

# Let's Try Performance-Based Regulation to Attack Our Smoking and Obesity Problems

BY STEPHEN D. SUGARMAN

“**P**erformance-based” regulation is a legal strategy that seeks to avoid the shortcomings of traditional “command-and-control” regulation. By the latter, I mean the conventional approach by which government demands certain inputs, hoping that they will yield the socially desired outcomes. Some simple examples are the requirements that autos have air bags to reduce crash fatalities, and pollution control devices to improve air quality. The problems with command-and-control regulation are that government may inefficiently insist on the wrong input mechanism, and that the enterprises being regulated have an incentive to figure out cheap ways of technically complying that fail to accomplish the social objective.

Some experts offer “deregulation” as the solution to these shortcomings, imagining that market pressures alone best achieve society’s goals. But given inadequate consumer information, concentration of market power, and the potential of harm to people and the environment—neither of which are in a market relationship with the enterprises that could cause the harm—deregulation will often be a very imperfect strategy. After all, market failures are typically the justification for command-and-control regulation in the first place.

“Participation” is a different strategy. Here the idea is that if, for example, workers are given a real voice in setting workplace practices, their participation may achieve higher workplace safety levels than can be achieved by either the Occupational Safety and Health Administration (OSHA) or an imagined market in safety in which workers trade off dangers and wages. Putting consumer representatives onto corporate product development teams or putting “public” outside directors onto corporate boards are other examples in which participation is used in pursuit of the public interest.



“Performance-based” regulation is yet another approach. Here government tells the enterprise that is being regulated what outcomes are required and holds it accountable for achieving those outcomes, leaving the individuals in charge of the enterprise to figure out for themselves how to reach the goals.

In the field of public education, the No Child Left Behind Act (promoted in the Clinton Administration and embraced by President Bush and his team) reflects this strategy. Schools are told that they need to bring children from all races and ethnic groups up to certain performance standards, meeting specific benchmarks over time. Schools are allowed to figure out for themselves how to meet their targets, and the law imposes penalties on failure that are meant to stimulate earnest effort at compliance. Some air quality improvement strategies are also in this vein. For example, operators of power plants in a geographic area

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may be told, as a group, that they need to improve air quality by X percent. They then have to figure out how to reach that target, and in doing so they are allowed to buy and sell emission reductions among themselves via so-called “tradeable permits” to pollute.

Strict liability in tort law is also something of a performance-based strategy. Those who dynamite to clear sites for

construction, for example, are not told how to blast. Instead they are told that if they cause any harm, they must pay, thereby giving them a strong incentive to figure out how to blast in a careful manner.

In two recent articles, I proposed using performance-based regulation to attack two extremely serious public health problems—smoking and obesity. As for smoking, my proposal is situated in the context of the federal government’s RICO case against tobacco manufacturers. The Department of Justice has accused the leading cigarette makers of a vast and long-term conspiracy to dupe the public and ensnare generations of addicted smokers. Even if the government were to win the case on the liability side, an important puzzle is what the legal remedy should be. Most tobacco control advocates have talked of command-and-control solutions—such as forcing the defendants to end certain advertising practices, offer free smoking cessation services, and cut off supplies to retailers who sell cigarettes to children.

By contrast, in an essay in *The National Law Journal* (February 7, 2005), I proposed a performance-based solution. I assume that, without the past misconduct of the industry, smoking prevalence rates in the United States would not be around 20 percent as they are today, but instead would be under 10 percent. Therefore, the tobacco companies would be ordered to bring smoking rates down to single digits and keep them there. Put simply: over, say, seven years, each firm would have to cut in half the number of people who smoke each of its brands (or else buy and sell reductions from other firms if others are better at achieving these results). The basic idea is that, since tobacco companies are so good at convincing people to start to smoke, they are best positioned to persuade people to the contrary.

Failure to achieve the performance-based target would result in a substantial financial charge based upon a multiple of the estimated future profits a firm would earn from having more smokers of its brands than their target. In this way, tobacco companies

would have a financial incentive to have fewer, rather than more, customers—at least down to their target. Although my proposal was launched in the context of litigation, it could be adopted by Congress through legislation.

Even more aggressively (in the January 10, 2005, issue of *Legal Times*), I proposed trying to use performance-based regula-

tion to deal with America’s growing obesity problem. Some want to deal with obesity through changes such as limiting advertising to children, getting Cokes and Pepsis out of public school vending machines, forcing McDonald’s to reduce its portion sizes, and insisting that Taco Bell inform consumers of the calories in the food it serves. Others think the key is more exercise, and they are pushing to force schools to re-emphasize physical education, and to require communities to offer bike paths and safe parks where children can play.

My approach is to require the food and beverage industry to solve the problem by setting targets for them and then holding them accountable for results—leaving them to figure out how to achieve the socially desired outcomes. For example, I propose that those who supply the calories that yield weight gain be required to reduce childhood obesity rates in the United States to what they were 30 years ago, which is about half of current levels. As with “tradeable permits” to pollute, food and beverage companies could trade among themselves, thereby seeking to reduce obesity in the most effective and efficient manner. Just how the responsibility would be allocated and how success by each firm would be measured are difficult problems, and I am at work on trying to solve them. For example, suppose that Coke were held responsible for reducing childhood obesity in Atlanta (where it is headquartered)—or perhaps it would be all of Georgia—once we decide Coke’s fair share of the responsibility.

If nothing else, the general rhetorical point behind both of my public health proposals is that our society should insist that the enterprises whose products cause the problems take responsibility for remedying them.

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