Perspectives on Consumers, Industry, and Regulations in the Food Sector

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On three different occasions, American business firms became the target of organized consumer movements. The first consumer movement took place in the early 1900's, fueled by rising prices, drug scandals, and Upton Sinclair's exposes of conditions in the meat industry. The second wave of consumerism, in the mid-1930's, was caused by such factors as an upturn in consumer prices in the midst of the depression and another drug scandal. The third movement began in the 1960's as a result of a more complex set of developments: consumers were better educated and more aware that products had become increasingly complex and hazardous. Inflation was causing increased food prices resulting in beef boycotts. Such influential writers as John Kenneth Galbraith, Vance Packard, and Rachel Carson accused big business of wasteful and manipulative practices. Presidents Kennedy and Johnson addressed the issue of consumer rights and the Congress initiated investigations of certain industries. Finally, Ralph Nader appeared on the scene to crystallize many of these issues in the minds of consumers.

From these early stirrings, many private consumer organizations have emerged, several pieces of consumer legislation have been passed, and numerous state and local offices of consumer affairs have been created.

The food industry has balked at the consumer movement, resenting the power of consumer leaders to point an accusing finger at their products and send their sales plummeting. This happened, for example, when Robert Choate accused breakfast cereals of containing "empty calories." The food industry and some government agencies have also resented consumer proposals in many regulatory areas, such as the recently revised beef grading standards, and regulations permitting the marketing of mechanically deboned meat.

One conclusion that could be drawn from this is that industry and government agencies must begin finding ways to include the views and interest of consumers in the formulation of regulations, which after all, ultimately affect all of us. The food industry must begin to take consumers' wants into account and voluntarily implement those desires before being forced to by regulations. Government agencies must voluntarily work with consumers and industry in modifying existing regulations to reflect current marketing conditions. The rationale for voluntary cooperation among business, government, and consumers is what I want to emphasize in my discussion, which is based upon these premises:

1. that forces are building for more consumer involvement in establishing food regulations,

2. that the food industry has been basically opposed to involving the viewpoints of consumers.

3. that voluntary action by business, government agencies, and consumers tend to forestall legislative action, but

4. that if voluntary action is not taken, legislative action may be taken.

The necessity for voluntary cooperation among affected members of the food sector can be seen in the following examples.

Universal Product Code

The attempt to implement the Universal Product Code (UPC) is an excellent example of the trade-off between industry adopting a new technology to increase productivity and consumer interests. UPC adopted by the food industry in 1973, for use at the retail level, is a revolutionary technology that facilitates inventory control, speeds up the check-out process, and can potentially decrease costs and eliminate checker error. The new technology was conceived, planned, and almost implemented by the industry. Consumer groups who were given a preview of this technology immediately prior to its implementation, were impressed with some of the advantages to the retail store and the consumer but were wary that this new technology which could increase productivity might create problems for consumers. Consumer advocates were primarily concerned that because prices could be programmed into the computer, individual pricing of grocery items would be eliminated, saving labor for the retailer but requiring consumers to rely on shelf prices.

Consumer groups opposed the removal of individual prices because they believed it would reduce price awareness. No mechanism had been established by industry to take these potential problems of consumers into account, so the consumer groups took to the legislative halls. Legislation was introduced in the United States Congress, and Rhode Island, Connecticut, California, and New York passed laws requiring individual pricing.

In the wake of this legislative furor, a food industry-financed study on consumer price awareness in stores adopting UPC was conducted by a team of researchers at Michigan State University. The study concluded that when individual prices on grocery items were removed in stores with scanners there was a significant reduction in price awareness. As a result of these findings, the industry's Public Policy Subcommittee on UPC recommended that stores using the electronic equipment follow the same traditional approach to individual item marking as is used in conventional supermarkets.

In exchange for this recommendation, the food industry wanted consumer groups to stop seeking legislative remedies. To date, no progress has been made on resolving the issue. Some individual retailers have stated they will not guarantee that at some later date they will not decide to eliminate individual pricing. Thus, consumer groups will continue to seek legislation.

The lesson we learn from this experience is that if the consumers' viewpoint had been sought before the decision to implement the UPC concept was made by industry, much of the controversy could have been eliminated. Communication between industry and consumers at an early stage, focusing on the potential problems of implementing UPC and initiating the appropriate research to evaluate these problems, could have eliminated the need for the legislative action.

Revision of Beef Grading Standards

The next example looks at the involvement of industry and consumers in

revising U.S. Department of Agriculture (USDA) beef grading standards.

When USDA announced a new beef grading proposal in September 1974, public comment was solicited as the law required. The commenting period and subsequent ruling were the basis for much controversy. During the commenting period more than 4500 written comments were received from individuals and organizations according to USDA's count; more than 12,000 according to calculations by the proposals' opponents. After a three-month review of the comments, the adoption of the proposed revision of the beef standards with only minor modifications was announced, with implementation being scheduled for the following month.

This ruling resulted in a storm of protest. The proposals' opponents exerted pressure through a media campaign. A U.S. District Court in Nebraska issued a preliminary injunction enjoining the implementation of the revised beef grade standards. The injunction came in response to a complaint filed against USDA by eight meat packers in Omaha, who were later joined by the National Association of Meat Purveyers, the National Restaurant Association, the National Livestock Feeders Association, and a coalition of consumer groups. The American National Cattlemen's Association intervened for the Department of Agriculture. All of this activity prompted hearings by the House Agriculture Committee on the new beef grading standards.

Citing this example is not to debate the merits of the numerous comments received by USDA on the proposal, or to question whether or not USDA should make its ruling on the basis of popularity. These are merely symptoms of the problem, which is the lack of communication among USDA, meat processors, and consumer groups. Communication should have begun before any regulations were ever written. It could have taken the form of a task force composed of all parties affected by change in the standards. The recommendation of the task force may not have been any different than the new standards adopted, but two-way communication would have been established. USDA, through this communication process, could have been enlightened as to consumers' concern, and consumers could have been educated as to what problems their concerns bring to a very complex industry. If this type of dialogue had taken place before, rather than after, the fact, the judicial and legislative action might not have been necessary.

The lesson in this is that regulators must include from the very beginning the views of consumers and others who are affected by any change in a regulation. If this type of voluntary action is not taken - legislative or judicial action may have to be taken.

Mechanically Deboned Meat

The next example looks at how USDA recently viewed the trade-off between adopting the cost reducing technology of mechanically deboned meat (MDM) and consumer interests. Earlier this year, the Animal and Plant Health Inspection Service (APHIS) of the Department of Agriculture proposed creating thirteen classifications for "meat." The controversial aspect of the proposal was the concern over marketing mechanically deboned meat. APHIS made a clear bow to consumers in the proposal, the first proposal of major significance published by the agency since it developed its Consumer Representation Plan by soliciting comments from the very start of the procedure. Under the plan which was ordered by the President, all departments were to design a program that would involve consumer input into establishing or revising federal regulations.

Consumers did not appear to be opposed to the concept of gaining more meat from processing through mechanical deboning but did voice several concerns. Consumers clearly wanted the end product to indicate on the label that it contains mechanically deboned meat. In addition, they were worried that this product is more prone to bacterial contamination and that mechanically deboned meat contains a "small amount" of pulverized bone. Consumers voiced their concern over the lack of information on the effect of increased intake of the bone particles on the body.

However, despite these concerns, USDA issued interim regulations authorizing the use of this process and the marketing of products containing MDM. Cries of protest arose from consumers and other government agencies. The presidentially appointed Consumer Advisory Council urged the Secretary of Agriculture to withdraw the proposal pending further study of the effects of bone particles on the body. The Council's official statement was prompted by the famous nutritionist Dr. Jean Mayer, who stated before the Council that he was concerned about the effect of the bone particles on the body, particularly the human digestive tract.

The Attorney General of Maryland and seven consumer organizations petitioned for a temporary restraining order asking the Secretary to withdraw the interim regulations but not the notice of proposed rule making. Pressure was also applied by Representative Heckler of the House Agriculture Committee, who warned that if USDA did not withdraw the interim regulation, she would call for a hearing to have USDA explain.

USDA did not voluntarily suspend the interim regulations allowing for mechanically deboned meat to be used by the industry while the proposed regulations were under comment. However, a federal court ruled in favor of the consumers' petition and ordered meat processors to halt production of mechanically deboned meat. The court ruled that the Secretary had violated the law by permitting the production and use of mechanically deboned meat under an interim regulation. The judge found that mechanically deboned meat is an adulterant and products containing it are to be considered adulterated at the present time. Also products containing mechanically deboned meat under the regulation would be misbranded. In a related development, Representative Heckler introduced a bill to require the labeling of all food products containing mechanically deboned meat.

Thus, the lesson in this case is that even under the consumer representation plan, complaints can fall on deaf ears in government. Government agencies must show a willingness to enter a dialogue with consumers. If consumers are wrong, then the agency needs to do the proper educational job of explaining why they were wrong. However, if the agency does not know the answer to a legitimate consumer complaint, such as the effect of increased intake of bone particles on the body, then the appropriate research needs to be undertaken to find the answer. This is especially true in the food sector, where we are becoming increasingly aware that ingestion of substances of whose effects we are uncertain of now, can have profound ramifications on our health much later.

Fair Packaging and Labeling Act

If administrative rule making does not work - what are the alternatives? Certainly one alternative is for Congress to process regulations through legislation. The writing of the Fair Packaging and Labeling Act can be viewed as the result when Congress begins the process of writing regulations. The history of the passage of this law has been well

publicized and documented. There are two aspects of the law's history worthy of review - the time involved to achieve formal passage and the provisions considered for inclusion.

The first hearings, expressly for the purpose of reviewing packaging and labeling practices, were held in 1961 by the Senate Judiciary Committee. The law was finally passed in November, 1966. The summary of activities between 1961 and 1966 is staggering. In total, five years time passed, 54 days were devoted to hearings, close to 300 witnesses spoke during the committee hearings, over 3000 pages of testimony from these witnesses was compiled, and approximately 350 statements and additional pieces of information were submitted to the committees.

It is interesting to note that during all of this activity more time and funds went into assuring that every one had the opportunity to air their views than in assuring that all relevant information was presented and was correct. Many industry representatives supported their claims with surveys they had taken. However, the Congressmen or the committee staffs failed to correct the biases exhibited by some of these surveys, nor was sufficient effort made to obtain relevant research data on consumer needs, which was necessary because of a scarcity of expert professional testimony representing the consumer viewpoint.

During the course of activity from initial discussions to passage of the final law, several features of packages came under criticism. The regulations embodied in the final law were milder even than many of the early proposals to cause one writer to comment that the "elephant had brought forth a mouse."[1]

In the end, the simple need for similar products to be packaged in similar sizes so consumers could compare prices became muddled by problems such as vending machine use, reusable bottles already in use, product diversity differences, supposed hindrance to the free market system, the needs of consumers, and the added cost of compliance which would be incurred by industry and ultimately by the consumer. Legislators were bewildered by questions associated with economics, with consumer behavior, with the strength and weaknesses of government intervention, and with simple differences of opinion and not so simple personality clashes.

In the initial House bill and the final Senate Bill the legislators attempted to take care of all the problems by making exceptions to the law. The final result of this Act was a continuing proliferation of sizes, obscure net contents statements, blatant stock filling, deceptive illustrations, and the like.

The lesson learned from using the legislative approach to establish regulations for an industry is that while this route is successful at identifying consumer problems, directing accepted principles into operating rules in a complex industry is very difficult without the technical expertise provided by personnel in government agencies and industry.

Nutritional Labeling

The nutritional labeling regulations issued by FDA represent a different approach to consumer representation and protection. In contrast to the issues of UPC, beef grading, MDM, and the Fair Packaging and Labeling Act, the conceptulization and implementation of nutritional labeling can be viewed as a successful endeavor of formulating a regulation by an administrative body.

The primary impetus for nutritional labeling was recommendations by the 1969

White House Conference on Food, Nutrition, and Health. During this discussion, FDA began working out some proposals for voluntary action by the food industry. An initial proposal was published in the Federal Register on March 30, 1972. This was followed by some additions and revisions, and the final regulations took effect June 30, 1975.

The White House Conference on Food, Nutrition, and Health was composed of representatives of many divergent groups. The different groups' recommendations for nutritional labeling were quite extensive. Virtually all of the conferences' recommendations for labeling were implemented in the FDA regulations. However, instead of the "practical" or "suburban" vocabulary exemplified by the conference recommendations, the regulations had definitive terms and provisions. For example, the catch-all phrase of "imitation" usually connotes an inferior product. The new regulation solves this dilemma in the nutritional question by defining an "imitation" product on a strictly nutritional basis.

The point I am making is that the completeness and expediency of the nutritional labeling regulations is quite a diverse situation from the Fair Packaging and Labeling Act.

The important question is whether the nutritional labeling regulations show the result of skilled, knowledgeable people working out compromises to accommodate both consumers and industry. Review by industry, consumers, and academicians uphold this proposition. For example, several efforts were made to discuss different opinions on the feasibility of nutritional labeling and development of a labeling program. Consumer surveys were taken, hearings were held, industry and consumer comments were asked for and reviewed. Similarly, because establishment of a provision for labeling fats was complicated by the existence of several types of fats, FDA had to reach an agreement on categories that could easily be analyzed and understood by consumers. Also, not only did FDA ask for comments on proposed policies, they also actively sought relevant information by contracting for research from outside sources.

The description of the activities which culminated in the nutritional labeling regulations reads quite differently than that of UPC, beef grades, mechanically deboned meat, and the Fair Packaging and Labeling Act. After recommendations on areas of concern, FDA put its available resources to work in creating workable policies while minimizing dissatisfaction by the affected parties. What sets nutritional labeling apart from the UPC, beef grading, and mechanically deboned meat experiences is a conscious and dedicated effort by FDA to listen to comments of industry and consumer. When FDA did not have the facts to answer their concern, they initiated the appropriate research to find the answer.

The nutritional labeling experience is in marked contrast to the legislative experience, which is that of concerned legislators without sufficient resources to solve technical complexities. The FDA or agency experience is a picture of multidisciplinary scientists, lawyers, and administrators using their knowledge to resolve complex and often conflicting social objectives.

It should be noted that Congress is well aware of their lack of resources. That is one of the reasons for Congress creating the Office of Technology Assessment. Through staff and consultants, we form the multidisciplinary teams to tackle complex issues. Through advisory committees, we are able to obtain the views

of consumers, labor, industry, and government agencies. The integration of these views with the complexities of an advanced technological food industry is the formula for success in OTA and also the formula for success in writing new or revising old regulations. Let's look next at the consequences if industry, consumers, and government agencies cannot make this formula work on a voluntary basis.

Agency for Consumer Protection

In the last session of Congress, the Senate passed a bill providing for an Agency for Consumer Advocacy, and the House Committee on Government Operations favorably reported a similar bill calling for an Agency for Consumer Protection. The bills are premised on the proposition that consumers are not adequately represented before federal agencies. As a key function, the bills would establish an executive agency to receive consumer complaints, transmit them to the appropriate agencies, and make them publicly available.

To implement the agency's watchdog activities, the Senate bill would impower it to intervene, as an adversary, in any federal agency proceeding which may substantially affect an interest of consumers. This decision to intervene would not be challengable by anyone; the agencies would be required to give full consideration to any of their submissions. Should the proceeding not work out to the consumer agency's satisfaction, it could seek review of that federal agency's decision by petitioning a federal court to review the matter.

Industry would also be affected. The consumer agency would have the authority to require any person engaged in a trade, business, or industry - whose activities are determined as substantially affecting an interest of consumers - to file with the agency a report to answer, in writing, specific questions concerning such activities and related information. Should the recipient refuse to answer the question properly, a Federal District Court would issue an order requiring compliance with the agency's request.

The odds that this legislation will be introduced in the next session are very good. The major reason these bills did not become law in this past session was the political climate of an election year and the alternative Consumer Representation Plan ordered by the President for all agencies. With the implementation of the President's plan, he threatened to veto legislation creating the consumer agency legislation. However, given the experience to date of the Consumer Representation Plan, at least in food, the plan has not worked. The MDM experience was USDA's first test of the plan and consumers' concern fell on deaf ears. Thus the liklihood is very good that if the experience in other areas is like that in food, this legislation could become law in the next session of Congress.

What can be done to prevent the need for this compulsory action? We can begin by learning from the mistakes of the past. Industry has the responsibility to inform and seek advice from consumers at early stages of adopting new technology that directly or indirectly relates to consumers. Government agencies have the responsibility to represent the public interest which includes all affected parties of a regulation - not one or two special interest groups. Consumers have the responsibility to become more knowledgable of the complexities in regulatory areas and to approach the subject with open minds.

Above all, there must be a willingness of industry, government, and consumers

to work together. That is the only way to prevent the need for compulsory legislation. In the food area, we have shown that it can be done when we established nutritional labeling. I have confidence in the government, industry, and consumers to believe there will be more successful experiences in the future.

Footnote

[1]Mowbray, A. Q., The Thumb on the Scale, J. B. Lippincott, 1967, p. 25.

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