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**Should We Tax the Fat out of America?
The Trouble of Selling the Fat Tax to the Public**

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I. INTRODUCTION

In January of 2009 the New York State Assembly introduced legislation that, if passed, will impose an 18% tax on sugary sodas and juice drinks.¹ The bill states:

[T]here are hereby imposed and there shall be paid additional sales and compensating use taxes, at the rate of eighteen percent, on (i) fruit drinks that contain less than seventy percent of natural fruit juice and (ii) soft drinks, sodas, and beverages such as are ordinarily dispensed at soda fountains or in connection therewith . . .²

Proponents of this bill argue that this legislation will reduce the prevalence of obesity while raising more than \$400 million per year for health programs.³ Others, including the American Beverage Association, argue that the bill's purpose is generating revenue for the state rather than protecting the health of the population and express doubt that singling out one industry will significantly affect obesity levels.⁴

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¹ A. 160/S. 60, 2009 Assem., Reg. Sess. § 1105-D (N.Y. 2009).

² *Id.*

³ Sewell Chan, *A Tax on Many Soft Drinks Sets Off a Spirited Debate*, N.Y. TIMES, Dec. 17, 2008, at A36, available at <http://www.nytimes.com/2008/12/17/nyregion/17sugartax.html>.

⁴ *Id.*

Obesity is one of America's fastest-growing health concerns.⁵ Nationally, nearly one third of adult Americans are obese.⁶ Obesity has been defined by the Centers for Disease Control and Prevention to be a label "for ranges of weight that are greater than what is generally considered healthy for a given height."⁷ Obesity levels are determined by using a person's height and weight to calculate their body mass index (BMI).⁸ In most cases, one's BMI correlates with one's amount of body fat.⁹ In New York, one out of every four people is classified as obese, an alarming increase from the 14% of New Yorkers that were classified as obese in 1995.¹⁰

Obesity increases the risk of health problems, including coronary heart disease, type two diabetes, cancer, stroke, liver disease, sleep apnea, respiratory problems, and hypertension.¹¹ Obesity and related illnesses have cost the nation billions of dollars in health care costs, especially from federally funded Medicaid and Medicare.¹²

II. THE HISTORICAL TAXING OF TOBACCO AS A GUIDE TO "FAT TAXES"

Taxing foods and drinks that are linked to obesity in an effort to lower the prevalence of obesity in America may appear to be a novel idea, but it is hardly unique. There have been many occasions when taxes were used to promote public health by discouraging consumption of an unhealthy product, most

⁵ CTRS. FOR DISEASE CONTROL & PREVENTION, OVERWEIGHT AND OBESITY: U.S. OBESITY TRENDS 1985–2007, <http://www.cdc.gov/nccdphp/dnpa/obesity/trend/maps/index.htm> (last visited Mar. 29, 2009).

⁶ US DEPT. OF HEALTH & HUMAN SERVICES, STATISTICS RELATED TO OVERWEIGHT AND OBESITY 4 (2007), available at <http://win.niddk.nih.gov/publications/PDFs/stat904z.pdf>.

⁷ CTRS. FOR DISEASE CONTROL & PREVENTION, OVERWEIGHT AND OBESITY: DEFINING OVERWEIGHT AND OBESITY, <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last visited Mar. 29, 2009).

⁸ *Id.*

⁹ *Id.*

¹⁰ Chan, *supra* note 3.

¹¹ CTRS. FOR DISEASE CONTROL & PREVENTION, OBESITY AND OVERWEIGHT: INTRODUCTION, <http://www.cdc.gov/nccdphp/dnpa/obesity/index.htm> (last visited Mar. 29, 2009).

¹² Sayward Byrd, *Civil Rights and the "Twinkie" Tax: The 900-Pound Gorilla in the War on Obesity*, 65 LA. L. REV. 303, 323 (2004) ("In 1998, Medicaid spending related to obesity totaled 14.1 billion dollars, while Medicare spending totaled 23.5 billion dollars mitigating, treating, or attempting to treat the effects of obesity.").

famously, tobacco. Federal and state excise taxes on tobacco have raised billions of dollars in revenue since they were introduced, and have also contributed to a decline in total consumption of cigarettes.¹³ Statistics show that as states have raised excise taxes on cigarettes, total consumption has significantly declined.¹⁴ For example, when North Carolina raised its cigarette tax from \$0.05 to \$0.35, cigarette sales fell 18%.¹⁵ Likewise, in the five years after Connecticut increased its tax to \$1.51 per pack from \$0.50 per pack, the per capita consumption of cigarettes fell 37%.¹⁶ In South Carolina, the state with the lowest cigarette tax in the nation (\$0.07), consumption fell only 5% between 2000 and 2007.¹⁷

Recently, President Obama signed the Children's Health Insurance Bill. A portion of the programs created by the bill are funded by increasing the federal excise tax on tobacco.¹⁸ Under this act, the federal tax on a pack of cigarettes will increase from \$0.39 to \$1.00.¹⁹ Economists suggest that this raise in the cigarette tax will reduce smoking rates by 6%.²⁰ Furthermore, this estimate is reinforced by research studies that concluded that a 40% increase in the federal tax on cigarettes will drop smoking prevalence from 21.1% to 15.2% over a twenty-year period.²¹ It is estimated that this tax increase will decrease smoking-related medical care costs by an estimated \$317 billion over the next twenty years.²²

The underlying public health problems stemming from smoking are similar to the health issues and costs associated with the obesity epidemic that is

¹³ Dennis Cauchon, *Smoking Declines as Taxes Increase*, USA TODAY, Aug. 9, 2007, available at http://www.usatoday.com/news/health/2007-08-09-1Aled_N.htm.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Robert Pear, *Obama Signs Children's Health Insurance Bill*, N.Y. TIMES, Feb. 4, 2009, available at <http://www.nytimes.com/2009/02/05/us/politics/05health.html>.

¹⁹ See Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, §701, 123 Stat. 8, 106 (2009).

²⁰ Cauchon, *supra* note 13.

²¹ Sajjad Ahmad & Gregor A. Franz, *Raising Taxes to Reduce Smoking Prevalence in the US: A Simulation of Anticipated Health and Economic Impacts*, 122 PUB. HEALTH 3, 7 (2008).

²² *Id.* at 8.

plaguing American today, prompting both proponents and critics of governmental intervention to cite smoking when discussing obesity.²³

III. THE JUNK FOOD TAX VERSUS THE FAT TAX

Most taxes imposed on unhealthy foods can be categorized into two groups: smaller “junk food taxes” and more aggressive “fat taxes.” Many of the existing junk food taxes pre-dated the obesity epidemic and were enacted when there was much less concern about the health impact of such foods.²⁴ Advocates now propose extending these existing taxes, and using the large revenues they generate, to fund public health initiatives.²⁵ These junk food taxes are relatively small, generally less than 5%, but over time they generate significant revenue.²⁶ Polls suggest that the public approves of these small taxes, something that cannot be said about tobacco taxes or the more aggressive fat taxes.²⁷ Furthermore, these junk food taxes appear to be a viable way to raise revenue that can be allocated to promote healthy eating habits without affecting consumer access to these foods.²⁸ Individually, these relatively small junk food taxes are unlikely to substantially influence consumer diet quality or health since the taxes themselves are unlikely to significantly affect the price or accessibility of the foods and drinks.²⁹ Therefore, if these small junk food taxes are employed, there is an added importance and responsibility of allocating the revenue collected to programs that either promote healthy alternatives or subsidize healthy food.

²³ See David Paterson, *Commentary: Why We Need an Obesity Tax*, CNN, Dec. 18, 2008, <http://www.cnn.com/2008/HEALTH/12/18/paterson.obesity/>.

²⁴ Jeff Strnad, *Conceptualizing the “Fat Tax”*: *The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1224-25 (2005).

²⁵ *Id.* at 1225.

²⁶ See Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854 (2000).

²⁷ *Id.* at 856 (explaining that a national poll found that 45% of adults surveyed would support a one cent tax per pound of soft drinks, chips, and butter, with revenues used to fund health education programs).

²⁸ See *Id.* at 854.

²⁹ Fred Kuchler et al., U.S. Dept. of Agric., *Taxing Snack Foods: What to Expect for Diet and Tax Revenues*, Aug. 2004, at 1, 10, available at <http://www.ers.usda.gov/Publications/aib747/aib74708.pdf>.

Since small taxes are relatively ineffective in directly affecting consumption, state legislatures and local governments have proposed more aggressive fat taxes that call for the taxing of unhealthy food with the explicit goal of influencing consumer behavior to meet public health goals.³⁰ Critics of these fat taxes argue that they disproportionately affect the poor because smaller incomes create a financial burden when coupled with the lack of access to affordable, healthier alternatives.³¹

Once a state makes the decision to implement a small junk food or an aggressive fat tax, it must ultimately decide what foods and drinks will be subject to the tax. One method that experts recommend is to tax foods based on their content of standard or trans fat rather than taxing categories of foods.³² However most legislators, like those in New York, choose to create overly broad categories, such as “sugary drinks.”³³

IV. DEFENDING NEW YORK’S OBESITY TAX

New York’s obesity tax falls into the category of a fat tax because the stated goal is to reduce the consumption of high calorie drinks.³⁴ New York Governor David Patterson, who has championed the bill, believes this tax will help reduce the prevalence of obesity, much in the same way that cigarette taxes have been used to reduce the number of smokers.³⁵ While Governor Patterson also acknowledges that the tax itself may be unpopular, he cites a reduction in smoking following an increase in the state’s cigarette tax as being evidence of the potential public health benefits the obesity tax will foster.³⁶

New York’s fat tax is likely to face strong resistance, not just from the beverage industry, but also from the public. The state legislature needs only to

³⁰ Strnad, *supra* note 24 at 1226.

³¹ Byrd, *supra* note 12, at 329.

³² Jacobson & Brownell, *supra* note 26 at 854.

³³ *Id.*

³⁴ Paterson, *supra* note 23.

³⁵ *Id.*

³⁶ *Id.*

look at some recently enacted and proposed legislation from around the country to anticipate the public reaction to the tax. In Maine, voters overturned an April 2008 state law that added new taxes on sodas and the sugary syrups used to make them.³⁷ Similarly, a proposal from the mayor of San Francisco to charge stores a fee when they sell sugary drinks has not advanced since being introduced over a year ago.³⁸ It appears that the New York legislature will likely fight an uphill battle in convincing the public that this obesity tax will aid in the reduction of the prevalence of obesity in the state.

V. NEW YORK'S OBESITY TAX IS UNLIKELY TO SUCCEED

Given the history of aggressive fat taxes it is unlikely that New York's obesity tax on sodas and sugary drinks will pass into law because of broad opposition. Although aggressive taxing has appeared to work in lowering the prevalence of smoking, the same tactics will run into several roadblocks when applied to foods and drinks linked to obesity. New York may have more success raising revenues through employing smaller junk food taxes on sodas and sugary drinks. However, this will not raise nearly the same level of revenue, nor will it be as effective in lowering the prevalence of obesity. Until the public is more receptive to these fat taxes, state and local governments attempting to fight obesity will need to be content with employing smaller junk food taxes and promoting healthy alternatives.

³⁷ Chan, *supra* note 3.

³⁸ *Id.*; see also Jesse McKinley, *San Francisco's Mayor Proposes Fee on Sales of Sugary Soft Drinks*, N.Y. TIMES, Dec. 18, 2007, available at <http://www.nytimes.com/2007/12/18/us/18soda.html>.