets in the United States (Cosper 2013). At the outset, therefore, it might make good administrative sense to focus the plan on a limited number of regulatory targets, say a few hundred, which an agency like the FDA should be able to manage. If one were worried about leakage or escape hatches via sales by smaller retailers, those could be largely picked up by imposing the performance-based targets as well on a modest number of large wholesalers who are typically the major suppliers to these smaller firms. So, too, if need be, independent vending machine operations could be added to the regime as well. Those potential wrinkles in the plan will be put aside for now.

It is crucial to understand that individual regulated retailers would not all be treated identically. Each would be given a somewhat different reduction target based on the nature of what it sells at present. So, for example, if Whole Foods, as compared with industry averages, already sells less in the way of high calorie, saturated fat, sodium, and added sugar containing items, its reduction targets would be less than those imposed, say, on Safeway, were Safeway's typical basket of food sales today above average in calories, fat, sodium, and sugar. The same point applies to Subway and KFC, if their typical sales today were quite different in terms of the measures covered by the plan. In other words, over five years some firms would have to reduce the calories they sell by only 7 percent while others would have to reduce theirs by as much as 14 percent. The same goes for the specific required reductions in added sugar, saturated fat, and sodium.

Other adjustments would also be made in the fine tuning of the plan. Firms should not be penalized for increasing their food sales overall; nor should they benefit simply by reducing their market share and simply selling less of the same basket of items as in the past. Although the administering agency could use several strategies in dealing with this issue, one fairly easy to understand option would be to take a representative sample of \$1 million worth of a firm's food sales today and then keep sampling an inflation-adjusted basket of \$1 million of the firm's product sales as the plan is put into action (with care given that the sampling time frame does not allow firms to game the regime by significantly altering what they sell only at measurement times). The individual firm's annual reduction requirements, then, would apply to its representative basket, and aggregating those baskets across the entire nation would equal overall countrywide target reductions of the sort described above.

Because of the sophistication of today's bar code technology, it ought to be fairly easy for the FDA to require all items passing through a large firm's cash registers to carry in their bar codes the relevant information about the amount of calories, added sugar, sodium, and saturated fat in the products sold. Every processed food item already has a Universal Product Code, and because of data connected to each product code, firms already embed lots of information in bar codes that is captured through their cash registers. By getting their suppliers to give them data in the proper format that is needed for the proposed regulation to work, that information could be routinely added to the information gathered in the cash register records. Indeed, much of the information that the plan would require is already being generated through government-required label information on processed foods. Once the agency determined how to assure accuracy and honesty in cash register records, it would then be in a position to monitor a firm's sales against its plan targets (Kagan 1989). Given this use of high-tech oversight, generating and auditing the measurements required by this proposal should not be expensive for either the FDA or the regulated firms.

C. HOW THE REGULATED FIRMS MIGHT ACHIEVE THEIR TARGETS

Regulated firms would have many choices in how to meet their goals, and different enterprises might well adopt quite different strategies in seeking to meet their targets. With respect to the large supermarket chains, Walmart, for example, could in turn pressure its packaged goods suppliers to change the ingredients in their products or to change the size (or portion size) of what they package. Walmart could alter the range of products it stocks on its shelves, adding new healthier items and discontinuing less healthy ones. It could change the proportions of the products it sells, doing so by changing where in the store various goods are placed, altering how different foods are priced, shifting the ways in which different foods are advertised, and so on. Walmart might adopt disclosure regimes for its customers that turn out to

make a difference. For example, Walmart might try warning against buying too many of certain items that are high in added sugar, saturated fat, and/or sodium by putting red traffic light icons next to those items on the shelves. Moreover, Walmart would have the flexibility both to come up with other innovative ways to meet their targets and to blend their strategies in ways that achieve their goals while still maximizing profits.

Fast food chain restaurants would have a variety of their own, sometimes different, strategies to call upon in order to achieve their reduction goals (and to be clear the reduction targets would be applied at the chain level—e.g. Burger King—regardless of whether the actual retail outlets were owned by the national brand or by local franchise holders). For example, McDonalds might reduce the portion size of fries and sugar-sweetened beverages they sell. They might shift more customers away from Coke to Diet Coke or water, introduce potato items that are lower in calories, fat, and salt than the fries they now sell, and/or get more customers to buy fruit instead of fries. McDonalds could also alter how it promotes its fat-filled burgers, by changing the price or location on the menu board and in its media ads.

D. CONSEQUENCES FOR FIRMS THAT DO NOT MEET (OR EXCEED) THEIR TARGETS

Firms failing to meet their regulatory targets would be required to pay substantial fees (or fines). In setting these fees, either Congress, or the agency administering the plan, would consider the overall social costs of the sale of excess unhealthy foods (which are very substantial). Put simply, the goal of this strategy is not actually to collect money from firms failing to meet their targets but rather to provide the regulated firms with strong financial incentives to achieve the plan's objectives. An alternative and even stronger sanction scheme would be simply to forbid firms from selling more than their target, a strategy that could be realized by requiring firms to hold permits to sell the regulated foods and then giving the firms permits only up to their target quantities. But, then, what would the penalties be for unpermitted sales? In the end, this might come down to the same thing as the fees/fines proposed above.

Moreover, beyond the direct financial costs, noncompliant firms could earn bad reputations in the marketplace as more Americans seek healthy places to shop. Indeed, the FDA, if put in charge, should be directed to give public praise to firms that meet their targets, while perhaps at the same time to single out for shame those firms that fail to meet targets (Skeel 2001; Graham 2000).

For firms that achieve reductions beyond their targets, the plan could adopt a number of responses. A firm might be allowed to apply the excess to its next year target, or maybe a bonus payment would come from government for accomplishing even more than was required. Firms that exceed their targets perhaps could sell that excess to firms that are otherwise

having difficulty meeting their targets. This latter option would make this performance-based plan very much like the “cap and trade” strategy that has been used in the environmental context to address acid rain as well as climate change from global warming. Yet, experience in that realm suggests that policymakers should at least worry about possible undesirable gaming of the program by some retailers if the selling of excess reductions were permitted (Wara 2007).

E. POSSIBLE PITFALLS OF THE PROPOSAL

Certainly, like any policy proposal, potential pitfalls and unintended consequences, as well as creative compliance that amounts to substantial noncompliance, must be considered (Baldwin, Cave, and Lodge 2012; Farber 1999). Experience with other performance-based regulatory schemes like the federal education NCLB (2001) program has made clear that it is crucial to set the targets wisely and be able to measure compliance reliably. What we want our schools to do is to better educate our children, and NCLB was enacted, among other purposes, to hold schools accountable for that. In the details, what Congress mandated is that students achieve certain success rates on standardized tests. This, however, has resulted in “teaching to the test” that might not coincide with actual learning and arguably detracts from authentic forms of teaching and learning that provide students with a broader education (Volante and Cherubini 2007). Moreover, the NCLB testing mechanism has not proved secure as cheating has stigmatized the regulatory scheme (National Public Radio 2011). Furthermore, imposing penalties on *public* agencies (school districts) that fail to achieve their targets has proven difficult, especially when it becomes widely believed that, for all too many schools, the targets set are not plausibly achievable (Nutton 2011).

However, there is good reason to expect that these problems would not plague the application of performance-based regulation as envisioned here. While it is true that good health is the real social objective, there is a widespread consensus that the reduced consumption of calories in general and certain sorts of calories, in particular, is itself an appropriate social goal and one that will reliably translate into public health gains. The targets proposed here are fairly clear, easy to understand, and would appear to be easily measurable. And since relatively few firms dominate the market, it should be relatively easy to monitor those firms to determine whether or not they are in compliance without much controversy. And, private business, which now profits from the social costs its products generate, can be sold to Congress as a morally acceptable and economically practical target of the penalties proposed for noncompliance. Nonetheless, if it turns out that calories per se do not really matter or that sodium and/or saturated fat consumption really is not a problem—as some argue—then obviously using performance-based regulation to change the American diet would not be the same as making it

a healthier diet (Taubes 2011, 2007). But this concern applies as well to most of the alternative regulatory strategies now on the table or recently adopted.

That does not mean, however, that this proposal will come with no difficulties. Therefore, it is worth exploring the potential pitfalls unique to applying performance-based regulation to food and beverages.

First, what if the regulated firms achieve their targets by taking the reductions from food sold to higher-income and higher-educated people, leaving less well off Americans with the same diet they now have? As a practical matter, this is probably an unlikely outcome because many of easiest-to-achieve, healthier-diet improvements might well be achieved from the least educated and lowest earning families. However, to address this class-based concern, one could, for example, apply the targets, not to each firm on an overall basis, but rather by requiring reductions in subgroups of the firm's retail outlets that tend to serve different types of customers. These solutions mirror the strategies that are sometimes suggested or employed to counter the creation of "hot spots" in low-income communities when regulated entities respond to performance-based goals by reducing pollution only in higher income areas (U.S. Environmental Protection Agency 2013). NCLB adopted an analogous approach by requiring test score gains by students from each of a district's major ethnic/racial groups (NCLB 2001).

Second, were the proposal enacted, it would likely stimulate a search, for example, for nonsodium additives that could at least somewhat replace salt in enhancing taste. If such replacements had no negative health consequences, that would be fine, but what if they were just as risky as consuming high levels of sodium? Such a consequence would undermine the overall goal, and the FDA would need to be empowered to take action either to block such substitutes or to treat them as sodium for purposes of measuring whether the plan's targets were being achieved. In a similar vein, new food products created in laboratories might come onto the market to replace sugar and saturated fats, which also might be either ominous or innocuous. If dangerous in new ways, this could mean that the regulatory strategy, even if successful on its face, might be socially counterproductive. Because of these concerns, the FDA would have to monitor regulated entities and be empowered to take action designed to ensure that their solutions were not directly undermining the goals of the plan.

Third, some regulated firms might try to cheat by doctoring their records, tampering with their bar codes, bribing the officials who enforce the scheme and so on. While this sort of criminal evasion is probably not completely preventable, it is probably of relatively lesser concern with respect to large food enterprises that are regularly in the public's eye. Still, perhaps additional deterrence could be achieved by adopting a "whistleblower" feature as part of the regulation, so that insiders who saw cheating by their firms could be encouraged to come forward by the promise of a generous reward.

Fourth, experience from other regulatory endeavors should be drawn on to try to dampen industry efforts to use internal compliance mechanisms and/or

litigation strategies to circumvent the plan's social objectives (Edelman et al. 2011). Fortunately, that the performance objectives here are quantifiable should help avoid at least some of the problems we have seen, say, in the field of employment discrimination where, instead of being given outcome goals (i.e., minority hiring quotas), firms are merely required to engage in more amorphous fair hiring practices that depend a great deal on internal firm culture to actually yield substantially greater racial diversity in the workplace. Nonetheless, leaving key details to FDA development, rather than including them in the legislation, can mean not only delays in implementation, but also legal challenges by industry to the details that the FDA adopts.

Fifth, other possible gaming strategies by the regulated parties also need attention. For example, the definition of what items are included and excluded from the scheme could become a point of evasion and litigation (e.g., what counts as "sugar" or a "saturated fat"). Or escape hatches that, in effect, would permit regulated firms to contract out their unhealthy food to others to sell would need to be monitored. These sorts of problems plague any regulatory effort in this realm: for example, when schools are required to serve healthier foods in the cafeteria, we sometimes see junk-food selling food trucks appear at school curbs, or when calorie counts are required on food seller menu boards, we see movie theater snack food bars pressing for exemptions.

Some regulated retailers might engage in a creative compliance strategy of slowly acquiring the equivalent of smaller health food stores that are not subject to regulation by the scheme so as to make the regulated firm's overall basket of goods sold look healthier, and regulations might be needed to counter this practice.

Even if the regulated firms are good citizens and act in good faith, consumers will still be able to turn to unregulated food retailers with some of their food dollars, and it is imaginable that those would be concentrated on retailers who specialize in the very items subject to the performance targets. Surely, some leakage of this sort is likely to occur. But it probably will not be large, and were that to begin to happen at that point the regulated firms will have an incentive both to dissuade their customers from such unhealthy shopping and to bring more firms into the regulatory scheme.

Probably not all of the compliance shenanigans will be anticipated or even blocked by the plan's statute and regulations so that ultimately the plan's accomplishment is likely to be less than its aim. Yet, performance-based regulation might be able to counter this in part by simply raising the annual target reduction numbers from 5 percent a year to 6 percent (Hawkins 1983).

F. POLITICAL ISSUES AND PROSPECTS

It would be important for government to commit to and enforce the plan's targets rigorously through the first round of the plan's operation, say, five

years. Otherwise, firms might invest, not in changing what they sell, but in changing the law (Edelman et al. 1991). That is, in order to succeed, performance-based regulation must be viewed by industry as real and solidly in place; this makes adequate funding for plan oversight essential from the get-go. Recent experience with upgraded food safety legislation makes this clear; it is hard to expect the FDA to assure the public a safer food supply if no money is appropriated for the staff needed to bring this about.

Once it takes hold for a few years, then compliant firms, that have invested resources to meeting early-year targets, should support the plan's continuation. Yet, that does not mean that the initial five-year targets must be the targets forever. The government agency in charge of the plan would engage in program evaluation from the outset with the objective of deciding both whether some plan parameters might wisely be altered going forward and whether even greater reductions should be demanded of retailers in later years. The lesson from experience with performance-based regulation here is that the initial goals must be both substantial enough to make a real difference but at the same time be achievable. The numbers proposed here are meant to capture both those features.

Industry is likely to push for an implementation plan that would defer the major reductions until later years of the scheme or allow firms to petition for exceptions or delayed application of the rules. For example, they might accept a 10 percent reduction in calories over five years but push for only 1 percent reductions in each of the first three years, leaving 7 percent to be achieved in the final two. This is how industry has responded to "cap and trade" plans with respect to greenhouse gas emissions as industry attempts to adjust the annual schedule of cap and trade targets within the range allowed by regulators (Deason and Friedman 2010). This delayed target strategy is to be resisted. Not only does it put off real impact in the shorter run, but it also allows industry to perhaps effortlessly pick off the low hanging fruit at the start and then complain later on that the now larger annual improvements are unattainable. Better to seriously press retailers to carefully plan from the outset on how they are going to meet their longer-run target.

This discussion has so far assumed a national plan adopted by Congress. In gauging how food retailers might respond to such a proposal, it is important to consider "as compared to what." If performance-based regulation is layered on top of a number of other national initiatives that have similar goals of improving the American diet, the business community might be very tenacious in fighting a performance-based regulation plan. By contrast, if such a plan were adopted in lieu of many of the other regulatory strategies on the table, then industry might find it an appealing alternative as it allows flexibility in meeting the targets (Lobel 2004). To win business support in this way admittedly runs the risk that, were the performance-based regulation to fail, what government primarily would be doing is collecting a lot of fines (although that would turn the plan into something like a tax on junk food). Hence, an exemption from other regulatory requirements might only apply

to firms that meet their performance-based goals. This benefit of freedom from other regulation (both existing and proposed) could include the preemption of certain state and local regulation as well (Etienne 2011; Gunningham and Sinclair 1999).

A different approach would be for a few enterprising states, such as New York and California, to experiment with performance-based regulation within their borders by regulating the retailers who do business there. Perhaps Congress could facilitate that by exempting complying retailers in such states from some other federal regulation. This complex matter of food regulation by multiple levels of government is otherwise set aside for now.

G. WHAT SUCCESS WOULD MEAN FOR PUBLIC HEALTH

Transforming the overall American diet would not mean that the diet of every person would be sharply changed, certainly not in the short run. Indeed, the habits of the unhealthiest eaters could be especially hard to budge. Many consumers might not clearly realize that they have been enticed into eating a healthier diet, just as they have been enticed by businesses today to eat unhealthily. Some would find themselves eating similar items as before, but less of them; others would be eating reformulated products or would be eating some new, healthy foods instead of some of the unhealthy foods they previously ate. Overall it would be easier and more natural to make healthy choices. Social norms about eating would be altered and longer-run health gains would be achieved, especially by the vast middle of the population who, as a group, can decidedly benefit from healthier eating even if, at the individual level, the risk of bad health outcomes from their current consumption pattern is not large (Rose, Khaw, and Marmot 2008). These are the very goals sought by most of the competing proposals discussed earlier for dealing with obesity and unhealthy eating in America.

V. TWO VOLUNTARY INDUSTRY STEPS IN THE RIGHT DIRECTION

In the last few years we have seen two significant voluntary initiatives by leading food companies suggesting that businesses already are thinking in “performance” (or “outcomes”) terms. First, in May 2010, the Healthy Weight Commitment Foundation (HWCF), a food industry group comprised of many of the nation’s largest processed-food companies, signed an agreement with the Partnership for a Healthier America (of which First Lady Michelle Obama serves as honorary president) that promised to reduce the annual number of calories its members contribute to the American diet by 1.5 trillion by the end of 2015 (HWCF 2010). Alas, while a reduction of 1.5 trillion calories sounds like a lot, it is far too few when one realizes that this amounts to roughly fifteen calories per person per day when Americans now

consume on average at least 2,500 calories a day (Farah and Buzby 2005). Moreover, there is reason to resist HWCF's position that half of today's excess calorie intake should be countered, not by lower calorie intake, but by an increase in exercise since this sharply reduces the amount of change that industry is promising to make. Furthermore, HWCF's vision appears to be that calorie reduction should come exclusively from the reformulation of existing processed foods and their partial replacement with new ones. But this ignores the potential of shifting Americans' consumption patterns toward other existing, nonprocessed, lower-calorie and healthier items.

Nevertheless, the HWCF pledge is a step in the right direction, and surely the processed foods industry is not voluntarily going to promise to deliver anywhere near as much as it might do if pressed. Indeed, a recent preliminary report from the foundation claims that by the end of 2012 (three years before the original deadline), American consumers are already purchasing an average of thirty-five fewer calories a day from the plan's participants (HWCF 2013). A bit more than half of this reduction (twenty calories a day) appears to come simply from the fact that there are more Americans now than in 2007. The remaining fifteen calories a day, the foundation claims, comes from a reduction in average consumption. Of course, we do not know whether consumers have replaced these calories with those from foods not provided by foundation members.

In any event, a separate and substantial side benefit arising from this pledge has been in the creation of a sophisticated independent monitoring and evaluation mechanism that, when its evaluation is final, will help the public better understand just what the firms that make up the HWCF pledge team have actually achieved in terms of improving the American diet (Slinings, Ng, and Popkin 2013). If nothing else, this evaluation effort will provide invaluable monitoring experience that may be drawn upon were the proposal advanced here actually adopted.

In contrast to the HWCF pledge, which comes from food producers, the proposal advanced here is aimed at the retailer level. To be sure, as already noted, supermarket chains could pressure their suppliers to do just the sort of thing the HWCF members are promising and then some. But, as already explained, retailers can also do many additional things to reduce the total number of calories sold through their retail outlets, whether in stores or restaurants. Moreover, the performance-based proposal envisions a calorie intake reduction of more than fifteen times what the HWCF initially pledged. While the scale of the effort required to achieve that target is very different, what is most encouraging is the similar type of target—calorie reduction. As with performance-based regulation, the HWCF plan leaves it to business to sort out how best to make the reduction.

Second, and perhaps even more relevant, is a pledge made by Walmart in early 2011. Again with the support of First Lady Obama, America's largest food retailer announced plans to reduce sodium by 25 percent, reduce sugar by 10 percent, and eliminate industrially produced trans fats completely by

2015 (Obama 2011). In the fine print of the announcement, it appears that these promises only specifically apply to Walmart's house brands, although it also pledged to pressure national brand suppliers to match its own promises. As is true about the HWCF pledge, Walmart's specific target numbers are more modest than would be required under the proposal made here. But the key thing is that they are very much in the same vein—focusing policy reform on retailers but leaving it to them to determine how to meet their targets. If nothing else, Walmart's promise will give the firm a substantial jump start on complying with the target it would be assigned under this proposal.

Given the food industry's stand that healthy eating is a matter of personal responsibility, it is hard to see how voluntary promises flying under the banner of corporate social responsibility are ever going to be enough by themselves (Sugarman 2008). Food retailers are committed to maximizing profits, and absent regulatory requirements, their shift to healthier products, in the end, will be driven primarily to the extent that this change will be better for the bottom line and perhaps, to a lesser extent, by a decision to engage in a preemptive strategy to softly embrace public health values as a way to ward off stronger legal controls. But this does not mean that society should never partner with business to promote the social good (Parker 2002). To the contrary, a truly healthier national diet is a social goal that might well be achieved by using performance-based regulation in a way that aligns the financial health of business with the public health of the nation. And because of the flexibility that performance-based regulation allows, businesses can promote to the public their achieving a healthier basket of food sales as something they have done without the government telling them how to do it. Moreover, if, miraculously, the upswing in Americans' interest in healthier foods were by itself to shift the market for food exactly in the ways proposed here (or even more so) then, for the industry as a whole, the performance-based regime would essentially become nonbinding.

VI. COMPARING PERFORMANCE-BASED REGULATION WITH A JUNK FOOD TAX

Several U.S. public health advocates and political leaders have endorsed the idea of having government impose a substantial tax on unhealthy food (or, more typically, just on sugar-sweetened sodas), perhaps using the proceeds of the tax to subsidize the sale of healthy fruits and vegetables (Bittman 2011). In this vein, Hungary has recently imposed taxes on foods with added salt and sugar, and Denmark earlier imposed a tax on foods high in saturated fat (although it abandoned that strategy when Danes apparently responded by shopping for their old favorites at lower prices in Germany) (Daley 2013).

Determining just how high the taxes should be and, if there is to be a subsidy feature of the plan, precisely which foods should be subsidized, and

by how much, present administrative hurdles. But they could be overcome through careful planning and experimentation. A different concern about adopting simply a tax strategy is that if governments adopt junk food taxes during difficult financial times, then they might become dependent upon the tax revenues, and this puts them at odds with the public health objective of the tax—a problem that some jurisdictions with high taxes on tobacco products now face.

Probably most daunting in the United States, however, would be political opposition to new taxes even when designed to promote public health and even if, in the longer run, these taxes would sharply reduce the financial burden now faced by our health care system. Indeed, the combined opposition to any new taxes of Republican political leaders and Joe Public, when joined with food seller opposition to junk food taxes, makes this solution questionable in the current political climate. Ironically, the threat of junk food taxes might best serve as a vehicle for gaining support instead for the proposal advanced here.

When comparing the two approaches, what should be appreciated is that performance-based regulation simply establishes, as a matter of law, the dietary adjustment goals that advocates hope to achieve through a tax scheme. The “tax” bite of performance-based regulation comes if at all (and then it would be a much larger bite) only if the regulated firms fail to reach the social goals of the plan. In effect, under performance-based regulation, food retailers can avoid the tax if they are able to accomplish on their own the same net change in their product mix that these protax advocates are aiming for.

Moreover, whereas tax strategies generally aim to do their work centrally through their generating price changes, performance-based regulation would empower retailers to use price changes as but one of the many techniques they could deploy in meeting their calorie, added sugar, sodium, and saturated fat reduction targets. Notice as well that some consumers (especially low-income households) are likely to respond to a tax on sugary sodas by switching to cheaper house brands (just as some smokers switch from premium brands to cheaper cigarettes), which does not yield the health gains sought by the tax; by contrast, if Costco finds that charging more for Coke importantly yields more sales of full-sugar, house-brand Kirkland Cola, management will realize that this is doing the firm little good in achieving its performance target on added sugar. Notice furthermore that tax proposals are quickly subject to the charge that they could make food adequacy financially out of reach to the poor and in any event that excise taxes like these are regressive. While these claims could be countered by using the tax proceeds to subsidize the purchase of healthy foods by low-income households, deciding precisely what foods are healthy enough to qualify for a subsidy could well be more complicated than deciding which to tax. While performance-based regulation might yield some price increases, this is not likely to be its primary impact.

VII. CONCLUSION

If we can agree that creating a much healthier American diet is a desirable social goal, and if we can agree that a substantial step in this direction would be importantly achieved by sharp reductions in the added sugar, salt, and saturated fat that people consume, as well as a modest reduction in the calories we consume, then serious attention should be given to the use of performance-based regulation as the lead public health strategy for bringing about that change. Before the twenty-first century, it was a far-fetched idea that legislators might take on “big food” and seek to use law to shape what Americans eat through other than disclosure requirements and safety inspections. But today we have the benefit not only of the reasonably successful public challenge to “big tobacco,” but also a changing public discussion about food prompted by what appears to be an emerging healthy food movement (Flammang 2009; Martin 2009; Pollan 2007; Schlosser 2001).

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