Public Health xxx (2009) 1–5

Contents lists available at ScienceDirect

Public Health

journal homepage: www.elsevierhealth.com/journals/pubh

Original Research

No more business as usual: enticing companies to sharply lower the public health costs of the products they sell

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ARTICLE INFO

Article history:
Received 7 October 2008
Accepted 12 December 2008
Available online xxx

Keywords:
Regulation
Business
Performance-based
Tax
Products

SUMMARY

Cigarettes, alcohol, junk food and motor vehicles cause a staggeringly high level of death, injury and disease. Business leaders from the industries that make these products currently try to frame these negative outcomes as 'collateral damage' that is someone else's problem. That framing is not only morally objectionable, but also overlooks the possibility that, with proper prodding, industry could substantially mitigate these public health disasters. A promising regulatory tool called 'performance-based regulation' is a new approach to combating the problem. Simply put, performance-based regulation would impose a legal obligation on manufacturers to reduce their negative social costs. Rather than suing the firms for damages, or telling them how they should run their businesses differently (as typical 'command and control' regimes do), performance-based regulation allows the firms to determine how best to decrease today's negative public health consequences. Like other public health strategies, performance-based regulation shifts the focus away from individual consumers on to those who are far more likely to achieve real public health gains. Analogous to a tax on causing harm that exceeds a threshold level, performance-based regulation seeks to harness private initiative in pursuit of the public good.

Introduction

This article discusses a new way for the public to engage industry in promoting public health. At present, throughout the economically developed world, four consumer products are responsible for an enormous amount of illness, injury and early death. These key products – cigarettes, alcohol, junk food and motor vehicles – now cause approximately one-quarter of all deaths in many wealthy countries.[1,2,3,4] If the makers of these products could be enticed to sharply reduce the negative consequences of the products they sell, this would yield a huge public health gain. A promising new way to do this is by 'performance-based' regulation. Before turning to just what this type of regulation might be like, the following section describes the contrasting ways in which public health leaders currently view industry.

Many public health leaders distrust the business community. This is clearly the case with respect to the tobacco industry, but it is importantly true for the junk food, motor and alcohol industries as well. Many of these leaders see these industries as irresponsible in the way they formulate and market their products. They would ask, 'How can society count on any assistance from profit-seeking companies to solve public health problems when these businesses ignore the vast social costs of what they sell?'

For these business critics, it does not help that industry now blames consumers for these negative outcomes. Industry leaders typically frame obesity, smoking, road accidents (including those caused by drunk driving) and alcohol-related diseases as the responsibility of product users. These companies insist that they are just responding to demand, and providing a product that can be used responsibly (cigarettes aside). Industry says that user abuse is the problem. Put differently, industry uses the frame of 'personal responsibility' to exempt itself from responsibility for the public health costs of its products. This attitude makes some public health leaders even more sceptical about the trustworthiness of industry.

On the other hand, some public health leaders, perhaps many fewer in number than those that distrust industry, believe in cooperating with the business community and regularly turn to industry for help. They generally see 'voluntary agreements' as the right way to work with business. In the same vein, when pressed to help solve public health problems, businesses themselves also often suggest such cooperative arrangements as part of a self-regulation solution.[5]

While, of course, sometimes both industry and the public can benefit from the same action, in the end it is difficult to see how companies will freely increase costs and reduce profits in order to promote public health. Perhaps enterprises would more dramatically

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0033-3506/$ – see front matter © 2008 Published by Elsevier Ltd on behalf of The Royal Society for Public Health.
doi:10.1016/j.puhe.2008.12.020

change their behaviour for fear of even stronger legal requirements,[6,7] but truly voluntary agreements are generally not going to accomplish a great deal. This is well illustrated by recent promises made by the sweetened beverage industry (in cooperation with a foundation associated with former US President Bill Clinton) regarding which products they will sell in US schools.[8,9] While soft drink sellers will remove some high-calorie beverages from school vending machines, they will continue to offer high-calorie 'sports drinks' and will introduce new products containing nearly as much sugar as in those taken away.[10]

Between these two polarized views – distrust of industry and faith in voluntary agreements – lies a third approach. Rather than shunning public involvement with industry or pleading with industry to help, society can regulate industry in a way that persuades business to pursue the public good. This approach is performance-based regulation.

Performance-based regulation

Industry, of course, usually dislikes regulation, especially regulation of the conventional 'command and control' sort that mandates precisely what to do and fines businesses for non-compliance. Industry witnesses before legislative and administrative bodies are often quick to challenge proposed legal mandates as unlikely to have the public health gains imagined by its sponsors. It is possible, however, to press industry to take responsibility for lessening the harmful consequences of its products, but with the freedom to choose the best way in which to accomplish this.

The way to do that is through the use of performance-based regulation. Put simply, performance-based regulation requires but a few basic steps. A relevant public agency first sets the public health goals for each regulated company. Second, it measures whether or not each company has met its target. If so, the company is appropriately applauded. If not, substantial fines are imposed on the enterprise; costs that, in an important sense, internalize into the enterprise the negative social costs that flow from the products it puts into the market. The details are important and the details can be difficult. However, if the general principle were embraced, careful attention could be given to getting the rules right.

This is the strategy that the world is beginning to use in its fight against climate change.[11,12] When it comes to greenhouse gases, the best hope for now is that countries will agree to sharply and continually reduce the amount of net carbon emissions they produce. The way in which countries will make those reductions is by imposing ever-smaller net carbon caps on their relevant industries. However, it will be up to industry to figure out how to achieve these reductions, and the resulting social goals of environmental and health benefits. That is, industry will have the flexibility, but also the obligation, to determine what mix of actions it will take to realize the overall target reduction. This approach relies on the innovation and nimble behaviour of which industry is capable.

Getting industry to work towards these social goals can also happen with respect to the types of consumer goods that are the focus here. As with climate change, choosing which strategies to employ will be up to industry to resolve. It may be that new technology will play a key role. Perhaps luring consumers to change their conduct will be vital. Possibly, the serious application of techniques we already well understand can importantly contribute to combating the problem. Industry would have a clear incentive to adopt the most effective means available. This is because if businesses fail to achieve their public health goals, they would face stiff financial penalties.

This regulatory strategy puts public health experts into the role of advisors rather than imposers of input regulations. It may be a good idea to put calorie counts on fast food restaurant menu boards, to put disgusting photos of tobacco disease victims on cigarette packs, and/or to put breathalyzer machines in the cars of those convicted of driving under the influence of alcohol. However, with performance-based regulation, it would not be up to public health agencies or public legislatures to order these sorts of changes. Certainly, public health experts could recommend these strategies and provide helpful support in evaluating a range of experimental strategies. However, in the end, it would be up to industry to decide which, if any, of these ideas to adopt.

Application to key consumer products

How might performance-based regulation be applied to the four key consumer products? Let us first consider motor vehicles. Just for purposes of illustration, assume that the focus is on reducing the number of vehicle-related deaths, although an actual plan would probably set targets for both serious injury and death. If the annual road death total is now X, imagine that the target total is set at 0.5X, a reduction of one half, by 8 years in the future. Appropriate intermediate goals of, say, 0.9X, 0.8X, etc. could be set starting in the third year of the scheme. Notice that this strategy does not envisage that the motor industry would eliminate road deaths entirely, but it does require lowering the death rate to far less than what the existing regulatory scheme has been able to achieve.[13] The target of a 50% reduction used here and throughout this article is just an illustration, but one that is meant to emphasize that a substantial improvement in public health outcomes would be required.

Individual car manufacturers would then be given specific targets based on the extent to which their vehicles are currently involved in road fatalities. This would favour companies whose cars are already safer. Manufacturers would probably respond to this mandate, at least in part, by redesigning their products. They might install side air-bags, anti-lock brakes, roll-over prevention sensors and all sorts of new safety features that we cannot even imagine at the moment. As all car manufacturers would have to make vehicle safety a high priority, existing claims that buyers do not want to pay for safety would be muted.

Beyond changes in vehicle design, car companies might respond in other ways such as promoting better designed roads, faster responses to road accidents, and better enforcement of speed limits. The point is that, for the first time, the motor industry would have its economic interests aligned with the public health interest in road safety overall. Notice that what is implied here is that the motor industry would be expected to consider investing in changes beyond those matters completely in the internal control of individual businesses. However, the car manufacturers – often collectively via trade associations – are already quite accustomed to lobbying for legislative and regulatory changes. Companies would decide which combination of safety strategies works best, and they would be held responsible for accomplishing society's public health goals since companies that fail to reach their goals would face penalties of, say, $1 million per excess death.

Applying this approach to the tobacco industry would probably mean using a somewhat different regulatory target, focusing on reducing the rate of use of the product rather than reducing the number of deaths caused. In the end, the goal is reduced tobacco-related disease and death, but that takes years to play out. Society would not want to wait decades to find out whether 'Big Tobacco' had achieved its harm-reduction target. As smoking prevalence rates are clearly linked to eventual smoking-related deaths,[14] it makes more sense policy-wise for performance-based regulation to focus on smoking rates. So, for example, if the national smoking rate for people aged 16 years and above is now 24%, then the

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tobacco industry might be charged with cutting that rate to 12% in 8 years, again with appropriate intermediate target rates starting in, say, the third year of the plan. Each individual company would share in the overall target reduction by a scheme requiring it to reduce the number of customers it has for its own particular brands of cigarettes.

Note the two key underlying assumptions. First, since Big Tobacco is profiting from selling these dangerous items, it has a moral obligation to curtail the social harm. After all, a large majority of adult smokers began smoking and became addicted as children, who cannot be expected to control their behaviour on their own.[15] Second, since tobacco companies have been so adept at enticing people to take up this dangerous habit,[16] they ought to be able to figure out how to do the opposite. Whether the prevalence rate reduction would come primarily from current smokers, from former smokers who might otherwise relapse, from youths who otherwise would become smokers, and so on, would be for the tobacco companies to figure out. So, too, it would be up to them to decide whether strategies such as higher prices, subsidized access to cessation products, anti-smoking advertisements, and the like are the best way (or best combination of ways) to reach the social goal. By not setting the goal at zero, this approach leaves room for tobacco companies to remain in business and continue to make money (perhaps even as much profit as now if firms decide that raising prices is a good way to lose some of their customers), while at the same time achieving the social benefit of cutting the population of smokers in half. Turning to performance-based regulation to bring down smoking rates is not meant to disparage the important public health gains already achieved in many nations through existing, more intrusive tobacco control policy.[17,18] However, performance-based regulation holds the promise of even further smoking prevalence reductions (e.g. below or even close to 10% in developed nations) that have not been achieved through current strategies.[19]

Using performance-based regulation to deal with the negative social consequences of unhealthy foods and beverages would require more imagination, but various schemes are quite plausible. For example, when it comes to the obesity problem, one can imagine first that ‘junk food’ would be defined as any product containing more than 50% sugar or more than 40% fat (or bad fat). This would allow some companies to escape the performance-based regulation scheme at the front end by reformulating their products to make them less unhealthy. Then the relevant government agency would determine what share of the junk food market is held by each of the major companies. There is every reason to believe that, so long as store brands of major retailers and distributors are counted, the lion’s share of the junk food market could be attributed to a moderate number of large companies, and an appropriate subshare of the overall market could be attached to each of them.

Next, assume in this illustration that the performance-based target focuses on childhood obesity. For example, the goal might be to reduce the childhood obesity rate for children aged 6–16 years from 14% to 7% in 8 years. A logical way to implement the programme would be to base the performance-based targets in schools.

For example, suppose PepsiCo holds a 10% share of the junk food market. PepsiCo might then have responsibility for 10% of the schoolchildren in the scheme. The schools assigned to it would be in a physically contiguous area, containing both elementary and secondary schools. PepsiCo’s job would be to halve the obesity rate in its assigned schools by the end of, say, 8 years, with appropriate interim targets along the way. It might decide that the best strategy is to keep children slim rather than to try to reverse obesity after the fact, and that the best approach is to focus on very young children and their parents before the children reach school age. This is both because early prevention is likely to be the key to success, and because it is primarily the upcoming generation of children who would be measured in determining whether PepsiCo met its goal. PepsiCo would then decide upon the best way to achieve its target. Obviously, PepsiCo would consider changing the content of existing PepsiCo products and bringing out new PepsiCo products. However, PepsiCo might instead focus more on making sure that the children assigned to it engage in healthy eating and vigorous physical activity during their preschool years, perhaps focusing on day care and preschool programmes. Notice again that this use of performance-based regulation does not imply that junk food sellers are responsible for all childhood obesity, nor does it expect them to solve the problem completely.

A somewhat analogous approach might be attempted with respect to alcohol. Performance-based regulation could be aimed at all alcohol-related deaths (and diseases), the majority of which are suffered by drinkers themselves. However, one might start more narrowly by aiming the regime at drunk-driving accidents and deaths. For the purpose of illustration, the focus here is on alcohol companies, although this approach could overlap with a scheme of the type mentioned earlier aimed at car manufacturers. One goal, for example, might be to reduce drunk-driving deaths by 50% in 8 years, again with appropriate intermediate goals along the way. Unlike matching road deaths to specific car companies, it might be too difficult to match each drunk-driving death with the drinking of a specific alcoholic product, especially since many drunk drivers may well consume several different products. Assuming that through statistical sampling methods, the relevant public agency could fairly determine the market share of the drunk-driving problem attributable to each major alcohol company, responsibility could be assigned in a different way. Taking a cue from the approach suggested above with respect to junk food, alcohol sellers may be given geographic responsibility.

For example, if an alcohol company is responsible for 10% of the overall problem, it would be assigned a share of the country in which 10% of the drunk-driving deaths now occur, and a reduction in the drunk-driving death rate in that geographic area would be its target. Just how it would meet that target would be up to the company. It might get breathalyzer machines put in cars in its area, or get bars to better supervise excessive drinkers, or subsidize taxis and other services for those who leave public facilities having had too much too drink, and so on. As would also be true if junk food sellers were given regional obligations with respect to childhood obesity, the alcohol companies might choose to cooperate with each other in pursuit of coordinated national strategies to implement in each others’ territories, such as taking all high-fat snack food out of schools or lowering the alcohol level in beer.

Challenges

All of these performance-based regulatory schemes would face a set of specific challenges. For example, we do not want obese children to be replaced with anorexics, or cigarette smokers replaced with cigar smokers or cocaine users. Hence, businesses would have to disclose their plans to achieve their public health targets, and agencies would have to be able to veto plans that seriously risked socially unacceptable consequences. So, too, it would be critical that the agencies could reliably measure whether the target is really being met. It would hardly do if it turned out that junk food companies appeared to be on target because they enticed obese children to stay home on weigh-in day, or had paid for them to enroll in another school just over the relevant geographical border.

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Setting a challenging but not preposterously high target, and setting an appropriate penalty for failure to meet the target are other difficulties that programme designers will face. However, it should be emphasized that so long as the target is only a 50% reduction in death and/or disease or injury (as opposed to eliminating the harm completely), it is unlikely that any penalty for non-compliance that is agreed upon would force any company to more than internalize the full social costs of its relevant products. Indeed, it probably would be better to set the target and penalty somewhat on the high side so as best to promote technological innovation, as well as to be sure that the regulated businesses aggressively address the problem and not take credit for achieving small goals that could well be achieved in any event simply by evolving social norms.

At the same time, regulators need to be fair and not promote other social changes that would undermine a company's ability to reach its goals (e.g. by lowering the driving age), or at least take such changes into account in measuring a company's compliance. These same difficulties confront those trying to deal with climate change. At present, regulators are learning, for example, how to contend with 'gaming' by companies that claim carbon emission reductions that would have occurred anyway.[20,21]

Regulatory alternatives

In a world in which other regulatory strategies have their own substantial short-comings, performance-based regulation as applied to public health is surely worth serious consideration and experimentation. What are these other alternatives? Relying on the market and the felt 'social responsibility' of businesses has brought us to the sad state of affairs we now face. Imposing even more 'command and control' requirements suffers from the objection that, in many areas, regulators just do not know what to demand and too often wind up demanding the use of what is, or soon will be, outmoded technology.[22]

We could try to rely more on tax strategies.[23] However, in a sense, performance-based regulation is a tax scheme, although an especially subtle one. It is not the same as a general excise tax on, say, alcohol or junk food. That approach primarily counts on the tax to raise the price (which it may not) and in turn to discourage use. There is no direct connection with actual reduced harm, and it does not reward businesses for achieving public health gains. On the other hand, performance-based regulation is, in effect, a tax on excess negative outcomes beyond a company's target. Unlike, for example, a tax on not having seat-belts in a car, it is a tax on outcomes, not inputs. As a result, it is a tax that will impact individual enterprises very differently based on how well they can accomplish the goals that the regulatory regime has set for them.

Lastly, performance-based regulation has considerable appeal compared with tort litigation seeking damages for victims; a strategy frequently promoted by those who favour holding industry 'responsible.'[24] Almost all of today's tort litigation bases liability on fault, i.e. on proof of negligence. This is analogous to a system of 'command and control' regulation run by the judicial system, because the judicial system will impose costs on companies as penalties for not engaging in some specific precautionary behaviour that the court hopes will yield safer outcomes. Again, this is very different from performance-based regulation, which, most importantly, is directly focused on outcomes.

One can imagine a regime of true strict liability in tort in which the judicial system imposes on each enterprise all the social costs of the products it makes.[25] Under strict liability, businesses are responsible for harm caused regardless of fault. In contrast to today's negligence law, true strict liability in tort would be much more like performance-based regulation. Still, there are differences. Obviously with strict liability, the financial penalties would not be paid to the government but instead would go to victims as compensation for their harm. Strict liability would also require proving an individual causal connection between the product and the victim, instead of merely measuring non-compliance with the performance-based regulation scheme. More importantly, with strict liability, the outcome target would, in effect, be immediately set at zero. This means businesses would never escape financial penalties unless they completely eliminated the negative social outcomes. In contrast, as explained above, performance-based regulation would establish a more reasonable target, such as a 50% reduction in 8 years. Businesses that reached their target would face no financial penalties, and could be publicly praised for improving the public health.

Companies would probably far rather face a performance-based regulation plan than strict liability in tort, and, if given the choice, in many cases they would prefer performance-based regulation to a wide range of 'command and control' schemes. Indeed, one way to gain political acceptance of performance-based regulation might be to combine it with a promise not to enact new 'command and control' or excise tax requirements, and perhaps even to repeal existing measures. If need be, one might even want to suspend the operation of tort liability for negligence for enterprises that actually achieved ambitious performance-based targets.

Conclusion

Performance-based regulation offers an opportunity to engage business in a new way, a way that promotes the public health by pushing companies to dramatically reduce the high morbidity and mortality rates that societies now face from key consumer products such as tobacco, alcohol, junk food and motor vehicles. To pave the way politically for performance-based regulation, public health leaders will probably first have to reframe the negative consequences of these consumer products as industry's problem and not 'collateral damage'. Having achieved that reframing, the public health community could demand 'no more business as usual'. At that point, in hope of avoiding even more restrictive regulation, industry itself might embrace performance-based regulation as a way of showing that, with the right financial incentives, business can be counted on to do the right thing.

Ethical approval

None sought.

Funding

None declared.

Competing interests

The author is Senior Program Consultant and Adviser to the Robert Wood Johnson Foundation.

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