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**MANIPULATING DISCLOSURE: CREATIVE COMPLIANCE IN THE  
ISRAELI FOOD INDUSTRY**

SHARON YADIN\*

ABSTRACT

*Front-of-package food labels meant to inform consumers of the food's nutritional values through simple and easy-to-comprehend graphic rating and warning systems are gaining increasing popularity in regulatory spheres. Around the world, health regulators have adopted front-of-package disclosure systems based on infographics, symbols, logos, colors, numbers, and letters, via both mandatory and voluntary schemes, while others, such as the U.S. Food and Drug Administration ("FDA"), are considering adopting them. The recent Israeli food-labeling reform reveals consumer misinformation tactics deployed by food companies through various graphic manipulations that can be regarded as "creative compliance." Adding to the policy and theory of disclosure regulation, this Article discusses the misinformation effect of graphic disclosure and suggests soft law tools for combating this regulatory failure, such as regulatory shaming and voluntary regulatory agreements.*

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## INTRODUCTION

Governments worldwide use information disclosure as a tool for regulating pharmaceuticals, tobacco products, television and gaming content, finance and banking, food, and retail.<sup>1</sup> Disclosure rules are designed to address informational gaps between companies and stakeholders, such as consumers, viewers, users, investors, and patients.<sup>2</sup> These rules require companies to disclose certain information that can help the public make a more informed decision about whether, how, when, where, and how much to use products and services.<sup>3</sup> Disclosure is often aimed at reducing public misinformation and increasing the accessibility of accurate information regarding the risks, dangers, benefits, effects, performance, probabilities, advantages, and value associated with commodities. However, disclosure rules can also be manipulated by firms to produce misleading and counterproductive effects.

This Article focuses on a specific type of disclosure rule manipulation relating to recent regulatory endeavors to communicate simplified information to the public through infographics, color schemes, and icons—for example, on food labels. While technically complying with the regulation, firms use visual “creative compliance” tactics, such as changing the color of packaging, to increase consumer confusion and frustrate important regulatory goals.<sup>4</sup>

The Article examines a recent Israeli Ministry of Health reform in which food companies were required to mark relevant packages with predefined red markings indicating high content of saturated fat, sugar, and salt.<sup>5</sup> Yet, while companies generally complied with the letter of the law and added the required markings, many have also added markings of their own, changed the background color of labels and packages to red, and added red artwork next to the red regulatory markings.<sup>6</sup>

The case study of Israeli food labeling reveals a relatively underexplored problem, in which companies use subconscious graphic manipulation tactics to respond to newly mandated disclosure rules. Within this regulatory dynamic, a regulatory mechanism that aims to improve public access to information through easily understandable graphics is manipulated by firms, who instead spread misinformation in a sophisticated manner. I will discuss this specific type of regulatory failure as the misinformation effect of graphic disclosure.

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1. *See, e.g.*, CASS R. SUNSTEIN, TOO MUCH INFORMATION: UNDERSTANDING WHAT YOU DON'T WANT TO KNOW 50 (2020).

2. *See, e.g.*, ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 9, 40 (2007).

3. *See, e.g.*, OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 3 (2014).

4. *See infra* Part II.

5. *Id.*

6. *Id.*

This case study and its analysis may hold important implications for both theory and policy regarding disclosure rules. On the theory side, the article also contributes to creative compliance literature, consumer law and regulation studies, and food law scholarship. On the policy side, it aims to provide valuable insights for policymakers in various jurisdictions who are currently considering graphics-based reforms, especially in the food industry, but also in other fields of regulation.

The article is organized as follows: Part I presents the role and mechanism of disclosure rules in regulatory settings, focusing especially on food labels. Part II analyzes the recent Israeli food-labeling reform as a case study of industry manipulation of disclosure rules and develops a theory on the misinformation effect of graphic disclosure rules. Part III suggests possible avenues for mitigating the problem of misinformation and creative compliance in disclosure rules regimes, focusing on regulatory shaming of industry members and regulatory compliance agreements with industry.

## I. FOOD LABELS & DISCLOSURE RULES

### A. *Food Labels & Principles of Disclosure Regulation*

In our daily lives, we see disclosure regulation in action everywhere we look: our cars are rated as to how safe and how polluting they are; our television programs carry labels indicating which content is suitable for children;<sup>7</sup> and our food is stamped with labels providing information on its nutritional value. The main goal of disclosure rules is to reveal to the public more information, clearer information, more accurate information, or more accessible information.

Disclosure regulation requires manufacturers, marketers, and service providers to disclose information about their products and services to stakeholders, such as consumers, clients, users, employees, patients, residents, and investors. Regulatory rules of disclosure detail the ways and forms in which such information is to be provided.<sup>8</sup> For example, various rules and regulations specify the colors, sizes, location, and fonts of television markings, as well as cigarette packages and food labels.<sup>9</sup> The ways in which information is presented are considered crucial to effective disclosure regimes.<sup>10</sup>

In the food industry, regulatory laws, regulations, and guidelines determine which information should and should not appear on product packaging, as well

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7. See, e.g., Tali Teeni Harari & Sharon Yadin, *Regulatory Literacy: Rethinking Television Rating in the New Media Age*, 88 UMKC L. REV. 101 (2019).

8. See, e.g., BRONWEN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION 96 (2007).

9. See, e.g., Nathan Cortez, *Do Graphic Tobacco Warnings Violate the First Amendment?*, 64 HASTINGS L. J. 1467 (2013).

10. See David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS & MGM'T 161 (2006).

as how it should (and should not) be presented. Nutritional values, ingredients, expiration and manufacture dates, directions for use and storage, allergens and additives, manufacturer details, and prices are usually required to be placed on packaging according to specific rules.

While this is important consumer information, it is also a lot for consumers to process. For example, nutritional panels tend to be difficult to comprehend, time-consuming, and also hard to access because they are often located in the back of packaging or under packaging folds.<sup>11</sup> It is therefore not surprising that most consumers are interested in food labels that are easier to read.<sup>12</sup> Accordingly, substantial efforts are being made in countries all over the world to simplify the information provided under disclosure schemes; for example, by using symbols, icons, colors, prominent letters, and other graphical elements.

These markings, symbols, and icons are sometimes the product of private initiatives, such as the “Smart Choice” and “Facts Up Front” labels in the United States,<sup>13</sup> but they can also take the form of mandatory or voluntary government schemes. Indeed, disclosure rules can be designed and enforced by industry members, business unions, international institutions, nonprofit organizations, consumer groups, governments, and administrative agencies.<sup>14</sup> This article focuses on mandated rules, enacted and enforced by administrative agencies responsible for regulating food products.

Regulatory agencies often use disclosure rules to provide people with a solid factual basis for informed decision-making and to make them aware of any harms inherent in a product or a service. Properly informed, target audiences can then decide whether, how, when, where, and how much to use a commodity. In the food industry, disclosure regulation protects consumers from food hazards, such as eating expired foods, helps them make informed nutritional choices, for example, regarding consumption of calories, fats, and sugars, and facilitates cost–benefit decision-making, by providing information on price, quantity, and quality of food products. Disclosure rules in the food industry can also combat misinformation, such as the common notion that various breakfast cereals and

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11. See Brendon Murphy & Jay Sanderson, *Soft Law, Responsibility and the Biopolitics of Front-of-Pack Food Labels*, 26 GRIFFITH L. REV. 355, 359 (2017); Weil et al., *supra* note 10, at 171. However, recent disclosure scholarship, including on food labeling, highlights the idea that not all people necessarily want more information in their lives. See SUNSTEIN, *supra* note 1; Lucia A. Reisch, Cass R. Sunstein, & Micha Kaiser, *What Do People Want to Know? Information Avoidance and Food Policy Implications*, 102 FOOD POL’Y, May 5, 2021.

12. See, e.g., Alan R. Kristal et al., *Trends in Food Label Associated with New Nutrition Labeling Regulations*, 88 AJPH 1212, 1215 (1998).

13. See, e.g., Alexia Brunet Marks, *Taming America’s Sugar Rush: A Traffic-Light Label Approach*, 62 ARIZ. L. REV. 683, 714 (2020).

14. See generally MORGAN & YEUNG, *supra* note 8, at 96; Weil et al., *supra* note 10, at 155; Murphy & Sanderson, *supra* note 11, at 356.

energy bars are healthy, when in fact they are often packed with sugar.<sup>15</sup> All in all, food labels play an important role in addressing public health issues, including diabetes, obesity, heart disease, food poisoning, food allergies, nutritional preferences (such as gluten-free or lactose-free diets), and general well-being.<sup>16</sup>

Disclosure rules are considered a soft form of regulation, allowing the regulated entity (e.g., food companies) to operate relatively free from regulation in a specific area, as long as relevant information is provided to relevant audiences.<sup>17</sup> From the target-audience point of view, regulation by information advances individuals' personal autonomy and reduces the paternalism that is inherent to traditional command-and-control regulation, which relies on strict prohibitions and restrictions.<sup>18</sup> For example, governments generally do not limit the inclusion of sugar in food products, but merely set rules regarding how food companies should disclose sugar quantities on their packages.<sup>19</sup> Consumers are free to choose according to their personal preferences, as long as relevant information is made available by firms. Generally, disclosure is subject to regulatory supervision and enforcement, and corporations that violate disclosure rules, including food-labeling regulations, may be subject to legal sanctions.<sup>20</sup>

Another goal of mandated disclosure is to deter companies from supplying products and services that require adverse public disclosures and to softly motivate companies, without using direct legal commands, to change their products and services and to create new, more socially responsible products and services, such as healthier snacks, that do not warrant adverse labeling.<sup>21</sup> In the food industry context, this process is sometimes referred to as reformulation.<sup>22</sup>

### B. *Under-Investigated Challenges of Disclosure Regulation*

The goal of disclosure regulation in the food industry is not only to make sure that valuable information is provided to consumers, but also to monitor companies' textual statements on packages, such as "healthy," "just a tad sweet,"

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15. See Jayson L. Lusk, *Consumer Beliefs about Healthy Foods and Diets*, 14 PLOS ONE 10, 2 (2019) (empirically testing public misconceptions of "healthy" foods).

16. See, e.g., Natasha Clarke et al., *Impact of Health Warning Labels on Snack Selection: An Online Experiment*, 154 APPETITE 10–12 (2020).

17. See ROBERT BALDWIN ET AL., UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 119 (2d ed. 2012).

18. See BEN-SHAHAR & SCHNEIDER, *supra* note 3, at 146–47.

19. See Gyorgy Scrinis & Christine Parker, *Front-of-Pack Food Labelling and the Politics of Nutritional Nudges*, 38 L. & POL'Y 234, 236 (2016).

20. See Marks, *supra* note 13, at 713; Jennifer L. Pomeranz, *A Comprehensive Strategy to Overhaul FDA Authority for Misleading Food Labels*, 39 AM. J. L. & MED. 617 (2013).

21. See, e.g., Scrinis & Parker, *supra* note 19, at 236.

22. See Marks, *supra* note 13, at 696.

or “all natural,”<sup>23</sup> as well as terms such as “butter” and “meat” when used by vegan food companies.<sup>24</sup> These types of textual labeling often spark clashes, and even legal battles, between regulators, regulated food companies, consumers, and competitors.<sup>25</sup> Litigation in this context usually focuses on the meaning, interpretation, and implications of the wording used by food companies to describe their product.

While this is a familiar misinformation challenge in regulating food labels, there is another, under-investigated, misinformation challenge in this context that warrants attention: the “misinformation effect of graphic disclosure.” This term refers to graphic-based disclosure schemes, under which regulatees thwart regulatory objectives and spread misinformation through “creative compliance” and visual manipulation.

Generally, creative compliance means that companies comply with the language of the law but not with its spirit, using various and often sophisticated methods to bypass the essence of the law.<sup>26</sup> Thus, companies will supply the required information to the relevant public, for example, by adding mandated symbols on packages and at the same time will deliberately take steps to obfuscate and dilute this information and its impact on consumers, for instance, through packaging redesign.

The misinformation effect of graphic disclosure via food labeling is an important subject of inquiry for several reasons. First, types of disclosure manipulation are especially relevant in the food industry, in which disclosure rules, rather than other regulatory strategies such as command-and-control, play a key role in common regulatory frameworks. Graphic manipulation of disclosure rules may frustrate the regulatory goals of food labeling, such as protecting consumers from food hazards, helping them make informed nutritional choices, encouraging reformulation of foods, and addressing public health issues, all while maintaining consumer autonomy.<sup>27</sup> Graphic manipulations by food companies can not only set back important health regulation endeavors but also directly infringe on consumer autonomy.

Second, disclosure regulation in food industries around the world is shifting in recent years from the provision of tables, panels, and text usually on the back

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23. See, e.g., David Shimkin, *California Consumers and Food Manufacturers Await Key Government Rules on Food Labeling*, FOOD RECALL MONITOR, 2021, <https://www.foodrecallmonitor.com/2017/09/01/california-consumers-and-food-manufacturers-await-key-government-rules-on-food-labeling>; Marks, *supra* note 13, at 683, 690.

24. See Katherine Mckeen, *Are Vegan “Butter” and “Meat” Labels Protected as Free Speech?*, REG. REV. (Dec. 9, 2020), <https://www.theregreview.org/2020/12/09/mckeen-vegan-butter-meat-labels-protected-free-speech>.

25. See *id.*

26. See generally Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1162–63 (2010).

27. See *supra* Part I(A).

of packages, to the addition of front-of-package infographics,<sup>28</sup> based on color-coding, star ratings, and icons.<sup>29</sup> This experimental regulation is dynamic and would thus benefit from explorations of case studies in countries that have already implemented such labeling systems.

Such study may aid regulators who are contemplating adjusting current labeling systems. Government regulators that have implemented voluntary front-of-package labeling<sup>30</sup> may be interested in considering a move toward mandatory labels, while regulators that operate mandatory front-of-package labeling systems may want to consider a shift towards voluntary approaches. These and other types of regulatory and legal adjustments warrant careful consideration and efforts to learn from previous experience. Additionally, regulators in various countries that have not yet implemented front-of-package labeling systems, such as the U.S. FDA, are currently considering adopting them<sup>31</sup> and should be aware of possible pitfalls as well as potential solutions.<sup>32</sup>

Third, recent legal scholarship has advocated food-labeling reforms in the United States that would mandate color-coded front-of-package labels, based, *inter alia*, on other countries' experience with similar labeling schemes, like tobacco.<sup>33</sup> While the comparison is warranted, it is also imperative to explore the challenges that have been directly associated with front-of-package food reforms in other states before taking such steps.

Finally, studying the graphic manipulation of food labels can help develop the policy and theory of graphics-based disclosure regulation in general, which is becoming widespread in various areas of regulation, as well as creative compliance theory, which is prevalent in regulator-regulatee relationships in various fields.

The next Part will discuss the Israeli 2020 food-labeling reform, which introduced new mandatory front-of-package traffic-light symbols, and will examine the ways in which the food industry has actively tried to frustrate it.

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28. See Murphy & Sanderson, *supra* note 11, at 359.

29. See *id.* at 358.

30. See, e.g., Chantal Julia & Serge Hercberg, *Big Food's Opposition to the French Nutri-Score Front-of-Pack Labeling Warrants a Global Reaction*, 108 *AJPH* 318 (2018); Shmuel I. Becher et al., *Hungry for Change: The Law and Policy of Food Health Labeling*, 54 *WAKE FOREST L. REV.* 1305 (2019). See generally *Report to the European Parliament and the Council Regarding the Use of Additional Forms of Expression and Presentation of the Nutrition Declaration*, COM (2020) 207 final (May 20, 2020), [https://ec.europa.eu/food/sites/food/files/safety/docs/labelling-nutrition\\_fop-report-2020-207\\_en.pdf](https://ec.europa.eu/food/sites/food/files/safety/docs/labelling-nutrition_fop-report-2020-207_en.pdf).

31. See Marks, *supra* note 13, at 717; *Nutrient Warning Labels*, OBESITY EVIDENCE HUB (last updated Sept. 17, 2020), <https://www.obesityevidencehub.org.au/collections/prevention/nutrient-warning-labels>.

32. These will be discussed *infra* Part III.

33. See Marks, *supra* note 13; see also Camille Currey, *Despite What You've Been Told—Unwrapping the Falsities Surrounding Food Labels*, 118 *W. VA. L. REV.* 1279, 1308 (2016).

## II. CREATIVE COMPLIANCE WITH DISCLOSURE RULES: THE ISRAELI FOOD-LABELING REFORM

### A. *The Israeli Food-Labeling Reform*

Without doubt, one of the most notable recent consumer reforms in Israel is the 2020 food-labeling reform.<sup>34</sup> The roots of this reform lie in a set of recommendations issued by the Ministry of Health's Healthy Nutrition Regulation Commission, which was formed in 2016 to "examine various measures that can influence the dietary habits of the population on the one hand, and bring about a change in food composition on the other."<sup>35</sup> The Committee operated as part of a multi-tiered national program to promote healthy eating in Israel,<sup>36</sup> focusing on malnutrition problems and their impact on individuals as well as on society as a whole.<sup>37</sup> This national health program was launched in light of gloomy scientific predictions about obesity and related disease in Israel, as well as international studies on the prevention of such ailments.<sup>38</sup>

The highlight of these recommendations (and of the reform itself) was the imposition of "informative and evaluative labeling" obligations on food manufacturers and importers, entailing the inclusion of front-of-package red warning symbols on food products containing high concentrations of sugar, saturated fat, and sodium.<sup>39</sup> In addition to these warning symbols, the Ministry of Health would also allow manufacturers and importers to print a positive green symbol on products that meet the Ministry's nutritional recommendations.<sup>40</sup>

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34. See generally ISR. MINISTRY OF HEALTH, THE RED LABELS: HARMFUL FOOD LABELING, [https://www.health.gov.il/English/Topics/FoodAndNutrition/Nutrition/Adequate\\_nutrition/Pages/FoodLabeling.aspx](https://www.health.gov.il/English/Topics/FoodAndNutrition/Nutrition/Adequate_nutrition/Pages/FoodLabeling.aspx) (last visited Sept. 1, 2021) [hereinafter THE RED LABELS].

35. ISR. MINISTRY OF HEALTH, NUTRITION DIV. OF THE PUB. HEALTH SERV., REPORT OF THE HEALTHY NUTRITION REGULATION COMMITTEE 9 (2016) (Hebrew) [hereinafter REGULATION COMMITTEE REPORT], [https://www.health.gov.il/publicationsfiles/healthydietcommittee\\_recomendation.pdf](https://www.health.gov.il/publicationsfiles/healthydietcommittee_recomendation.pdf). See also Ronit Endevelt et al., *Regulatory Measures to Improve Nutrition Policy Towards a Better Food Environment for Prevention of Obesity and Associated Morbidity in Israel*, 3 PUB. HEALTH PANORAMA 566 (2017).

36. See ISR. MINISTRY OF HEALTH, HEALTHY ISRAEL 2020, <https://www.health.gov.il/English/Topics/HealthyIsrael/Pages/default.aspx> (last visited Sept. 1, 2021). The approach also includes, e.g., encouraging reformulation, regulating food advertising for youngsters, promoting nutritional education, and financial support for small businesses to manufacture healthy foods. See REGULATION COMMITTEE REPORT, *supra* note 35, at 37.

37. See REGULATION COMMITTEE REPORT, *supra* note 35, at 68.

38. See *id.* at 1.

39. See THE RED LABELS, *supra* note 34.

40. See ISR. MINISTRY OF HEALTH, CONDITIONS FOR LABELING FOODS WITH GREEN CHECK MARK (Nov. 24, 2019), [https://www.gov.il/en/Departments/news/24112019\\_2](https://www.gov.il/en/Departments/news/24112019_2).

Previously, mandatory disclosure rules focused on standard back-of-package nutritional panels.<sup>41</sup>

The Committee's recommendations were based on the idea that the design of the food choice environment for Israeli citizens is the responsibility of the state.<sup>42</sup> The Committee's report states that the purpose of this "traffic light" system would be to encourage citizens to consume fresh, natural, and homemade foods; reduce consumption of foods high in calories, saturated fat, sugar, and sodium; encourage consumers to check foods at the time of purchase and use the new markings to make informed purchasing choices; and develop a public preference for foods that carry as few warning signs as possible, especially for foods without any negative markings.<sup>43</sup>

The recommendations were also intended to support reformulation—a shift among food companies toward food products that meet the new standards and so require few, if any, warning signs.<sup>44</sup> The idea is that food companies will begin to phase out products requiring a red label, such as high-sugar yogurts and cereals, and instead will develop new products that do not have to be red-labeled at all, such as low-sugar yogurts and cereals.<sup>45</sup>

The Committee's report explained that it recommended this front-of-package traffic-light marking system because it is easy to apply and easy to understand, making it relatively simple for the public to select healthier products.<sup>46</sup> Using graphic markings can also help youngsters, seniors, and consumers who are not proficient in Hebrew to navigate the supermarket aisles and the abundance of foods more easily.<sup>47</sup> The Committee members also pointed out in their report that the public seeks and expects to receive information and recommendations from the Ministry of Health—the professional regulator responsible for the issue—regarding the products it consumes.<sup>48</sup>

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41. See ISR. MINISTRY OF HEALTH, FOOD LABEL AND NUTRITIONAL LABELING, [https://www.health.gov.il/English/Topics/FoodAndNutrition/Nutrition/Adequate\\_nutrition/Pages/labeling.aspx](https://www.health.gov.il/English/Topics/FoodAndNutrition/Nutrition/Adequate_nutrition/Pages/labeling.aspx) (last visited Sept. 1, 2021).

42. REGULATION COMMITTEE REPORT, *supra* note 35, at 1.

43. See *id.* at 42.

44. See *id.* at 43. See also Michal Gillon-Keren et al., *Development of Criteria for a Positive Front-of-Package Food Labeling: The Israeli Case*, 12 NUTRIENTS 1875 (2020).

45. See Flora Southey, *Israel: "New Opportunities" for Reformulation as Gov't Imposes HFSS Warnings Front-of-Pack*, FOOD NAVIGATOR (Jan. 27, 2020, 4:24 PM), <https://www.foodnavigator.com/Article/2020/01/27/Israel-introduces-mandatory-HFSS-warnings-front-of-pack>.

46. See REGULATION COMMITTEE REPORT, *supra* note 35, at 43.

47. See ISR. MINISTRY OF HEALTH, THE RED MARKINGS REACH THE SHELVES, <https://www.efsharibari.gov.il/eat-healthy/buy-healthy-food/food-labeling/harmful-food-labeling> (last visited Sept. 2, 2021).

48. See REGULATION COMMITTEE REPORT, *supra* note 35, at 43. See also Shosh Shahrabani, *The Impact of Israel's Front-of-Package Labeling Reform on Consumers' Behavior and Intentions to Change Dietary Habits*, 10 ISR. J. HEALTH POL'Y RES. 44 (2021).

In accordance with the Committee's recommendations, The Protection of Public Health (Food) (Nutritional Labeling) Regulations (2017) were enacted,<sup>49</sup> with the stated purpose of making information about the nutritional value of pre-packaged food accessible to consumers, in the form of symbols.<sup>50</sup> A cost-benefit report conducted by the Ministry estimated that the reform would prevent the death of some 2,000 people per year and save some \$185 million in public-health-system costs.<sup>51</sup>

The food-labeling regulations require manufacturers and importers of pre-packaged food products to mark on the front of the package those products whose sodium, sugar, or saturated fat values exceed the regulatory standards.<sup>52</sup> For example, foods containing more than ten percent sugar, four percent saturated fat, or 400 milligrams of salt per 100 grams of solid food should be marked with red symbols.<sup>53</sup>

These symbols (see Figure 1 below) appear in the first appendix to the regulations, and they state that the product contains "sugar in high quantity," next to an illustration of a teaspoon of sugar; "sodium in high quantity," next to an illustration of a saltshaker; and "saturated fat in high quantity," alongside an illustration of butter.

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49. The Protection of Public Health (Food) (Nutritional Labeling) Regulations, 5778–2017 (Isr.), [https://www.health.gov.il/Subjects/FoodAndNutrition/Nutrition/Adequate\\_nutrition/Documents/THE%20PROTECTION%20OF%20PUBLIC%20HEALTH%20%28FOOD%29%20%28NUTRITIONAL%20LABELING%29%20REGULATIONS%2c%205778%20-%202017.pdf](https://www.health.gov.il/Subjects/FoodAndNutrition/Nutrition/Adequate_nutrition/Documents/THE%20PROTECTION%20OF%20PUBLIC%20HEALTH%20%28FOOD%29%20%28NUTRITIONAL%20LABELING%29%20REGULATIONS%2c%205778%20-%202017.pdf) [hereinafter Nutritional Labeling Regulations].

50. *Id.* at § 1.

51. ISR. MINISTRY OF HEALTH, ECONOMIC EFFECTS OF UNHEALTHY FOOD CONSUMPTION AND OBESITY AND THE EXPECTED BENEFIT FROM THE IMPLEMENTATION OF FOOD LABELING REGULATIONS (July 25, 2017), [https://www.health.gov.il/NewsAndEvents/SpokemanMessegas/Pages/25072017\\_2.aspx](https://www.health.gov.il/NewsAndEvents/SpokemanMessegas/Pages/25072017_2.aspx).

52. Nutritional Labeling Regulations, *supra* note 49, at § 5.

53. *Id.* at § 9.

FIGURE 1. THE NEW ISRAELI FOOD SYMBOLS



As noted above, along with the obligation to mark harmful foods with red markings, manufacturers, farmers, marketers, and importers are also allowed to voluntarily mark foods that meet Ministry standards for nutritional content with a green symbol.<sup>54</sup> As shown in Figure 1 above, this is a round symbol with the caption “The Green Label.”<sup>55</sup> According to regulatory guidelines, foods that must be marked in red cannot also bear a green label.<sup>56</sup>

Generally, each symbol should appear only once on a single package (there is no requirement for two sugar warnings for products that contain twenty percent sugar, for example). The graphic design of all symbols, including their dimensions, formation, and order of appearance, are specified in Ministry regulations and guidelines in great detail.<sup>57</sup>

54. See ISR. MINISTRY OF HEALTH, THE GREEN LABEL — LABELING OF HARMLESS FOOD, [https://www.health.gov.il/English/Topics/FoodAndNutrition/Nutrition/Adequate\\_nutrition/Pages/green-labeling.aspx](https://www.health.gov.il/English/Topics/FoodAndNutrition/Nutrition/Adequate_nutrition/Pages/green-labeling.aspx) (last visited Aug. 14, 2021).

55. See *id.*

56. See ISR. MINISTRY OF HEALTH, REQUISITES FOR GREEN LABELING, <https://www.health.gov.il/subjects/foodandnutrition/nutrition/documents/green-label.pdf> (last visited Dec. 21, 2021).

57. See Nutritional Labeling Regulations, *supra* note 49; ISR. MINISTRY OF HEALTH, NUTRITION DIV., GUIDELINES OF GREEN LABELING (2020), <https://www.health.gov.il/subjects/foodandnutrition/nutrition/documents/green-label-inst.pdf>.

*B. Misinformation & Creative Compliance in the Israeli Food Industry*<sup>58</sup>

The Israeli labeling reform came into force after a long transition period of two years from the initial publication of the regulations,<sup>59</sup> instituted in response to pleas from companies. While manufacturers and marketers met the timelines and requirements for including the markings on products in accordance with guidelines and regulations, the manner in which they complied appears to be entirely against the spirit of the reform. Sadly, it seems that the food industry has employed various graphic-based misinformation tactics to circumvent the reform.<sup>60</sup>

Most prominently, many food companies redesigned their food packaging in a way that made it difficult to identify the new regulatory labels.<sup>61</sup> Additionally, many new products that have entered the market since the reform began have been designed in a way that camouflages the new regulatory labels.<sup>62</sup>

For example, the packaging of many food products has been changed to red, making it difficult to spot the new regulatory red markings.<sup>63</sup> Other packages were redesigned in red and green to create a similar effect.<sup>64</sup> In addition, round design elements, such as red strawberries, cherry tomatoes, and other red elements have been added or moved by food companies to be placed near the regulatory red markings and thus decrease their prominence.<sup>65</sup>

Circles in blue, green, and black containing texts such as “favorite and familiar taste,” “with oatmeal,” and “25% protein” were placed by food companies next to the regulatory symbols, making it difficult for consumers to distinguish between regulatory and non-regulatory symbols and to easily spot the new regulatory markings.<sup>66</sup> In a similar vein, food companies also added round green labels that are graphically very similar to the green regulatory label, stating, e.g., “natural ingredients only,” “contains sugar from fruit only,” and “for frying, cooking, and baking.”<sup>67</sup>

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58. This subpart is based on Israeli media coverage as well as this author’s own findings and observations in local supermarkets since the reform commenced in January 2020. Dozens of pictures of relevant food packages are on file with the author.

59. Nutritional Labeling Regulations, *supra* note 49, at § 18.

60. See Nurit Kadosh, *Too Much Sugar? St. Dalfour Invented its Own Green Sign: “Contains Only Sugar From the Fruit”*, *CALCALIST* (Feb. 25, 2020), <https://www.ynet.co.il/economy/article/H11JzVzE8>; Michal Raz-Haimowitz, *This is how health labeling disappears: the tricks of food companies to reduce product labeling reform*, *GLOBES* (Jan. 16, 2020), <https://www.globes.co.il/news/article.aspx?did=1001314991>.

61. See Kadosh, *supra* note 60; see Raz-Haimowitz, *supra* note 60.

62. See *supra* note 58.

63. See *id.*; Raz-Haimowitz, *supra* note 60.

64. See *supra* note 58.

65. See Raz-Haimowitz, *supra* note 60.

66. See *supra* note 58.

67. See *supra* note 58; Kadosh, *supra* note 60.

In itself, this plurality of front-of-package symbols also creates confusion and erodes the regulatory message inherent in the new markings.

Figure 2 below presents several examples of what appears to be graphic manipulations of the new food labels. The pictures show food packages with green markings that are very similar in design to the regulatory green label, and yet all of which are non-regulatory; red packages that camouflage red regulatory warning labels; cherry tomatoes and other round red objects that were placed or moved next to the red warning symbols; and packages that use red and green as their main background color—the same colors used in the new regulatory labeling system.<sup>68</sup>

FIGURE 2. EXAMPLES OF ISRAELI FOOD PACKAGES AFTER THE LABELING REFORM



While formal legal disputes have not yet emerged, walking down the aisle of a typical Israeli supermarket reveals a widespread practice of graphic manipulation by food companies.<sup>69</sup> Yet, companies that were asked about this

68. See *supra* note 58.

69. See *id.*

practice by the press have completely denied engaging in such manipulation.<sup>70</sup> In some cases, in response to media coverage, the Ministry has declared that companies' labeling is misleading, but the companies themselves have rejected this assertion.<sup>71</sup> In any case, this practice would seem to represent a significant loss for consumers, regulators, and the food industry in general and is an unwanted phenomenon that warrants attention.

### C. *Interim Conclusions*

The case study presented above shows that front-of-package food-labeling reforms can be subject to misinformation via graphic manipulation of packaging by firms. Three, more general, conclusions can also be drawn from the case study, regarding disclosure-based regulation and creative compliance:

1. Graphic disclosure rules can be subject to misinformation effects, via graphic manipulations by regulatees.
2. While disclosure rules are generally regarded as soft regulation, in that they do not dictate output quality, quantity, or prices but merely regulate the provision of information, they still do not guarantee industry compliance and may suffer from similar creative compliance ailments as command-and-control regulation.
3. Misinformation via creative compliance tactics can occur not only in mandatory disclosure settings but also in hybrid regulatory schemes of disclosure, and with regards to both the mandatory and voluntary components of such schemes.

A more detailed discussion of these conclusions falls outside the scope of this Article, and they warrant further, separate research.

The next Part discusses what can be done to mitigate the creative compliance problems of disclosure-based regulation, such as those presented in the case study. The suggested framework is also applicable to the Israeli arena and can potentially correct the misinformation effect of recent food labeling strategies post-reform.

### III. MITIGATING CREATIVE COMPLIANCE PROBLEMS IN DISCLOSURE SCHEMES

Legally, the Israeli case of misinformation through graphic manipulation of food labels ultimately depends on the interpretation of such terms as "noticeable" (labeling) and "deceiving" (labeling), as the relevant regulations<sup>72</sup> did not account for this specific type of misinformation. This is often the case with creative compliance. Creative compliance tactics typically exploit legal

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70. See Kadosh, *supra* note 60; Raz-Haimowitz, *supra* note 60.

71. See Kadosh, *supra* note 60.

72. See Nutritional Labeling Regulations, *supra* note 49.

loopholes or grey areas in a manner that is not a violation of the law *per se*, but neither can it be regarded as full compliance with the law.<sup>73</sup>

Creative compliance tactics—sometimes referred to in legal scholarship as technical or minimal compliance<sup>74</sup>—can be subject to litigation in appropriate cases. But litigation is not always the answer, and in fact, it can be counterproductive. For example, though the Ministry of Health could launch legal proceedings against food companies that have graphically manipulated disclosure, such litigation would be prolonged and costly, its outcome uncertain, and its deterrent effects unclear. These concerns are particularly acute since the food companies engaging in graphic manipulation include major monopolies that are well equipped to fight and survive prolonged legal battles.<sup>75</sup> Also, from an *ex-ante* point of view, it is generally better to encourage compliance before implementing new regulation than to enforce it through administrative sanctioning and in the courts.<sup>76</sup>

Legislation is also often futile. It is a known phenomenon in regulatory relationships that regulators play cat-and-mouse with regulatees.<sup>77</sup> In the context of creative compliance, regulators typically attempt to fill legal gaps via the enactment of legal amendments, even as regulatees often think of new ways to bypass regulation.<sup>78</sup> The Israeli case demonstrates that even the most specific labeling regulations covering issues of size, color, form, and location of symbols<sup>79</sup> cannot anticipate all possible strategies to circumvent full compliance. Formal legal tactics, such as enforcement through litigation or regulatory legislation including legislative amendments, are therefore not necessarily the answer to creative compliance.<sup>80</sup>

The author suggests accompanying new disclosure schemes with a carrot-and-stick approach, based on two other soft regulatory tools: “regulatory shaming” and “regulatory contracts.” The power of these tactics is that they shift the regulatory relationship from the administrative legal sphere into the public, social, and commercial spheres, which can be more effective in achieving regulatory goals. These tools supplement hard law with soft law, and replace concepts such as formal legislation, enforcement, inspection, and compliance

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73. See Hickman & Hill, *supra* note 26, at 1162–63.

74. See *id.* at 1162.

75. See *supra* Part II.

76. At the same time, there can be advantages to command-and-control enforcement, including deterrent effects and boosts to the public image of regulatory agencies (assuming victory in court for the regulatory agency).

77. See, e.g., Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 611 (2011).

78. See *id.* at 614.

79. See Nutritional Labeling Regulations, *supra* note 49; see also *supra* Part I(A).

80. See Buell, *supra* note 77, at 614–16.

with ideas of trust, reputation, long-term relationships, consensus-building, and social responsibility.

“Regulatory shaming” refers to the publication by government agencies of negative information concerning regulated private bodies—mostly corporations, industries, businesses, organizations, and factories—in order to further public-interest goals, such as occupational safety, consumer protection, and environmental protection.<sup>81</sup>

“Regulatory contracts” refers to regulator-regulatee agreements regarding the terms of regulation.<sup>82</sup> Typically, the regulator and the regulatee undertake voluntary commitments, which may include, for instance, compliance assurances from the regulated entity in exchange for regulatory leniency in rulemaking, inspection, or enforcement.<sup>83</sup> Regulatory leniency may include postponing the commencement of a new reform, promising regulatory stability (not changing the regulatory framework for a certain period), and gradual enforcement.<sup>84</sup> Such regulatory agreements are based on dialogue, trust, consensus, and cooperation.<sup>85</sup>

Regulators should consider accompanying new (and current) disclosure schemes with regulatory agreements (preferably industry-wide), in which companies undertake to comply fully with regulation and to maintain open dialogue with the regulator, based on trust and cooperation regarding issues of compliance (the carrot approach). As part of such agreements, companies should also state that they acknowledge the importance of the new regulation and are committed to achieving its public goals based on their social responsibilities.

In exchange, regulators could offer regulatees leniency and adjustments regarding regulatory reforms—for example, in terms of the scope and level of obligations imposed, enforcement and inspection policies, date of commencement, and setting future timelines for reexamining the reform or, alternatively, assuring regulatory stability.

Agreements should be made public by regulators as part of their efforts to publicize such new reforms. While regulatees tend to comply with consensus-based regulation more than with command-and-control regulation,<sup>86</sup> this added publicity dimension should operate as an additional safeguard against regulatory violations and creative compliance.

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81. See Sharon Yadin, *Regulatory Shaming*, 49 LEWIS & CLARK ENVTL. L. 407, 419–20 (2019).

82. See Sharon Yadin, *E-Regulation*, 38 CARDOZO ARTS & ENT. L. J. 101, 129–30 (2020).

83. See *id.*

84. See Sharon Yadin, *Israel’s Law and Regulation After the Gas Discoveries*, in REGULATION IN ISRAEL: VALUES, EFFECTIVENESS, METHODS 217, 223 (Eyal Tevet et al. eds., 2021).

85. See Yadin, *supra* note 82, at 130.

86. *Id.* at 130–31.

In a similar vein, regulatory agreements on disclosure reforms should also be accompanied by “regulatory shaming” (the stick approach), in which regulators “name and shame” those companies that engage in creative compliance—thus violating not only the regulations but also the regulatory agreements they signed—and also publicly identify and praise those firms that excel in compliance. For example, in the food industry, regulators can publish a list of the best and worst companies in terms of compliance with labeling regulations. Top-rated firms should demonstrate not only full compliance with regulations but also beyond-compliance practices, such as green labeling and reformulation, which are often voluntary.<sup>87</sup>

Regulatory shaming and praising tactics will give companies a new kind of motivation to comply in full with new and existing regulatory reforms and to refrain from creative compliance tactics. If regulatory agencies do not have sufficient existing powers to “name and shame,” companies can be required to give their prior consent to “regulatory shaming” under the terms of the regulatory agreements. Alternatively, shaming powers can be legislated as part of the new disclosure reforms or after the fact.

Regulatory shaming is especially well suited to disclosure-based regulatory schemes, which are often consumer-oriented, because consumers can operate as effective shaming agents vis-à-vis misbehaving firms.<sup>88</sup> Graphic manipulation of visual labels that are meant to aid consumers in making healthier choices is especially appropriate for such a “shaming” approach because of the strong effect this approach can have on consumers.<sup>89</sup> Corporate attempts to deceive consumers via subconscious manipulation (for example, by using misleading colors and artwork) can elicit strong reactions from individuals and consumer organizations with significant implications for companies’ bottom line. Regulatory shaming may also invoke effective responses from other stakeholders, such as creditors, investors, competitors, suppliers, stockholders, management, and the media.

#### CONCLUSION

This Article discussed the misinformation effect of graphic disclosure rules, in which companies thwart regulatory objectives through graphic manipulation of regulatory labels, symbols, and other visual information-based tools. Harnessing lessons from the recent Israeli food-labeling reform, the Article has shown that front-of-package food labels, which are becoming increasingly widespread in various jurisdictions and are under consideration in the United States and other countries, can be subject to visual manipulation and

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87. See, e.g., the Israeli case study discussed *supra* Part II(A).

88. See, e.g., Leah Chan Grinvald, *Shaming Trademark Bullies*, 2011 WIS. L. REV. 625, 666 (2011).

89. See Sharon Yadin, *Shaming Big Pharma*, 36 JREG BULLETIN 131, 137–38 (2019).

misinformation as part of corporate creative compliance. Especially in the age of Covid-19, companies should be held accountable for any attempt to manipulate citizens in matters of public health. The Article therefore suggests a combination of a stick-and-carrot approach, including both regulatory shaming and regulatory agreements, to alleviate some of the compliance problems discussed.