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C O N T E N T S

P R O C E E D I N G S

DR. BENEDICT: Okay, let's get started. We're going to change a couple of things, and so we ask you to bear with us as we move as rapidly as possible into the real business of the day.

Welcome to the second day of our meeting. Today we're going to deal with dietary supplements, and we're going to hear reports from the various working groups that we established several hundred years ago, and on which we have been working very diligently.

Let's begin, because we have some new faces around the table, and this vast audience behind us might want to be able to keep us straight, with perhaps a little briefer introduction than we gave each other yesterday.

My name is Steve Benedict. I'm from the University of Kansas, Department of Microbiology and Molecular Biosciences. I'm temporarily chairing this meeting in the stead of Ed Brandt, who is the permanent Chair. And let's continue to the right and just all of us introduce ourselves.

DR. BUCHANAN: Good morning. Bob Buchanan, Senior Science Advisor, Center for Food Safety and Applied Nutrition, U.S. Food and Drug Administration.

DR. MONTVILLE: Tom Montville, Professor and Chair, Department of Food Science, Rutgers, the State

University of New Jersey.

DR. SIGMAN-GRANT: Madeleine Sigman-Grant, University of Nevada Cooperative Extension.

DR. HOTCHKISS: Joe Hotchkiss, both the Institutes of Food Science and Toxicology at Cornell.

DR. KUZMINSKI: Larry Kuzminski, from Ocean Spray Cranberries. I'm Vice President of Technology there.

DR. LARSEN: Lynn Larsen, ex-Executive Secretary of this committee, or as Steve would probably say, emeritus Executive Secretary, and currently the Director of the Division of Programs and Enforcement Policy in the Office of Special Nutritionals.

DR. LEWIS: I am Christine Lewis, with FDA's Office of Special Nutritionals.

DR. HARLANDER: My name is Sue Harlander. I am Vice President of Green Giant and Progresso Research and Development, and Agricultural Research, at the Pillsbury Company.

MR. McGUFFIN: I'm Mike McGuffin, co-founder of McZand Herbal, and a board member of the American Herbal Products Association, and of the American Herbal Pharmacopeia.

DR. BOLAR: Paul Bolar, Vice President, Regulatory and Legal Affairs, for Pharmavite Corporation, and the Chairman of the Regulatory Affairs Committee for the Council

for Responsible Nutrition.

DR. WANG: Mary Wang, California Department of Health Services.

DR. APPLEBAUM: Rhona Applebaum, Executive Vice President for Scientific and Regulatory Affairs, National Food Processors Association.

DR. BRACKETT: Bob Brackett, Professor, Center for Food Safety and Quality Enhancement, University of Georgia.

MS. RICHARDSON: Donna Richardson, Howard University Cancer Center.

DR. RUSSELL: Robert Russell, Professor of Medicine and Nutrition at Tufts University.

MS. DeROEVER: Cathy DeRoever, Office of Science, and the new Exec Sec to this committee.

DR. BENEDICT: And finally at the table.

Okay, in an attempt to--actually, with the advent, the arrival of Dr. Lewis, we can go back to the original schedule.

DR. LEWIS: Dr. Lewis's security alarm wouldn't let her out of the house this morning. The police are there now turning it off.

DR. BENEDICT: That's amazing.

DR. LEWIS: Yes, I was impressed, too. I apologize.

DR. BENEDICT: But I'm sure you feel much more

secure.

DR. LEWIS: In a way.

DR. BENEDICT: So as you've noticed, Dr. Larsen, who is going to be with us today, is the former Executive Secretary, and as such he's available here to give us lots of advice on these reports.

We're going to begin with the open public hearing. We have one person who has requested to speak for about 10 minutes, Mr. Marc Ullman of Ullman, Shapiro & Ullman. Is Mr. Ullman in the house?

MR. ULLMAN: Here.

DR. BENEDICT: Great. We have a lapel microphone there if you'd like to use it. And when you begin to speak, tell us, if you will, who you represent.

MR. ULLMAN: You lucky people get to hear from the lawyer first thing in the morning, and I have down here who I represent because I think they'd be kind of unhappy if I neglected to mention them.

Good morning. As you just heard, my name is Marc Ullman. I'm a partner in the New York City law firm of Ullman, Shapiro & Ullman. I want to thank you for the opportunity to speak this morning.

I am here today on behalf of Traco Labs, a manufacturer and supplier of dietary supplements based in Champaign, Illinois, and Nature Aid, a distributor of

dietary supplements based in Irvine, California. I have also been asked to advise you that Citizens for Health, a nonprofit consumer advocacy group that champions public policies empowering individuals to make informed health choices, joins in the ideas and spirit of these comments.

Traco, Nature Aid, and Citizens have previously taken an active role in the submission of comments to FDA urging the agency to permit the free flow of truthful and non-misleading health information to the American public. I am here today to once again reiterate this position.

While I understand that the committee's primary focus is scientific in nature, we believe that two of the issues that you will be considering today relate to matters which raise significant issues touching upon the First Amendment to the United States Constitution and the free speech rights of companies to communicate important, truthful, and non-misleading information, and the concomitant right of the public to receive that information.

Those issues are the committee's consideration of what should be meant by the term "significant scientific agreement" for health claims under Section 403(r) of the Federal Food, Drug and Cosmetic Act; and the question of whether food labels can and should be used to communicate information on emerging science to consumers.

We believe that the First Amendment considerations

as recently articulated in two Federal court decisions involving the FDA, and the Supreme Court's decision last week in Greater New Orleans Broadcasting Association v. the United States, require that these issues be addressed in a manner that permits the free flow of all truthful and non-misleading information to the American public.

While each of these decisions is by itself significant, taken together they send a powerful message that laws, rules and regulations which restrict the flow of information within our society are greatly disfavored, even if the information that is conveyed is primarily commercial in nature.

In the first of these decisions, handed down a little less than a year ago, which was Washington Legal Foundation v. Friedman, Judge Royce Lamberth of the United States District Court for the District of Columbia held that FDA regulations which severely restricted the manner in which drug manufacturers could communicate information to health care practitioners concerning the off label use of drug products--in other words, a use other than that for which FDA had explicitly approved the product--violated the First Amendment. In reaching this decision, Judge Lamberth rejected FDA's contention that the regulations were necessary in order to ensure that physicians were not confused by the information disseminated by drug companies.

Of particular note, Judge Lamberth stated: "If there is one principle in the commercial speech arena, it is that a State's paternalistic assumption that the public will use truthful and non-misleading commercial information unwisely cannot justify a decision to suppress it. To endeavor to support a restriction upon speech by alleging that the recipient needs to be shielded from that speech for his or her own protection, which is the gravamen of FDA's claim here"--and as an aside, I might add, the gravamen of those who would restrict the flow of truthful and non-misleading information to consumers concerning the health benefits of dietary supplements--"is practically an invitation to have that restriction struck."

The second decision warranting the committee's consideration is the ruling of the United States Court of Appeals for the District of Columbia in Pearson v. Shalala, handed down earlier this year. In that case, in which Citizens for Health was a co-plaintiff, the Court of Appeals ruled that FDA's failure to provide any definition of "significant scientific agreement" and its blanket refusal to consider any qualified health claims in connection with its rejection of four proposed claims submitted to it in 1993, violated the First Amendment.

For our purposes here today, the most significant aspect of the Pearson decision is the Circuit Court's review

and rejection of FDA's contention that any qualified health claim is inherently misleading and thus cannot pass muster under the "significant scientific agreement" standard.

In reaching this conclusion, the Circuit Court stated: "As best we understand the Government, its first argument runs along the lines that health claims are lacking significant scientific agreement, are inherently misleading, because they have such an awesome impact upon consumers as to virtually make it impossible for them to exercise any independent judgment at the point of sale. It would be as if the consumers were asked to buy something while hypnotized and are therefore bound to be misled. We think that this contention is almost frivolous."

Rejecting FDA's petition that it is impossible for a disclaimer or qualification to be presented in conjunction with a health claim in a manner that would render the claim truthful and non-misleading, the Court further explained: "The Government disputes that consumers would be able to comprehend appellant's proposed health claims in conjunction with the disclaimers we have suggested. The mix of information would, in the Government's view, create confusion among consumers, but all the Government offers in support of the FDA's pronouncement that consumers would be considerably confused by a multitude of claims with differing degrees of reliability. Although the Government

may have more leeway in choosing suppression over disclosure and response to the problem of consumer confusion where the product affects health, it still must meet its burden of justifying a restriction on speech. Here, FDA's conclusory assertion falls far short."

Supporting this conclusion, the Court also cited the Supreme Court's 1994 decision in Ibanez v. Florida Department of Business and Professional Regulation, which concluded: "If the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the Government's burden to demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree."

The third and most recent decision which we wish to bring to the committee's attention is the Supreme Court's 8-0 ruling, with Justice Thomas concurring in the result, in Greater New Orleans Broadcasting v. The United States. In that case, the Court in an opinion by Justice Stevens overturned FCC regulations barring, under certain conditions, the broadcast of advertisements for private casino gambling over commercial radio and television stations, finding that the regulations violated free speech provisions of the First Amendment.

It is particularly noteworthy that in reaching

this result, Justice Stevens rejected the notion that casino advertisements were entitled to only the barest of First Amendment protections, as they constituted purely commercial speech, finding instead that "The proposed commercial messages would convey information, whether taken favorably or unfavorably by the audience, about an activity that is the subject of intense public debate in many communities. In addition, petitioners' broadcast presumably would disseminate accurate information as to the operation of market competitors, such as payout ratios, which can benefit listeners by informing their consumption choices and fostering price competition. Thus, even if the broadcaster's interest in conveying these messages is entirely pecuniary, the interests of and benefits to the audience may be broader."

In considering the issues before you today, we respectfully submit that when compared to information concerning casino gambling, the notion that the transmission of truthful and non-misleading health information to consumers is not entitled to an even greater degree of protection under the First Amendment is untenable.

Moreover, in the New Orleans decision, after acknowledging that the regulatory scheme in question permitted the transmission of virtually identical information through other media, much like FDA's regulatory

scheme which permits the transmission of much of the information barred from product labels through other media, Justice Stevens aptly noted that "Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment."

As a result of these tensions, the Government's inability to articulate a rational basis for making such choices among speakers, the Supreme Court concluded in the New Orleans case, "Accordingly, respondents cannot overcome the presumption that the speaker and the audience, not the government, should be left to assess the value of accurate and non-misleading information about lawful conduct."

While each of these decisions by itself stands for the proposition that even commercial speech is entitled to a significant degree of protection under the First Amendment, we believe that the message that the committee must take from these cases as a group is that the First Amendment encourages the free exchange of competing messages within what Jefferson referred to as "the marketplace of ideas," and that it should be left to the audience to judge the value of those messages.

In connection with the issues before the committee today, we submit that these decisions mandate that the

development and application of a regulatory scheme permitting the transmission of all truthful and non-misleading health information concerning the benefits of dietary supplements to consumers. Only when they are armed with this information will consumers be able to make truly informed judgment as to what course of action they wish to take in order to maintain their good health.

These cases inarguably stand for the proposition that FDA may not place a blanket restriction on qualified health claims, create a standard of "significant scientific agreement" which prohibits all claims except those which are universally accepted within what the agency defines as the relevant scientific community, or prohibit claims which seek to transmit information concerning emerging science on the grounds that consumers will be unable to comprehend such information.

Similarly, the teaching of these cases is that FDA may not, absent some compelling rationale, prohibit the transmission of this type of information through certain media such as food or dietary supplement labels, while the very same type of information is available through devices such as third party literature or the media.

These principles, the issues before you today to be considered by the committee today, mandate the adoption and application of a definition of "significant scientific

agreement" that does not bar the use of claims that transmit what may be vital health information because they employ qualifications. Indeed, we respectfully submit to you that the qualified claim proffered by the D.C. Circuit in its Pearson decision, "Consumption of antioxidant vitamins may reduce the risk of certain kinds of cancers, however, the evidence of this is inconclusive because existing studies have been informed in foods containing antioxidant vitamins, and the effect of these foods in reducing cancer may result from other components in these foods," must be considered an appropriate claim for use on dietary supplement products in order for the regulatory scheme applying "significant scientific agreement" to pass constitutional muster.

Similarly, we believe that First Amendment considerations compel the committee to answer the question of whether food labels can and should be used to communicate information on emerging science in the affirmative.

We are in the midst of an extremely exciting time in the development of scientific support for the plethora of benefits attributable to the use of supplements. For example, the past three years have seen the publication of a number of studies associating the intake of Vitamin E with reduced risk of heart attacks. Other studies have found an association between garlic and heart health.

Furthermore, the National Institutes of Health has

issued statements discussing significant clinical studies indicating the likelihood of a strong association between the ingestion of Vitamin D and reduced incidence of hip fracture, and the consumption of between 100 and 200 milligrams per day of Vitamin C by healthy adults and a reduced risk of certain cancers.

So long as information concerning these findings can be transmitted to the American public along with the message that they are the subject of emerging science, we submit that the labels of food and dietary supplement products can and should be considered appropriate forms for their communication.

Thank you.

DR. BENEDICT: Thank you, Mr. Ullman. We appreciate your interpretations.

Okay, let's move directly to a discussion of emerging science, and just before we do that, we'll ask Dr. Larsen to kind of give us an overview of this process that we've gone through and to more or less just take charge of what's happening.

DR. LARSEN: I don't know about taking charge, but I will give you the overview.

I want to make a few comments to set the stage for today's discussions in all four cases. You are today receiving reports from four of your working groups, and they

are being presented for discussion and decision by you, the Food Advisory Committee. The working groups have put a lot of efforts into their reports, and FDA wants to be able to utilize the results of these reports in our consideration in the agency.

The passage of time since some of the charges were given to the committee is another factor that I think begs, that itself begs for closure on these working group efforts, and I think the Chairs of some of these working groups would not argue with that situation. Additionally, in the time since the charges were given, events have occurred that provide some different perspectives on the issues addressed by the charges, and I think our public hearing speaker brought those out, at least in some cases.

Consequently, FDA needs these reports so the agency can better address some of these issues. We at FDA are asking that you consider the reports, provide us with your collective thoughts on the reports as part of the record of this meeting, and forward the reports and your considerations to the agency.

Now, I mentioned these working groups. Since most of you at the table are new, I thought I better give you a perspective of what the working groups are.

The working groups are subgroups of the Food Advisory Committee, augmented with other experts who are

either consultants to the Food Advisory Committee--in this case Dr. Wang, who is a former member of the committee, is now a consultant to the committee and a temporary member for the purposes of the GMP working group--or industry liaisons to the committee, as are Dr. Bolar and Mr. McGuffin. Some of the consultants, as I mentioned, are also temporary voting members of the committee.

The role of such a group is to do the work necessary in preparing the FAC's response to questions or issues posed to the committee by the FDA. The committee then bases its official response to FDA on the efforts of the working group. This is in contrast to other issues where FDA or some third party brings the--prepares the documents and serves as the focus of the committee deliberations, such as happened yesterday.

Although FDA provides the staff support for the working groups, I want to emphasize that the products are the result of the working group's deliberations and represent the best thinking of the group members.

We have four issues before us today, and they have at least two origins. The Nutrition Labeling and Education Act, or the NLEA, of 1990 among other things authorized FDA to allow food labels to carry statements that we are calling health claims. These statements describe the relationship between food substances and a disease or a health-related

condition.

Under consideration today are three working group efforts on health claims. The issues being addressed by these efforts stem from recommendations of the Keystone National Policy Dialogue on Food, Nutrition and Health, for which a final report was published in March of 1996, and this is a copy of the report.

FDA requested the committee's assistance on several recommendations in that report, among them the recommendations that focused on the issue of significant scientific agreement and totality of evidence in support of health claims; the recommendations concerned with the need for increased research to support such claims, and on economic incentives to encourage such research. We will be discussing that one this morning. And recommendations about label claims arising from emerging science, and these claims for which there is not yet significant scientific agreement, and that's the other one we will be starting with this morning.

We provided you with a copy, this morning, a copy of the charge on the Significant Scientific Agreement working group, and I apologize that we did not get that out to you in your briefing packages. The charges for Emerging Science and Research Incentives Groups were included in your briefing packages in the appropriate tabs, right behind the

working group reports.

The fourth working group report under consideration today arises from a provision of the Dietary Supplement Health and Education Act of 1994, or as we call it, DSHEA or DSH-E-A, depending on how you want to pronounce it. That act authorized FDA to establish Good Manufacturing Practices for dietary supplements.

In 1995, representatives of the dietary supplement industry submitted a suggested outline for such GMPs to FDA, and FDA published that outline in the Federal Register of February, 1997, as an Advanced Notice of Proposed Rulemaking. The agency subsequently then asked the FAC--and I'm using "FAC," I forgot to mention, that's the Food Advisory Committee--asked the FAC to provide assistance on two areas that generated significant comment: identity testing of dietary supplement agreements, and records to be kept as documentation of GMPs. The charge to the committee regarding GMPs has been incorporated into the preface of the working group report, and so you should have that before you as well.

Now, the procedure that I anticipate us following today is, it's our intent to address each working group effort in turn and to obtain your concurrence or commentary on each before tackling the next. As you've already heard, at least one recent court decision has a bearing on two of

the reports, and Dr. Lewis will provide you with some comments on that decision as preparation for your discussion this morning.

We also included the text of the court decision in your briefing materials. And we will do this as a preface to the Emerging Science Report, but bear in mind that this, as you've already heard, has a bearing on the Significant Scientific Agreement Report.

The Chair of each working group, or in one case the Acting Chair, will give you an overview of the group's report and comment on the working group's effort. FDA staff or I will provide any comments that may have been received from working group members who are not present today. Those who are present will be invited to participate in your discussions of that particular report and, along with the Chairs, to answer any questions you may have.

For two of the reports, I also have some comment on the material that has been included in what I call the draft committee report, which is in addition to the working group report.

At the conclusion of your discussions on each of these reports, we are asking you to determine, make one of three determinations: (a) that you elect to transmit the report to FDA as such, with of course any word "draft" on it deleted; (b) elect to transmit it to FDA with some editorial

changes which will be captured by the transcript; and/or (c) transmit it to FDA along with additional commentary that modifies or may modify the recommendations or conclusions of the working group.

In the case of the Emerging Science and Research Incentives, I've already put some words into your mouths as tentative text, and I would ask that in those cases you consider that text, decide whether you want to have it in or delete it or modify it. And in those two cases, depending upon the results of your discussion and deliberation, I would likely end up having to circulate those to you to make sure what you've said is captured correctly and they come to FDA in the appropriate format, then.

Of course, there is a fourth option. I hesitate to mention it, but the fourth option is that you reject the working group report and send the working group back to their tasks and come back. And I would hope that you wouldn't do that because FDA needs it and the working groups are tired. They want to get on with other things. But that is an option that I need to provide to you.

I think that provides the comments that I wanted to make in setting the stage for your discussions. I'll give you an opportunity for any questions at this time, and if there are none, we'll go right to Dr. Lewis's little presentation.

[No response.]

DR. LARSEN: Okay.

DR. LEWIS: Good morning. I am Christine Lewis, with FDA's Office of Special Nutritionals, and the court decision known as Pearson v. Shalala is about disclaimers on health claims, and I need to start with a disclaimer for myself. I am not a lawyer, I am not emerged in the law, and so therefore I am not capable nor is it possible for me to help with the interpretation of this court decision.

What we intend to do today, since all decisions on Pearson, both at the agency and the Department of Justice, are still in a state of flux, is simply, as the old television show Dragnet used to say, "just the facts." We're just going to go over the facts of the Pearson case, and I think it's something you need to be aware of because, as Dr. Larsen has indicated, its presence is an issue both for the Emerging Science issues that will come up today as well as the Significant Scientific Agreement Report.

Pearson v. Shalala, the court decision was filed by Pearson and Shaw but it's been abbreviated to Pearson v. Shalala, was a court decision made in January of this year. It came through the U.S. Court of Appeals for the D.C. Circuit. The lawsuit itself was filed on behalf of marketers of dietary supplements, and it stems from the fact that during the implementation of NLEA in 1993, FDA rejected

four possible health claims, specifically for dietary supplements.

According to the lawsuit known as Pearson v. Shalala, FDA should have allowed the following claims for dietary supplements in 1993: the antioxidants and cancer; fiber and colorectal cancer; Omega-3 fatty acids and coronary heart disease; as well as a claim concerning .8 milligrams of folic acid in a supplement being more effective in reducing the risk of neural tube defects than a lower amount in foods in common form.

The decision itself in Pearson v. Shalala indicated that FDA acted inappropriately by, first, failing to define "significant" in the standard of significant scientific agreement; and that FDA also violated free speech, that is the First Amendment, by not considering disclaimers or what some call qualified claims for health claims.

Concerning the concept of disclaimers, the court ruled that the First Amendment does not permit FDA to categorically reject the use of disclaimers on health claims. In essence, it suggested that the agency needed evidence to show that disclaimers do not prevent consumer deception.

A further analysis of this by the court indicated that the First Amendment protects only lawful and non-

misleading commercial speech. FDA had argued in the case that claims without significant scientific agreement are inherently misleading. The court suggested that without evidence, they were only potentially misleading and therefore could be fixed by the use of disqualifiers or disclaimers.

The court said that the government's interest in protecting public health and preventing fraud, that there was no evidence of a threat to public health vis-a-vis these claims, and that in effect more information, not less information, was in the interests of consumer protection.

The court did not conclude that all claims may be fixed by the inclusion of a disclaimer. They deferred to FDA the determination of whether a claim is so misleading it could not be made non-misleading by a disclaimer.

Concerning the standard of "significant scientific agreement," the court ruled that FDA must clarify the standard vis-a-vis the so-called Administrative Procedures Act, APA. They said their reading of the APA required that FDA either promulgate a regulatory definition of "significant scientific agreement" or define it on a case-by-case basis.

The court indicated that denying the four claims without defining "significant scientific agreement" was an arbitrary and capricious act by the agency under the APA.

The court indicated that FDA should explain what it means by SSA or at least what it does not mean.

There was a third prong to the court decision, which was the requirement that FDA consider those original four claims. The court requested--which is a kind word, I suppose--that we review the four claims that were the subject of the lawsuit. They need to be considered as claims for use on dietary supplements, and the agency should consider whether each claim would be non-misleading if it carried an appropriate disclaimer. If that were the case, then the agency would need to authorize this qualified claim in the case of the four relationships for dietary supplements.

In March FDA--actually, it's the DHHS in conjunction with the Department of Justice--went back to the court and requested a rehearing. The agency gave as its reasons their belief that the court misconstrued the government's in regulation of health claims on dietary supplements, and that the court misinterpreted the APA. If the standard for a health claim is that it meets SSA, FDA indicated that the health claim must be based on SSA. Remember, the court had said in the absence of SSA, FDA must consider the use of a health claim that is qualified or, as they sometimes referred to it, is "fixed."

At this point in time the situation is unclear.

The government argued or FDA has indicated that their interest in public health goes beyond preventing deception. Their interest is based on ensuring the products are safe and effective when they bear a health claim, and therefore only scientifically valid claims can be relied upon by consumers.

In their request for rehearing, FDA vis-a-vis DHHS indicated that the complexity of the issue of significant scientific agreement eludes the possibility of a precise definition, and they further argued that the APA does not require the high level of specificity as suggested by the court.

As I have indicated, we are still in a state of flux on the issue of Pearson v. Shalala. The D.C. Court refused to rehear the request, and this in effect means that the Department of Justice, in conjunction with DHHS, has until July 1st to decide whether they would like to seek a hearing in the U.S. Supreme Court. This is known as filing a petition for certiorari.

And so therefore, within a week or so, the decision will have been made on the government's part whether to see redress for the Pearson v. Shalala claim in the Supreme Court. Clearly, the issues that were raised, the notion of science being less than significant scientific agreement and what it means for wording of a claim, is one

that will certainly come up today.

So those are the facts of the case as we have them at this time. Final decisions have yet to be made. Consider this a backdrop for what you're talking about today.

DR. BENEDICT: Thank you, Dr. Lewis.

So next we go directly to Emerging Science.

DR. LARSEN: Before, I just want to make one comment.

DR. BENEDICT: Certainly.

DR. LARSEN: This was presented for your background and information. As Dr. Lewis said, we have no lawyers here. We're not here to address the legal issues involved. We just want to provide you the background, so that you understand how this has a potential impact on the two working group discussions.

DR. BENEDICT: So now we'll hear from Dr. Harlander, who will introduce some of the questions that the working group had to deal with, and will initiate the discussion soon after that.

DR. HARLANDER: Thank you. I was Chair of the Emerging Science Working Group, and I would first like to discuss the charges to our working group that emerged out of the Keystone dialogue.

The first charge was, given that emerging science

by definition lacks significant scientific agreement, what criteria should guide the agency in disseminating such information in the unregulated arena? What criteria should be used to determine when emerging science can be used on the food label?

The second charge was to identify and prioritize options for implementing the recommendations. Our working group--and the members are listed in the summary--met on three different occasions to discuss this charge. We had some outside consultants that worked with us to provide additional information for our committee.

We believed we needed to understand DSHEA better, and some of the regulations around dietary supplements. Also, FDA had conducted some consumer research on food labels, and that was very revealing to our committee as well.

The first thing that we talked about was consumers and their perceptions or their understanding of nutrition information, and the information that was provided through consumer research by FDA indicated that consumers did not know how to interpret and utilize the information on food labels that are currently supplied to them. Something quite revealing to us was that consumers were unable to distinguish between health claims, nutrient content claims, and structure function statements as they appeared on food

labels currently.

In fact, as a representative of industry on this panel, I was quite surprised to learn that consumers trust the back of the label, the nutrition information panel, because they believe that that is regulated by FDA, but they did not believe that the front panel was regulated by FDA. They thought that that was whatever the food company wanted to put on the label. So there is quite a bit of confusion about just the current food labels as kind of a backdrop to this.

We then attempted to decide whether or not emerging science should be considered a fourth category of claims that could go on packages, and we felt we need to come up with a definition for emerging science, and as you have seen previously today, that the upper limit on emerging science would be significant scientific agreement. And so we did have a number of members on our committee that also sat on the Significant Scientific Agreement Committee, so we could see could see how they were progressing on their definition.

And where we really struggled as a committee was putting a lower limit on the definition for the purposes of labeling. It was very difficult and we had a lot of discussion around how many studies, what quality of the studies would dictate the lower limit of what would be

considered valid emerging science information that could somehow be captured and communicated to consumers.

We did put forward an initial definition, after several hours of discussion, and I'll read it for you, and I think here somewhere that Lynn might step in. I'm not sure. But emerging science, this is what our committee came up with:

"Emerging science is one or more research findings pertaining to a food substance's consumption by humans that are judged, by a panel of appropriately qualified experts, to indicate, after consideration of all valid reports pertaining to the substance, that the general population, or some specific segment of the population, will probably achieve a significant health benefit without significant adverse effects when the substance is consumed in a reasonable amount over a reasonable period."

I don't know, Lynn, do you want to talk about that?

Following, once we sent out the minutes to our committee members, a couple of people raised the issue about the word "probably" and that we might want to consider "possibly." And so we didn't, I believe, reach a final consensus on that.

DR. LARSEN: No. I wanted to wait until we got to the advisory committee, since we were at that stage, so we

will leave that to you to decide whether you want to transmit that word change as an amendment to the working group report.

DR. HARLANDER: And there are several significant words in the definition, and so it really was quite thoughtfully put together.

I think it's important that the committee decided that there needed to be some expert panel that would be involved in the assessment of the emerging science, and this, we had several proposals on what that group might be or be constituted by, and those proposals of who might constitute that expert group are in our minutes.

I will say that we were unable to reach consensus on how we would be able to communicate emerging science on food labels in truthful and non-misleading ways. We did have members that felt that it was not appropriate, that it was inappropriate to place information about emerging science on food labels. One member had qualified support for that, as long as appropriate, I guess what would be called disclaimers now, could also be communicated at the same time. And there were other members that were very positive and supportive of placing emerging science information on food labels.

We did talk with individuals from the Federal Trade Commission because they are very involved in

advertising, and they brought us a perspective as well. And then we talked a little bit about off-package labeling, and I can tell you that there was a little more consensus around communicating that kind of nutrition information and emerging science information in off-label formats, but again there was not consensus on that issue. Some believed that that information, because it gets disconnected from the product or could potentially be disconnected from the product, consumers would not have the appropriate information at the right place in order to have a true understanding of the implications.

We did talk also about emerging sciences in arenas not regulated by FDA. And again, all of the working group members were supportive of FDA's current efforts to disseminate truthful and educational information, but recognized that resources are limited for FDA to really communicate across all of the emerging science nutrition information that is coming out.

We also talked a little bit about emerging science and research incentives, and again there was disagreement about what research incentives might provide. Some believed that it would encourage more research into emerging science areas, and others felt that it might discourage future research in this area that was required.

So, in conclusion, I will say that our Emerging

Science Working Group could not reach general consensus on allowing statements with less than "significant scientific agreement" on food labels or in labeling, and consequently as a group we are unable to offer recommendations on this question. FDA may wish to consider the variety of suggestions, that I have been able to cover here, in our minutes.

We are going to put forward our definition of "emerging science" for the committee's consideration, and again we can discuss whether or not we want to substitute the word "possibly" for "probably."

With respect to FDA's activities in the unregulated arena, we obviously believe that we should have FDA continue to expand the availability of information for consumers on emerging science issues as part of the agency's world wide web site.

We did consider information on how we might be able to get valid nutrition information out to the public, and this could be accomplished by a number of means; by leveraging groups that are already out there, like the International Food Information Council and food editors, in getting valid consumer information to the public.

And FDA is encouraged to reissue and update a brochure that was reviewed by our committee on--and we kind of referred to it as the "quackery" brochure, but it gave

information to consumers on how they can be healthy skeptics around scientific information that's reported in the press. What we found is that consumers are very confused by one day beta carotene is very good for you in the news media, and the next day it's associated with some negative effects, and that consumers need to take more responsibility and be given the tools in order to evaluate emerging science.

There are a number of members from my subcommittee here. If you have anything to add to our report, I invite you to do that right now.

DR. BENEDICT: Does anyone from the working group have a comment before we begin the actual discussions?

[No response.]

DR. BENEDICT: Seeing none, does Dr. Larsen or Dr. Lewis have comments they would like to add?

DR. LARSEN: I have one additional comment. In addition to the response from one member, or at least one member, about using the word "possibly" instead of the word "probably" in the definition, another working group member pointed out a minor editorial change that I'll take care of.

They or she also pointed out that at the very end, in the recommendations of the working group report, we talk about restarting a food editors conference. What is a food editors conference? It just sort of pops up in the report. There was discussion about it, but she suggested that

perhaps on page 9 of the working draft report we might put in a sentence or two that indicates FDA used to have these meetings and what their purpose was, and that would then at least support the fact that there's a conclusion regarding such meetings. I'd appreciate your comments on that.

I would say that we can include these, we can actually modify the working group report with respect to those two comments, or we can include your statements regarding those possibilities in the, what I'd call part two of the committee report. As you noticed, I've drafted these first two documents as a committee report, with the working group report being part three, your commentary being part two, and then part one just simply being what the committee overall decided; the fact that you met today and actually made a decision one way or the other.

But those are the only other comments that we got back from the working group at that stage, at this last stage of their report.

DR. BENEDICT: Thank you, Dr. Larsen.

Let's just establish the format by which we can carry out this discussion, then. I'd like for it to be similar to what we did yesterday, and that would be, the object of the discussion is for the Food Advisory Committee to ask questions or make statements regarding the issues at hand, and everyone else around the table is here to provide

supporting information.

And so the format will be, I think, that if you're a member of the FAC and you would like to ask a question or make comments, let us know and Ms. DeRoever will write our names down in order, and then when the time comes, address your question to whomever. When you're responding to a question or making a comment, please be sure to state your name for the record so that the transcript will reflect your wisdom.

And at the end of an open discussion, then we'll ask questions about "possibly" versus "probably" and some of the other things. And we'll ask the question finally about will we transmit it as is, will we transmit it editorially, will we transmit it with comments that are reflected in the transcript, without figuring out where they will go at this point.

And let me just say that what I would like for us to avoid is, unless it's really crucial, wordsmithing the document as we go through. If you have comments of a wordsmithing or punctuation or even spelling nature, just wait until you get home and transmit that to us individually, and of course the FDA will be overjoyed to incorporate those into the final document.

Dr. Larsen?

DR. LARSEN: You mentioned who else on the

committee, on the working group, is here. Unfortunately, Dr. Harlander, Dr. Benedict, are the only listed members who are here from the working group today. I believe Dr. Wang participated in one or two of the working group discussions, so she might have her perspective. So those are the three people, but primarily Dr. Harlander and Dr. Benedict, to whom you may address your questions of the working group's activities.

DR. BENEDICT: Thank you. All right, so let us get started, and let's note that Dr. Ed Croom has just joined us. As soon as you plop down, introduce yourself for us, Ed, and then we can go on with our discussions.

DR. CROOM: Ed Croom, University of Mississippi. Actually I was just hearing the gen on traditional medicines on the way over here, so thanks.

DR. BENEDICT: Thank you.

All right, who has questions?

DR. LARSEN: Dr. Montville has a question.

DR. MONTVILLE: Tom Montville. I'm new to the committee, so before we get into "possibly" or "probably," in the first part of the claim, A may reduce the incidence of B, in the hard sciences if you put "may" in, it's a weasel word big enough to drive a truck through. Is there a legal definition of "may" in terms of possibly, probably, might, does?

DR. BENEDICT: Dr. Lewis?

DR. LEWIS: I can give you a little background on it relative to health claims. The "may" is not a reflection of the quality of the science. Rather, the "may" was included by the agency to connote the notion that it's a risk reduction for a population, and that you as an individual may or may not benefit.

So we need to be very clear, that wasn't--there is assumed to be, in the case of health claims as they are now, significant scientific agreement, so "may" is not meant as that kind of qualifier. It's meant to say this is not a magic bullet for an individual. Now, that's perhaps slightly different than how the Emerging Science Group wants to approach it, but that's how the agency has used it in the past.

DR. BENEDICT: So does that take care of your question?

Dr. Russell has a question.

DR. RUSSELL: Dr. Russell from Tufts. I would like to--I think this is to Dr. Strauss--I would like to hear some discussion about what "reasonable amount" means, or what was the thinking of the committee on that. A reasonable amount of a food product that takes--I mean, if somebody had a total carrot diet or something, that would be unreasonable? I'm not quite sure what it means.

DR. BENEDICT: This is Dr. Harlander.

DR. RUSSELL: Dr. Harlander. I'm sorry.

DR. HARLANDER: Yes, we did have discussion around that, and we were considering it as a reasonable amount of that food. Okay? So to have an efficacious dose in a reasonable amount of the food in order to make an emerging science claim.

DR. RUSSELL: I guess there's a lot of subjectivity to that--

DR. HARLANDER: Absolutely, absolutely.

DR. RUSSELL: --or flexibility, and that was purposeful, I gather.

DR. HARLANDER: Yes.

DR. RUSSELL: The other thing I wanted to ask you was, it reads "one or more" research findings, and I think it would be very difficult on one research finding to say that there was something probably going to happen.

DR. HARLANDER: Yes. We had--again, that was a cause for lots of discussion. I guess what we came to was that if you had one really well designed, double blind, you know, the best designed study, and we haven't seen one of those yet but it's possible that one could be there, that demonstrated a dramatic effect, that that was more important than smaller studies that were not as well designed.

So I can tell you there was a lot of discussion

around how much, and we ended up coming back to the quality of the science versus the number of studies. But I can tell you it was a pretty controversial discussion.

DR. RUSSELL: My feeling, my own feeling, is that --and I know the issues around this somewhat--that if you're talking about one study, it's very hard to use the word "probable," no matter how beautiful the study is.

DR. HARLANDER: Right, and that's what came down to the discussion about, you know, is "probably" too strong a word to include in emerging science definition?

DR. BENEDICT: And let me just interject one other thing. If you recall, the "significant scientific agreement" subsection is going to essentially set the upper limit.

And so as we looked at it from the two committees, anything that doesn't achieve that will fall below, and that one beautiful study might not get you into scientific agreement and allow you to make a health claim, but it might get you close enough, if emerging science is to be considered to be in that category. It's almost a fall down rather than a build up.

DR. RUSSELL: Yes, I understand that. It's just that I think that the word "possible" then is much more appropriate than "probable."

DR. BENEDICT: Thank you.

Dr. Applebaum has a question next.

DR. APPLEBAUM: And if Dr. Harlander or Dr. Lewis or even the Chair could help me with "reasonable amount," and if this is in conflict or potential conflict with a serving size as defined currently by FDA.

DR. HARLANDER: I don't think we believed that it needed to be a reasonable amount--well, I don't know--in one serving. I mean, you might have to consume several servings of that per day in order to get the amount, but we didn't try to put it within the context of serving sizes.

DR. APPLEBAUM: Can I go on?

DR. BENEDICT: Sure. Please continue.

DR. APPLEBAUM: And another question I have is in terms of--and, you know, I read it in the back and I just want to make sure in terms of the transcript or for the history of this, of this meeting, which the Chairman mentioned could be the substance of many theses in the future, if not dissertations.

DR. BENEDICT: Make it clear that was "theses".

DR. APPLEBAUM: Pardon?

DR. BENEDICT: Theses.

DR. APPLEBAUM: Theses, theses. Theses. But the panel of appropriately qualified experts, this was, in terms of the discussions that occurred, this did not in any way, shape or form translate to a paper that's submitted for

publication and the reviewers could constitute a panel of appropriately qualified experts, because you did say the committee felt very strongly or the task force felt very strongly that FDA had to be part of that panel.

DR. HARLANDER: That's right. That's right. We would--I don't believe, I hope I speak for the committee, that we would consider reviewers of a manuscript as constituting this expert panel.

DR. APPLEBAUM: Okay, and my last question, it's just a question that I have in terms of emerging science based on one, and again this is a point for the record and clarification. It does not suggest sometimes the practice where they want to look at intriguing hypotheses that might be displayed in a current or in a particular study as being reflective of emerging science. And these intriguing hypotheses sometimes come out of observational studies.

It's a probably--I mean, I don't have any answer, so that's why I just want to make sure that--

DR. LEWIS: I don't--I was not actively involved. I was initially. And I can't clarify the discussions. But if you take a look at the nature of the evidence used for health claims, there would be theoretically nothing that would preclude a health claim getting all the way to significant scientific agreement on epidemiological evidence, or as you say, observational. So your point is

well taken.

In the nature of diet/health relationships, sometimes observational data is all that you have, and it may be of high quality. So again you're back to the standard being relatively flexible because of the nature of the relationships, and the agency has been careful to say that observational data is not necessarily weak and clinical data necessarily strong. Certainly the more specific the claim, the more it would appear you would need clinical data, but that's an issue that's open for debate.

DR. BENEDICT: And we could refer you to the diagram at the end of "significant scientific agreement" for some of those.

DR. LEWIS: Yes, I agree. I agree.

DR. BENEDICT: Dr. Larsen would like to comment.

DR. LARSEN: I think your question gets back to the very first part of the definition, "one or more," and there was a lot of discussion about that very issue. Where does it--where is it, and what constitutes--an intriguing, not thought but--well, let's call it an intriguing thought, that this may possibly in some fashion or another have benefit, and where does it become truly emerging science?

The lower boundary was as difficult for the group as the upper boundary, which they dumped off onto the Significant Scientific Agreement Working Group,

appropriately. But the lower boundary was an extremely difficult concept, as to where does that really start? Where is it just something just sort of on the horizon, but not even appropriate for emerging science in this kind of a milieu, and where is it more appropriate--where can it appropriately be called emerging science and have some merit to appear in some fashion?

You'll notice the charge addresses both the unregulated arena, as we call it, and the food label itself, which is where a lot of the attention is focused.

DR. BENEDICT: Do you have additional questions?

DR. APPLEBAUM: It's on the probably/possibly, but you're going to hold that til after.

DR. BENEDICT: Well, if you have something to say, we'd love to hear it.

DR. APPLEBAUM: Well, I agree with the comments that have gone before me, or the commenters who have gone before me, that "probably" is stronger than "possibly." And in my former life this was two very important words that we had major arguments over, and I won't go any further.

But the way I clarified it is, "probably" is "can", "possibly" is "may." It's the difference between being likely to occur versus--or likely to happen versus being able. And I know it's like a when is "is" is type of thing, but it's--when you're dealing with emerging issues

and emerging science and emerging benefits, you could get crosswise with each other unless you have, you know, a firm view of those two terms.

DR. BENEDICT: This is not reflective of the entire committee, but one of the possibilities was that the definition would serve both the purpose of emerging and significant scientific agreement, depending on whether you inserted "possibly" and "probably," which is sort of what you're, I think, saying.

The next person on our list is Dr. Hotchkiss.

DR. HOTCHKISS: Thank you. The draft report indicates that the working group could reach no consensus on allowing statements with less than "significant scientific agreement." I'd like to hear--which tells me that there were some who would support that and some who would not support that, and probably a fair amount of discussion.

As I go through this, I couldn't see a clear rationale of the position of those who would allow statements with "less than significant scientific agreement." I wonder if somebody from the group could, for me, paraphrase or at least lead me through the rationale that would allow such statements on labels.

DR. BENEDICT: Have we a volunteer?

DR. HARLANDER: Go ahead, Lynn.

DR. LARSEN: By default. I'm not sure we can

fully answer your question. It was very clear that members of the working group, some members of the working group came from a very hard science base and had the view that this information, to be presented on the label, had to have a clear significant scientific agreement. I mean, they were holding to that, to that position.

Others were much more down the road in the line of what we heard in our public hearing speaker this morning, that there is and should or can be a mechanism by which consumers can get this information, and the food label is an appropriate place to do that. They felt that with the proper wording of such statements, that the consumers would be able to identify what the meaning of the words were and be able to interpret that in their own--for their own purposes.

So I don't know if I can clarify it any more than that, other than that there was this dis--in some senses disparate views expressed by members of the working group, and we see it constantly, I guess, and we are--

DR. HARLANDER: I will say, Joe, that we did talk about that these statements need to be accurate and balanced, but you'll see in the report that we were going to leave it up to FDA to determine that, because we did throw out a whole bunch of statements and we did not agree that they were accurate and balanced.

And so I think that's where a lot of our discussion was, is that what sounded accurate and balanced to some members of the group, did not to other members of the group, and so we could not reach consensus on how you would communicate in a truthful, non-misleading, accurate and balanced way, emerging science information, particularly in the limited space on a food label.

DR. BENEDICT: Let me just--

DR. HARLANDER: It would be difficult to reach that.

DR. BENEDICT: Yes. One of the other series of considerations was or were, or some were, that the FDA unfortunately suffers from the problem that the media will report something that is in fact probably emerging, the public will pick up on that, and then later it will be reversed and the public must now disbelieve that.

And the questions that arose dealt with how can we maintain the credibility of the FDA when the FDA says there is significant scientific agreement and this is okay. But is it possible, because the consumer is going to deal with emerging science that they hear, no matter where, is there a way for the FDA to put something on the label to say we think this is actually, really emerging science and not someone else's hypothesis in order to sell a product.

And the discussion centered around how can you

convey to the consumer that the FDA has placed its own imprimatur on this particular emerging event, and by default, because the other one has nothing on it, the consumer should perhaps beware a little bit. Because of course there'll be some things that are much more ephemeral than others.

And so we tried to come to some sort of an agreement about how we could protect the consumer from frivolous things, and yet give them some information which would essentially say "It's entirely likely that this is going to help you, but we can't promise, and we may take it back later," as opposed to, "No way is this going to help you." And so it's a real problem, when you think about it, because if the FDA has to support solid claims and has to dismiss others, somewhere in between there is a "probable" or a "possible" as we were discussing. And that was what we were having to deal with.

Dr. Larsen has a clarification.

DR. LARSEN: I want to second your comment, I guess I would say, about the way some people viewed the food label, and I think Dr. Harlander mentioned it earlier. Consumer surveys indicate that consumers trust at least certain aspects of the food label because they believe that FDA regulates it.

And the members of the working group who felt

emerging science didn't belong on the food label wanted to maintain that credibility, if you will, of what the food label says. The other members, who felt emerging science had a place on the label, felt that the credibility could be maintained under the right circumstances.

DR. BENEDICT: Dr. Hotchkiss, please continue.

DR. HOTCHKISS: Well, thank you. That goes somewhat to clarifying my confusion, but I'm still a little lost about this. This is the way it seems to me, and I'm probably misinterpreting this, but you have defined, I think nicely, emerging science, so you have an idea about what emerging science is. And assuming that everyone can agree about that, that's good.

You have proposed how to decide if a finding in emerging science is supported. You have scientific agreement, you have a rather detailed proposal, how to form a panel and what consideration should be taken in that.

So in a practical world I'm trying to think, if food component X has some data on it, and food component X may be emerging science or fits the definition, a panel is going to be convened to view the weight of evidence and the value of that evidence and pass judgment on it. So the panel may be convened and the panel may say, "Well, this is intriguing, but certainly we can't come to any kind of consensus that there is a meaning to this," and then we fall

back to, "Well, we can't set lower limit so you can put it on a label anyway." And you've gone through an exercise that, as I kind of envision it--and I'm probably wrong--seems to be rather meaningless, if you can't set a lower limit to what "significant scientific agreement" is.

Am I missing something here?

DR. BENEDICT: I don't think you're missing anything. I think that setting the lower limit of "significant scientific agreement" we tried to outline in the SSA section, and we think that's probably going to be pretty straightforward, except it will be on a case-by-case basis, depending on the strength of the various studies with which we're presented.

But, as you say, setting a lower limit on emerging science will probably be more subjective, and we'll convene the committee and the committee will say, "Well, it's not SSA, so is it emerging science?" And if the committee of disinterested scientists, who are all qualified to deal with it, conclude that there's really no basis for even pretending to make this claim, then it will not be emerging science.

It's a really crummy way for me to answer your question, I think, that it's going to be a committee of experts, as many as--as Dr. Lewis told me the other day--as many as we can cram into a room, to argue it out over a

period of time and make the decision. And it will be people as you see around the table, who will in all good conscience come up with an answer.

DR. HOTCHKISS: I'm sorry, but--okay, I understand that. I'm reading, and it says that "the working group could reach no consensus on allowing statements with less than significant scientific agreement on food labels and labeling."

Are you saying that if a panel of qualified experts decides that it cannot agree, that that would--because the lower limit has not been set, then at least by what we have here, it could still go on a label?

DR. BENEDICT: Would the Chair or Dr. Larsen like to comment?

DR. HOTCHKISS: That's what really, I guess, what I'm trying to say, is that's the way I interpret this, and maybe that's not correct.

DR. BENEDICT:

DR. LARSEN: When you say "can go on the label," I think you have to remember what we just presented a few minutes ago and what you heard from the public hearing speaker, that there is a mitigating circumstance here from where we were when this charge was originally given to the committee and where we are today. We will presumably know later this year which way the FDA is being instructed--well,

we know which way the FDA has been instructed at the present time. We'll know which way FDA has to take those instructions later on this year, presumably. To the extent that this court case has an impact, then, you know, we'll have to take that into account.

DR. BENEDICT: Yes?

DR. LEWIS: Again, I wasn't actively involved in this group, but just to clarify for the history, when the Keystone report ended, the issue was, we know we have health claims when there's significant scientific agreement. Because of the Keystone dialogue, there was a lot of interest to the question of when scientific, significant scientific agreement isn't there, what can happen?

I think what we're facing here is a report that says we're not sure. In other words, they came to no conclusion. When the agency cannot determine that there's significant scientific agreement, the working report, the working group report said, "We can't come to closure on what else can be done."

So if you're reading that this is a directive to the agency to do something when SSA isn't there, I think the working group said, "Well, we don't know." And so the issue isn't what happens when there isn't SSA vis-a-vis these definitions, but rather when there isn't SSA, the working group hasn't come up with a concrete framework for the

agency to use.

Does that help with your--

DR. HOTCHKISS: No, I understand. I understand that. That's very clear from reading this. I just was trying to understand why those who--

DR. BENEDICT: Could you get close to the mike?

DR. HOTCHKISS: I'm sorry. Just trying to understand why those who--I'm trying to understand why there couldn't be agreement on that, and what's the position of those who argued that when there is not agreement, you could--you should still be able to go forth with something on the label. That's simply my question, because I can't really understand the rationale to that.

DR. BENEDICT: Dr. Harlander, did you have a comment?

DR. HARLANDER: Well, I think we basically said we could not reach agreement on whether emerging science or how emerging science could be communicated on labels. We said that if FDA decided to permit emerging science, that we--that they would have to really develop criteria for how these statements are going to be developed.

I mean, it was--I guess we're kind of kicking the ball back to FDA, saying no, we don't agree that if there's not agreement by this expert panel, that people should be allowed to use it or how they should be allowed to use it.

But criteria would really need to be developed around that before people will be allowed to use it.

I should point out, too, that Keystone also was not able to reach consensus on this issue. A two-year dialogue, you know, with a very broad cross-section had-- really ran into the same kinds of issues that our small working group did with emerging science.

DR. BENEDICT: With some reluctance I'm going to make the following statement that represents a very minority view on this topic, coming from someone who has a pretty hard science background.

And that was that if it was proposed, and probably justifiably never found its way into any of the reports, it was proposed that you could do this if you had to by asking the FDA to advertise a series of rankings where a number would be placed on the label, or a letter, under the FDA imprimatur that said "Pick a number, one, it's highly probable that this is going to help you, calcium; two, it's possible this is going to help you, but we'd like to take it back later; and, three, there's no way." But of course no one would put that on a label. And the thought was, if you could just educate the public to just look at the numbers or letters as a code, then you wouldn't have to have long, involved labels.

There are a lot of things wrong with this

suggestion, but in principle this may be the way that we have to move. And I invite anyone to comment on that who was on the committee. It's--thank you very much.

DR. HARLANDER: We rejected it.

DR. BENEDICT: It was soundly rejected.

Let's see. Next on the list is Dr. Sigman-Grant.

DR. SIGMAN-GRANT: I thought I understood the definition of "emerging science" until Dr. Harlander tried to explain something to Dr. Russell. The way I read it, it says a food substance, it's the research finding pertaining to a food substance consumption, not the food but the food substance, and that if the substance is consumed in a reasonable amount--but in your response you indicated something about the food being consumed, and then you--Dr. Lewis mentioned something about serving sizes. So could you clarify that for me, please?

DR. HARLANDER: We were talking about food products. It's the amount of a substance in the food products.

DR. SIGMAN-GRANT: Then the way I read the definition, it says the substance, not the food.

DR. HARLANDER: But when we were referring to "substance," we were talking about the scientific evidence that related to all valid reports referring to the substance. Because those studies that might have been done,

the substance under question might not have been delivered in the specific food products that it's ending up in.

So does that clarify that?

DR. SIGMAN-GRANT: Not when you read the end phrase, when it says "when the substance is consumed in a reasonable amount."

DR. HARLANDER: And then putting it on the food label, you're talking then about the food.

DR. SIGMAN-GRANT: That's where it's confusing.

DR. HARLANDER: But the claim itself would relate to the substance.

DR. BENEDICT: Does that--Dr. Lewis?

DR. LEWIS: Again, I wasn't actively involved, but I suspect this is harkening back to the requirement for health claims, that it be consumed within the context of the total daily diet, and they may have been trying to capture that but maybe don't have the grammar down correctly.

DR. BENEDICT: Does that conclude your questioning, Dr. Sigman-Grant?

DR. SIGMAN-GRANT: No, actually I have--can we move on to the third recommendation?

DR. BENEDICT: You can say anything you wish.

DR. SIGMAN-GRANT: I just wanted to say that the world wide web is wonderful, but not the total population has access to it, and so there needs to be some

consideration for if there's going to be off-label communication of a science in some other manner besides the world wide--the www.

DR. BENEDICT: Dr. Harlander, do you want to respond? We did discuss that at great length, in fact.

Dr. Brackett.

DR. BRACKETT: Thank you. Dr. Harlander sort of got me thinking when you used the term "balance," and I'm wondering how emerging science fits in when you've got significant scientific agreements that may contradict each other. Is there some sort of risk-benefit ratio, an example of which might be--I don't know--cruciferous vegetables, which are--have, you know, significant scientific agreement that these have anticarcinogenic properties, but at the same time these same components have toxic and even carcinogens in it. I mean, is the label allowed to carry one side but not the other, or they must--or should they make the other claim, saying that there's toxics involved? I mean, I'm sort of confused where this fits in there, then.

DR. HARLANDER: Well, that's why we got into so much discussion around how would you provide an accurate and balanced view of emerging science, because you almost do have to put it in that context, particularly if there is conflicting information. That's why we almost had to conclude the totality, when you're looking at the totality

of the studies that are out there.

It's very difficult, particularly in the space that you have on a food label, to try to convey that, that balance?

DR. BENEDICT: Do you have additional--okay.

Dr. Kuzminski?

DR. KUZMINSKI: Thank you. This is a very difficult topic, obviously. I've tried to organize my comments on the definition and one of the conclusions reached by the working group, and forgive me if I bounce around a little bit in my comments.

But to me the word "emerging" connotes newness. It's not brand new but it's early in the maturation of the knowledge about a topic, whatever it is, the health benefit of a particular component in a food or the food itself. And because of that, it's not conclusive information and there may be some doubt or lack of certainty, certainly, about this new information. And if there's going to be a message to the consumer about that component of a food, that doubt or lack of certainty in some manner should be communicated.

I look upon the food label as really the last line of communication by manufacturers to the consumer. To me, it should represent accurate, bona fide information about the contents of that package to the consumer: how it's prepared, what's the components, a list of ingredients. the

vignettes on it should reflect the contents; the nutritional information and any health benefits, too.

I guess we're all a product of our times, and for me the off-package labeling doesn't carry the same impact as the food label and should not be as restrictive in the information content as the food package label. And I recognize that there are differing views on this.

So if there is going to be a message on area that there may be some doubt about because it's emerging and new, that doubt should be communicated. So on the "probably" versus "possibly" debate, I guess I'm in the "may" camp. This isn't the hard science. I respect the views there that the connotations of "may" carry, but to me it does portray some doubt. It's a positive indicator, and it certainly allows the consumer to decide, and perhaps that vehicle allows credibility of the label to be maintained.

I am also in the camp of that one research finding is insufficient, just not sufficient, especially if it's emerging, because there's doubt. Another one could come along, as has been stated, with a differing viewpoint, and it is emerging also.

Now, comments have also been made to the substance in a food, and there are cases out there where perhaps the health benefit of a food in total has really not been pinpointed to conclusively identify to a certain component

of that food. And if the working group's intent is to specify to a certain substance in the food, it may be excluding those foods that can carry a benefit, have been studied bonafidely, and don't necessarily have the active, if you will, identified.

I don't know if that's helpful or not, but I just tried to go through the issues and give you a viewpoint there. It's a very difficult topic to deal with.

DR. BENEDICT: Thank you very much for those comments. Does anyone on the panel have a response or a comment? Dr. Russell?

DR. RUSSELL: Thank you. I think this is to Dr. Lewis or Dr. Larsen.

If an emerging claim of some sort with a disclaimer is allowed on a label, for example fiber in colon cancer, and then subsequently, as has happened, a large study comes along which makes that a lot less probable, or even if it's an intervention study it disproves it, for example, what--do you then convene another conference to disallow the statement, the emerging science statement that you've already allowed, or is there--what is the process of taking away an emerging science claim, even with a disclaimer, if there is a second, a subsequent work that makes that a lot less probable than we thought, say, one year ago?

DR. LARSEN: I don't think we've gotten to the stage of determining what our process would be at this point in time.

DR. LEWIS: We have not ever dealt with disclaimers, so the issue has been health claims with significant scientific agreement. Under the provisions for significant scientific agreement, we authorize the claim, and I suppose in theory if the--I don't know if this is on--I don't know how to put it.

If evidence were--the reason you have significant scientific agreement is that you want that claim to be very, very stable. So in considering the provisions under NLEA, the decision was made to authorize the claim and use significant scientific agreement on the part of Congress, because they wanted these claims to last over time.

With the Keystone and this group, we're addressing what do you do with claims that are less tenacious. And your question is, how would FDA get rid of them, and we're not in that ball park yet.

DR. RUSSELL: The reason is, I think you need to get in the ball park because even with one of the ones, one of the claims that was considered in the court case, there is now a very large study that makes that a lot less likely, the fiber-colon cancer relation.

DR. LEWIS: Sure, but we don't have a claim for

that.

DR. RUSSELL: No, I understand that, but if you're going to--well, if you're going to be thinking about allowing emerging--

DR. LEWIS: I understand.

DR. RUSSELL: --you also have to get the other side of it.

DR. LEWIS: Right, and that's part of the, as we would say, implementation of Pearson, if it comes to that.

DR. BENEDICT: Okay. Dr. Montville.

DR. MONTVILLE: It appears we all agree that there's no agreement on this middle ground, and I do like this idea of quantitating a rating system like movies, but I can understand where that would lead.

It seems, though, that the use of a disclaimer for the middle ground that just conveys to the public, as Dr. Kuzminski suggested, that they should know that there's this doubt, but they have a right to know that there's also a possibility. "The FDA has not evaluated this claim," or "There is no scientific consensus to support this," or some kind of disclaimer, would seem to cover both bases. And I'd like to know why that doesn't appear to be acceptable to the FDA.

DR. LEWIS: The issue is the provisions under NLEA. NLEA required that health claims be based on

significant scientific agreement, and there was no authorization or provisions for other types of health claims. So it wasn't that we arbitrarily said we don't like this, but that the congressional provisions were for that standard.

DR. BUCHANAN: Dr. Applebaum? I have you down, we have you down as next.

DR. APPLEBAUM: And that was before, because I think we're getting into discussions and they're all very, very good discussions, but they could all be for naught based on the decision coming out of Pearson. Because essentially the decision says that FDA, unless FDA goes forward and challenges it and wins, that FDA cannot ban truthful, non-misleading statements, and I'm going to go as far as to say on emerging science, simply because it's not based on sound scientific or significant scientific agreement.

So there's a legal issue that we--you know, that has, if you will, superseded discussions by the task force, and in the confines of their understanding at that time, you know, it's no wonder in terms of the first bullet that they could reach no consensus, because this has had to be thrown into court to come out with some type of direction.

But essentially what's coming out is that there is now essentially, through FDAMA and the interpretation of

Pearson, that there is now an alternative for bringing information to the consumer. Rightly or wrongly, there is now a health claims path according to FDA's interpretation, but now an alternative path based on authoritative statements and emerging sciences as well, that has to be considered.

So it's--we're looking for questions or answers to questions that are wonderful in terms of our knowledge, but you now have this whole issue of this Pearson decision and FDAMA, which together have put a whole different twist onto this whole situation of statements being provided to the consumer.

But the bottom line is, for either emerging science, significant scientific agreement, structure, function or whatever, that they should be truthful and non-misleading, because there is no protection in the First Amendment for statements that are deceptive in nature.

So I think, you know, I applaud this working group, because they've had a lot of things to deal with in terms of, you know, preventing to the extent possible those types of deceptive statements from being protected by the First Amendment and being put on the label and doing a disservice to the consumer and to the public.

DR. BENEDICT: Thank you.

Dr. Buchanan?

DR. BUCHANAN: I also, if nothing else for my own edification, wanted to get a better feel for the discussions the working group had on disclaimers. And I have to agree with Dr. Applebaum that, considering the Pearson case and the issues that were raised in the background, that certainly the definition of "significant scientific agreement" is critical to what was identified in the Pearson case, and it does seem to offer direction by the courts, but still allowing emerging science based on a disclaimer.

And I think it's important for the committee to understand the deliberations of the working group in conjunction with disclaimers, or was that just not considered an option at all?

DR. HARLANDER: I think we did talk, we didn't talk extensively about disclaimers, but when you talk about how you communicate in a truthful and non-misleading manner, emerging science, what you end up verbalizing is something that sounds like a disclaimer.

So although we didn't call it a disclaimer, we discussed how would you communicate, and I can tell you we couldn't reach agreement on that. What some people felt was accurate, balanced, non-misleading and truthful, others did not interpret that way.

So you'll see in our minutes that we did talk about the fact that any statement should be reviewed by a

panel of marketing experts for effective communication and needs to be tested with consumers. You know, what do consumers--you have a bunch of scientists and food scientists sitting around and talking about these things.

But what I have learned being in a food company is, I am not the consumer of many of the products I produce, and so you've got to understand how consumers really interpret this, and we didn't have time for that research. And let me tell you, that research, a lot of it has not been done. It's not out there.

And so, you know, we did end up--I think we ended up discussing disclaimers but we didn't call them that. And it's very difficult. It's very hard to come up with statements that are really accurate, balanced, non-misleading and truthful, in this area.

DR. BENEDICT: Ms. Richardson?

MS. RICHARDSON: I would echo Dr. Applebaum's comments, but the other issue that I wanted to address is the recommendation that the agency reissue its "quackery" brochure. I think that if you're going to address this issue about diet and health information, that it should be separate from a quackery brochure.

And I say that because being in the business of promoting health and talking about disease prevention, that you can't promote trust in health messages regarding food

and diet and prevention if you're including it in a message about quackery; that you're going to have to look at informational brochures that are focused on trying to impart a positive message as opposed to having people confuse diet and health messages with quackery.

Because right now what we have are consumers saying, "I don't know what to believe. One day I can eat eggs; the next day I can't. I can drink coffee; the next day I can't. Maybe I can eat red meat." And at the same time you have infomercials running 24 hours a day on supplements and diet. And so I think that we have to keep the messages separate.

And I would also reiterate that not everyone is on the web. I am now computer-literate, but I know from looking at the demographics that when we start talking about the elderly, when we are talking about minorities and women, that they don't all have computers, there are not always computers in their local libraries, and so we have to figure out how we can get the message to everyday people who are not sitting at a computer all day or half the night, looking at the web.

DR. HARLANDER: I just want to point out that the committee came up with several suggestions to make it--to continue to have FDA, you know, provide information where they could, and so the web was just one of those. It

certainly isn't viewed as the primary method for getting this out.

With regard to the quackery informational brochure, subsequent to us looking at that, a number of groups have come out with publications. IFIC is a good one, where it doesn't--it gives you criteria for becoming a healthy skeptic around all emerging science, not just diet health, and I think a good--that would be a good way to modify this so it's not--I agree with you, it's not linking, you know, being skeptical about diet health information.

But there's a whole bunch of emerging scientific issues that consumers are faced with, not just diet health related, where one day it's okay and the next day it's not, or somebody raises concerns about it. So I think you could put that in a broader perspective of being a healthy skeptic around any kind of emerging science information and that would be valuable. People can relate it to diet and health and to lots of other things.

DR. BENEDICT: Are there additional comments or questions from the committee? This is your opportunity to make statements that you'd like to have in the record, additional clarifications that you'd like to have.

[No response.]

DR. BENEDICT: Okay. Dr. Larsen?

DR. LARSEN: After listening to the discussion, I

would maybe offer a fifth choice in how you deal with this, and maybe that fifth choice, at least in this case, is that you pass on--scrap the way I've developed this report from the committee and simply pass on the working group report without parts one and two of this thing that I've developed.

And just pass on the working group report with the record of your recommendations or your comments on these issues of "possible" versus "probable," one or not one, and "food substance" as opposed to "food," and those comments, so that FDA has in the record then, as we will with a couple of the other reports, simply the working group report along with the transcript of your comments as they apply to that working group report.

I guess what I'm saying is, I tried to put a format together here, and I'm letting you back away from that format.

DR. BENEDICT: I'm deeply grateful for that because it simplifies things considerably.

Before we deal with this very relieving statement just made by Dr. Larsen, I would like to perhaps ask you the question about "possibly" versus "probably" because I think this is a very important thing. And we'll just go around and you can answer with which of the two words you might find favorable, and if you have a third one, we'll welcome it. Dr. Applebaum?

DR. APPLEBAUM: Okay--

DR. BENEDICT: Possibly or probably? I sound like Alex Trebek.

DR. APPLEBAUM: That's right, that's right. Possibly.

DR. BENEDICT: Possibly. Dr. Brackett?

DR. BRACKETT: I prefer possibly.

DR. BENEDICT: Ms. Richardson?

MS. RICHARDSON: Possibly.

DR. BENEDICT: Dr. Russell?

DR. RUSSELL: Possibly.

DR. BENEDICT: Dr. Montville?

DR. MONTVILLE: Possibly.

DR. BENEDICT: Dr. Sigman-Grant?

DR. SIGMAN-GRANT: Possibly.

DR. BENEDICT: Dr. Hotchkiss?

DR. HOTCHKISS: Probably.

DR. BENEDICT: Probably. Dr. Kuzminski?

DR. KUZMINSKI: Possibly, or may.

DR. BENEDICT: Possibly, or may. Okay, thank you.

Is there a good way, a definitive way to ask the committee to address "substance" versus "food substance"? Do you have a suggestion, or shall we just incorporate the comments as they are?

DR. LARSEN: I guess my gut reaction is just to

incorporate the comments as they are because, you know, as Dr. Lewis has mentioned, this is--or I think she mentioned--this is something that we have struggled with in terms of the health claims themselves. Is it a health claim for a food substance, or how do you interpret that term? And in some cases we have authorized a health claim that is a little bit broader than one might usually interpret the term "food substance."

DR. BENEDICT: Okay. Given the recent suggestion by Dr. Larsen of passing on the report with a record of comments, and contrasting that with the three choices we were going to ask you--transmit, transmit with some editorial comment, transmit with editorial comment and things reflected in the transcript--I think that I'd like to exercise the Chair's prerogative and ask you if you're willing or unwilling to pass on the report with a record of the comments and throw it into the opposite court for the FDA to deal with.

But before we do that, it's appropriate that since we might have changed the direction of what we're going to do, that you have the opportunity to make additional comments, to make sure that there's absolutely nothing that you want to have on the record that isn't in there--comments on substance versus food, comments on anything at all that we might do.

And this is a good time, because you are the Food Advisory Committee, to object to what we just proposed to do. If you would like to have us discuss those three points, or if you would like to reject the document, this is a good time to bring that up. So does anyone have anything they want to say? Dr. Applebaum?

DR. APPLEBAUM: Again, I'm just going to ask for guidance from the task force in terms of deliberations that might have gone on. The "reasonable amount over a reasonable period," because we're looking at claims that are going to be applied to both dietary supplements and food, conventional food, I--was there any discussion during the last two years on an unfair advantage as it relates to, you know, you can no doubt get more of a substance, of a beneficial substance, in a dietary supplement than you could from its counterpart in the conventional food.

And I was just wondering, was there any discussion that one, one particular food would be getting a distinct advantage over another food in terms of the way--because you never--when these types of things are discussed right now, we don't think of all the types of possibilities that might go on, and I was just wondering. They are both foods. Dietary supplements and conventional foods are foods, according to the definition, but I'm just wondering if that was taken into consideration.

DR. HARLANDER: To tell you the truth, I don't remember that we ever discussed that. Does anybody else recall if we discussed an advantage of a supplement over a food?

DR. BENEDICT: I don't recall that we did. No one else seems to have, either.

Can we recommend that this be considered by the FDA in compiling the final document? Is that appropriate, or are we left to just not deal with it? What is our option?

DR. LARSEN: I think what you're left--I think the option you have is providing us with your comments on the record on that issue. I think if one wants to characterize the term "reasonable amount" and "over a reasonable period" as weasel words, you know, that's probably a characterization that may be accurate.

The working group had--you know, they didn't want to pin it down because they didn't want to tie their hands or the manufacturers' hands or FDA's hands at this point in time. They just wanted to put on the record that there probably are unreasonable levels. But certainly, in direct response to your question, I don't recall that they got into the issue of one food or one product having an advantage over the other because of the amount. It was more--it was just the whole concept.

DR. APPLEBAUM: No. You know, I'll disagree with you. I don't think they're weasel words. I think in looking at the context of what constitutes food, I think you're right on in terms of a reasonable amount over a reasonable period.

But despite the Act saying that everything is now considered a food, it sometimes can be the difference between, you know, comparing apples and oranges. And just again sometimes we have a tendency to throw bigger problems back into your laps because we don't have the necessary, you know, crystal ball, you know, to anticipate what might come forth, but I just--and you know, FDA knows this probably more so than we do, you know, on this side of the table.

But there is a difference in terms of the amounts that can be achieved in a capsule form when you're dealing with one particular substance versus in the food from which it originates, or the plant, in that regard, from which it comes from.

DR. BENEDICT: Dr. Russell has a question.

DR. RUSSELL: So we're talking about supplements here, as well as foods. I didn't realize that. I thought we were talking about foods or substances within foods. We are also talking about supplements.

And with regard to the issue of the food, or the supplement having an advantage over the food, it could also

work the other way. For example, in beta carotene, where we know the foods high in beta carotene in study after study have an advantage with regard to carcinogenic effects, but a high dose of beta carotene in a supplement has just the opposite effect.

So I'm not sure. I think it's something that--actually I wasn't aware that we were talking of supplements here as well as foods, but I--I don't know if the rest of the committee was aware of that, but I was not.

DR. LARSEN: The issue of claims, since dietary supplements are a category of foods, the issue of claims applies to all the food products.

DR. BENEDICT: Dr. Hotchkiss?

DR. HOTCHKISS: I wanted to raise the same issue in a little bit different context. This definition of "emerging science" seems to me to be the heart of this report and exquisitely important, though I hate to pay any attention, to give any weight to the legal issues, but that seems to be where it will end up.

This definition seems to do two things or should do two things. It says what the standard is that something must meet, what is the standard of proof or what is emerging science, and it gives the standard. I'm a little unclear why we just lowered that standard by saying, rather than probably, possibly.

The other thing it does is, it says what the substance is. Is it a food? Is it a supplement? Is it a food containing a supplement? Is it a food that naturally contains the supplement? The definition, in my view, as others have expressed, is not clear about what we're talking about here. It says a food substance in some place, but I heard discussion that that's a food.

If compound X, possibly now, rather than probably, if it possibly--which is a pretty weak word in my view--has a beneficial effect, does this refer to that compound as a pure substance, a multicomponent extract of a natural source, a chemically synthesized compound, a food containing a significant amount of that? All that is in it.

I would suggest that we, not to that detail, but it would be nice to clarify that to say emerging science is one or more research findings pertaining to a food or food substance, if that's the case, or just a food, or whatever it is. But it seems quite unclear, and I think there have been several comments to that.

DR. BENEDICT: Dr. Lewis?

DR. LEWIS: Your confusion is certainly understandable. There's a great deal of, I guess for lack of a better word, case law interpretation, preambles that define the meaning of "food" or "food substance." And I think the working group was just deferring to those existing

regulatory definitions.

And if I remember what you said, virtually everything you said comes under the definition of what we're talking about. It can be a whole food, it can be an extract, it can be a substance in a food, it can be a combination. It goes back to what the scientific evidence can show is attributable to the effect.

So perhaps it is helpful for the working group to clarify it, but they can defer back to existing legal definitions, that don't necessarily always have a common sense definition we as individuals in the supermarket might think in terms of.

I think, too, Rhona, to go back just very quickly to your concern about "reasonable amount," in the provisions for health claims attributable to significant scientific agreement, the examination of the relationship addressees the consumption of the substance within the context of the total daily diet, so that it's going back to the notion that the level at which there is some benefit is consumable within the context of the total daily diet.

That's open to interpretation, but my read is not that there are substances that could--high amounts and low amounts, but that the overall examination of the relationship, whether it be SSA or emerging science, I think the working group is suggesting that that would be within

the context of what could be reasonably consumed. It doesn't entirely deal with your issue, but I think it's not the product itself but the examination of the relationship.

DR. BENEDICT: Dr. Russell?

DR. RUSSELL: Just to clarify that, what reasonably is taken in as part of the overall diet, though, could be in the form of supplements, and high dose supplements.

DR. LEWIS: The amount--again, I'm talking in the context, because this whole notion of emerging science is not one we've dealt with, but in the context of the SSA standard, there is--in order to authorize the claim, the effective amount must be known.

The agency has to review that relationship to make sure that effective amount is normally consumable. It doesn't partition it out to say if you take a whole bunch of it and up it. The question then comes, are you talking pharmacological or nutritional. And those are all questions built into the science review.

DR. RUSSELL: I'm just thinking about Vitamin E, where you couldn't possibly take 400 units in a diet without drinking a gallon of oil a day, which would be unreasonable, but you can certainly take it in a supplement pill, which would be reasonable.

DR. LEWIS: The agency then has to consider the

legal requirement of, is that within the context of the total diet, and would make a proposal for or against based on exactly the consideration you're talking about. It's case-by-case.

DR. BENEDICT: So we'll begin to wrap it up, and Dr. Montville will help us.

DR. MONTVILLE: I would just like to follow up on Dr. Russell's question. With the specific example of Vitamin E, is it possible then that a claim would be allowed for a capsule but not for an oil?

DR. LEWIS: The claim is allowed for a substance in a certain amount. It could be Vitamin E in a food. It could be--the law doesn't distinguish between a supplement and a food. The provision for a health claim is for a certain amount of a substance, Vitamin E.

DR. MONTVILLE: But if the amount is not--

DR. LEWIS: If you're saying could the amount only be achieved in synthetic forms or whatever, that's taken into the consideration of the definition of "within the context of the total daily diet."

DR. BENEDICT: All right. Let's figure a way to end this discussion gracefully. What I propose that we do is just poll the group, and I'll ask you would you like to pass on this report along with the record of the comments that have been taken, or would you like to take Dr. Larsen's

dreaded choice (d) and reject? And I hesitate to offer you that option, and we weren't going to, but I have to offer an alternative to what seems very reasonable.

Dr. Applebaum?

DR. APPLEBAUM: Pass on the report with the commentary this morning to FDA.

DR. BENEDICT: Thank you. Dr. Brackett?

DR. BRACKETT: Pass on the report with the record of comments.

DR. BENEDICT: Ms. Richardson?

MS. RICHARDSON: Pass, with comments.

DR. BENEDICT: Dr. Russell?

DR. RUSSELL: Pass on the report, with comments.

DR. BENEDICT: Dr. Montville?

DR. MONTVILLE: Pass, with comments.

DR. BENEDICT: Dr. Sigman-Grant?

DR. SIGMAN-GRANT: Pass, with comments.

DR. BENEDICT: Dr. Hotchkiss?

DR. HOTCHKISS: Pass, with comments.

DR. BENEDICT: Dr. Kuzminski?

DR. KUZMINSKI: Pass, with comments. But I have a concern that due perhaps to the difficulty of the topic--and I had this concern when I read the pre-reads--how is the agency going to laterally integrate the conclusions of each of these working groups? And because that is the way it was

structured, the charges were broken down, groups were assigned, and now there are these reports.

So I feel a certain let-down, if you will, personally, that in "pass on with comments," I would agree with that recommendation, but I'm not sure that despite all the good, hard thinking that has gone into this, we have done a lot to clarify things.

DR. BENEDICT: And I suspect it won't be the last time you'll see it. I suspect that once it's been laterally integrated, your comments will be sought again. Is that a fair assessment, or not? Perhaps not.

DR. LARSEN: I'm not sure exactly what that question means. Are you asking would we append your comments to the report and come back to the--and run them back by the committee to review? Or are you asking are we eventually going to bring FDA's process for how we've integrated all of these working group reports back to the committee for one big go-round?

DR. BENEDICT: I guess I was suggesting--or not suggesting, no, far be it from that--I was asking whether you would be bringing the finished, completely finished document back to the FAC, or would it just--this is our chance, and it's--

DR. LARSEN: This is--I would say what you've just instructed to me, I believe, is that I take the word "draft"

off of the working group's report and that I append--and that we take into consideration, from the record of the transcript, all of your comments as they modify that working group report. And the FDA will then just, you know, take that into account, and it wouldn't come back to the committee.

DR. BENEDICT: Okay. That's fine. Thank you.

Okay. This is and has been a really exciting discussion about a very difficult topic, and we are very grateful for the efforts of the working group and the FDA employees who helped in assembling this. This was a huge job, and you can see the complexity that we had to go through over a number of years. And so I'm sure I speak for the committee in expressing its gratitude for all the hard work that was done.

We are scheduled--actually we are on time, and we had expected to be early. So why don't we take now the 15-minute break that's scheduled for 10:45 and return in 15 minutes, which will in fact be at 5 minutes until 11:00 by my watch, where we will initiate our discussion of research incentives. Thank you all.

[Recess.]

DR. BENEDICT: All right. Let's initiate our discussion of the second item on our agenda, which is Research Incentives, the Draft Working Group Report, and it

involves economic incentives for private health claims related research. The FAC Chair of the working group has been Ms. Donna Richardson, and she has been assisted by Dr. Larsen, and we'll ask them to say anything they wish to say before we open the discussion for the committee.

DR. LARSEN: I'll just make a couple of brief comments. I note that Dr. Rhona Applebaum was also a member of this group, so at least Ms. Richardson does have some support from her working group when Dr. Applebaum gets back to the table.

This particular report has one controversial portion to it. It's not a controversial portion in the sense of the working group recommendations; it's controversial in the sense that there were two very distinct views expressed about how the working group report should be presented in light of other groups that have struggled with the same issue.

Initially the comment came to me, and I--that there should be some recognition that others have struggled and been equally unsuccessful, I guess is the term, in coming to a closure on it. There was a--the working group subsequently, in editing the draft report, deleted that comment. One member strongly objected to the deletion. I attempted to incorporate it as a footnote, to at least give it recognition but maybe downplay it somewhat. There was

continued objection to, even as a footnote, from at least one member. Other members were maybe a little more willing to accept the footnote.

So that was the point where I thought I would pull it out of the working group report and instead couch this in the sense of a Food Advisory Committee report, with the middle section of the Food Advisory report to incorporate this other information, if the Food Advisory Committee chooses to do so--in other words, I'm dropping it on your laps--and structure it in that fashion.

The draft advisory committee report then went back out to the working group members, and as you might expect, the same two comments came back strongly. Most of the committee didn't comment. Most of the working group, I'm sorry, did not comment, which meant that I guess they could go either way. And the two strongly opposing views, the one who wanted it there says this is great, leave it there; the one who opposed it because it was felt that it may--it had--it was a negative comment about the process of the working group itself, opposed it even being in the Food Advisory Committee report.

And then the other issue was, during the course of the work of the working group we had attempted to get some information from the IRS with respect to these tax incentives that had been addressed in the Keystone report,

and the working group was trying to struggle with as well, even though that's not an FDA--that's beyond FDA's purview. That, the response that we received from the IRS did not arrive until the working group had basically finalized their report, and so I've incorporated for your consideration in the Food Advisory Committee report a statement about that. It just more or less is a summary.

I guess, given what we've just been through, I'm giving you the fifth option again, that you can simply address your comments, accept the working group report with your comments and address your comments to the record on each of these two issues, or you can utilize the format that I've suggested to you as a Food Advisory Committee report, at least with those two additional commentaries in there, and any editing of them that you may wish to give me here or in writing later.

With that, I think those are the only comments I wanted to make. I'll let Ms. Richardson provide a summary of the working group's efforts and where we're at.

DR. BENEDICT: Ms. Richardson?

MS. RICHARDSON: Thank you. The working group had three meetings, including a conference call, and it was composed of a diverse group representing industry and consumers.

And we were specifically asked to look at the two

Keystone recommendations: one, that research into the relationship among foods, food substances, diet, and disease be increased and that more private and public sector funding be made available for this purpose; and, second, that the potential for providing various economic incentives be explored as a means of stimulating private investment in research that could establish relationships between food substances and the reduction of disease risk.

Interestingly, Keystone cited four obstacles to industry investment in health claims research: that because of the lack of experience with new health claims, that it was unpredictable about what would happen with a petition regarding health claims; two, that the lack of certainty about what is significant scientific agreement also was an obstacle; and that the public record of research and the required availability of the petitions to competitors also was an obstacle; and that, fourth, there was an assertion that research without a level of scientific agreement does not allow reference to early research that may indicate a potential diet-disease link, further restricts research.

Keystone made recommendations regarding incentives for research, and there were four. One was that FDA should provide confidential lead time between FDA's authorization of health claims and the public announcement of the claim; two, that a more lengthy period of market exclusivity exist

after an announcement of a health claim; three, that perhaps compulsory royalties, set at a rate to provide reasonable returns to direct reduction of the research costs be considered; and, fourth, that perhaps we should look at combining exclusivity, additional tax credits, and government research grants for health claims research.

We looked at the recommendations from Keystone. We also looked at the fact that they did not have a consensus. And so our discussion ranged from whether incentives were needed at all, and what research is presently being funded by government and how much by industry; what should be FDA's role in the development and implementation of the incentives.

And we also looked at what was the charge, because at one point there was a discussion about whether or not our charge really was to look at the recommendations from Keystone, or did we develop a new charge? And was this new charge that we needed to identify and prioritize options for implementing the Keystone recommendations?

And we also had extensive discussion about why industry presently does research, from, you know, the proverbial quest for knowledge to recognition for their accomplishments, and what everyone agreed was perhaps the most significant, which was that they do it to ensure or enhance their economic success for their company, and to

enhance the demand for and increase the market share of their products.

What we talked about a lot before we tried to come to some consensus was the fact that a number of the group's members believe that we need to simplify the claims petition and authorization process, and that there needs to be a clarification of the meaning of "significant scientific agreement." Where have we heard that before? And "emerging science." And we figured--we believe that those were the most important incentives; that if we could address those questions, that that would help us in dealing with the issue about research.

After an extensive discussion on the above issues, the working group came to the belief that it's inappropriate to expect FDA to provide economic incentives for health claims research; and also after looking at FDA's statutory authority and jurisdiction, that several of the suggested incentives would require legislative action outside of the agency's statutory responsibility.

We have made the following recommendations after extensive discussion, and hopefully they reflect the opinions of the group, and we were not always on the same level.

One, we did not reach any consensus on the need for additional incentives. We believe that there are

incentives that are already built into the statutory process, and that if we address the issues of significant scientific agreement, that perhaps those incentives would be enough.

We also recommended that FDA should promulgate food industry labeling regulations that provide the industry with greater flexibility in developing truthful, non-misleading health claims, and that we believe that FDAMA provides additional incentives and clarification of "significant scientific agreement," and the "emerging science" issue is critical to the incentive question being answered.

Also, the agency should examine its statutory authority in looking at how we can create incentives that are within the purview of the agency, such as the lead time concept, and we think that this concept should be examined and explored more fully..

FDA should also consider expansion of cooperative research efforts, and look at how the Federal-private partnerships could provide incentives by leveraging the resources of both groups, and we recognize that there will be less money coming from the Federal side.

And we should also--we would also have the agency look at the public availability of the scientific data supporting a health claim which we believe is important for

consumers' understanding of the basis for a claim, and we strongly urge retention of this requirement.

And, finally, it is our view that exclusivity, royalties, and tax relief can be addressed in the appropriate jurisdictions.

DR. BENEDICT: Thank you, Ms. Richardson.

Dr. Larsen, do you have anything else to add?

DR. LARSEN: Interesting you asked me that question.

Since the charge was given to the working group, and we don't have anybody from our Office of Food Labeling here today, but since the charge was given to the working group, there have been a number of changes in the health claims rules that at least some people perceive get at the issue of providing greater flexibility. Now, I'm sure there is not consensus on that issue, but at least the perception in some circles is, that has provided that.

The issue of expanding ways for cooperative research, I don't remember the timing of all these things now, but FDA has entered into an agreement with the University of Maryland, something called the Joint Institute for Food Safety and Applied Nutrition, and that may in the future provide a mechanism for some of these cooperative research types of activities, where the academia, industry and the government can work together. We already have

something like that in what we call the Moffett Center in Chicago with respect to food science itself.

So the fact that these cooperative efforts now exist, to the extent that we get to health claims research, if we do, they are a potential mechanism. Maybe Dr. Buchanan would have some wiser words on those issues.

I guess the only other comment I wanted to make in adding to Ms. Richardson's comments is that my comment at the very beginning about not reaching consensus focused on only one of these issues that they present. That is the need for additional incentives. As you will see, they came up with--the working group came up with quite a list of commentaries, and in most cases they were able to come to some sort of agreement. It was whether or not there are additional incentives was where they, like others, could not come to agreement. Existing incentives are there. What more is really needed?

In fact, even one of the industry members, if I am characterizing his position correctly, entered into the working group believing that additional incentives were needed, but as the working group explored and he himself explored how one might go about this, he ended up more on the view that there may not be any need for additional incentives. So if I properly characterized his views, there was that transition as well amongst at least that one member

of the group.

That's the only additional comments I wish to make at this point.

DR. BENEDICT: Thank you. As long as we're doing this, Dr. Buchanan, would you like to comment on cooperative research at this time?

DR. BENEDICT: I would first like to comment on research, period, within the Food and Drug Administration. And research within the Food and Drug Administration is targeted specifically to research that allows us to fulfill our mission. So in the areas of health claims, research that helps us evaluate health claims more effectively, research that allows us to speed up the process that we would conduct these evaluations, to allow these evaluations to take place more effectively, these are all appropriate subjects for FDA research.

Research that would specifically be done to support a health claim would not be appropriate for our research activities. It would have to be broadened out to a broader area. In some instances where there is wildly conflicting data on a health claim, where our ability to evaluate it would be in jeopardy because of this wide area, we might undertake a limited scope of research to help us reach a better conclusion.

Now, this is not to preclude activities associated

with some of our consortia, but again, we would still look at these very closely on whether or not they are helping us support our research mission. Now, in that light there are several opportunities for conducting research. Most effectively we do this through our consortia.

If there is a high enough area of interest in this, in a specific area, and we have advance function for it, we do put out calls for research proposals in different areas, and in fact several of these areas are anticipated to be elevated to a request for outside proposals in future years, depending on what Congress does in terms of our research funding. Please note that we do get our budgets on a yearly basis, so it's a little hard for me to predict what's going to happen next year until we hear from Congress.

DR. BENEDICT: Thank you. So now let us do what we just did, and open the floor for questions or comments from the advisory committee, and we'll do it the same way we've done in the past. Who would like to go first, if anyone?

[No response.]

DR. BENEDICT: Well, there's a first. So, seeing that there are very few questions--oh, Dr. Kuzminski, thank you very much for participating.

DR. KUZMINSKI: Thank you. I just didn't want to

be first, that's all.

Just a question to the committee on your recommendations there on pages 8 and 9 of the material. In the consideration of incentives, could you tease out more, perhaps, what the working group meant by "lead time concept"?

MS. RICHARDSON: I think it was building upon the experience that FDA had had before. I think when we--when the agency looked at oats, that if there was a way for industry to be given additional time between the--the approval of a health claim and the marketing of a product, so that that--especially for the group who had done the research, so that they could have a better marketing approach and they would not be economically disadvantaged, in that they had done the research but there would be other people who would garner the benefits of that research.

And this is especially when you're talking about products that are just sort of like worldwide, like oats, that if you're going to say that, yes, oats are a benefit, then everybody who does something with oats gets that benefit. Whereas if the group who did the research could have an extra amount of time, and they would be notified by FDA that, yes, this is going to be approved, and then they could jump out in the lead with their marketing approach, their advertising, and get an economic benefit to offset the

research costs that they had put in, that are going to benefit a large group of people.

DR. KUZMINSKI: Was there any discussion given to, as I interpret your response, was there any discussion given to a period of time of in-market exclusivity to the claim, if you will?

MS. RICHARDSON: Yes. The--

DR. KUZMINSKI: After, as I understand, when the agency approves something, that is say zero time, and the advantage in recommendation (c) on lead time would be that the submitter, the organization that did the research would be notified in advance of anyone else, any other party, and they would have more preparation time to get to market.

But what I'm addressing is, once they're in market, was there any exclusivity given to that party that did the research and took the risk, of being in market on an exclusive basis?

MS. RICHARDSON: That was also an option that was discussed, as well.

DR. APPLEBAUM: And just to add to that, we were getting involved in issues concerning free speech issues. How can you deny someone who has--you know, someone, you know, for example, a company that produces the same type of product, how can you prevent them from using something that's truthful and non-misleading? So there were some

issues that we had to deal with in that regard as well, as it related to exclusivity.

But Ms. Richardson is absolutely correct, it kind of boiled down to the fact that if I'm the petitioner, you have a good dialogue with FDA, and FDA said, "We will be publishing the final rule on this health claim July 23rd," and they're telling you several months back so you can have --and if I'm not characterizing it correctly--but essentially a competitive advantage in order--you did all that work. You should be getting some type of benefit from your labors.

DR. BENEDICT: Dr. Larsen has a comment, as well.

DR. LARSEN: The lead time concept, as presented by Keystone and as indicated by the working group, is something that it was felt FDA should explore under its statutory authorities whether it could or could not do that. The exclusivity, I think it was pretty much understood that there would have to be some other--some change in FDA's legal authority, and I hope I'm not mischaracterizing that, but exclusivity is not something that we have currently in the food arena. That exists on the drug side of the house.

DR. BENEDICT: Dr. Buchanan?

DR. BUCHANAN: As a representative of the agency that will be receiving this report, I have several questions or clarifications that are needed, or just comments on the

recommendations.

Specifically, recommendation (e) regarding public availability of the scientific data supporting the health claim, I would like some clarification on if this is really related to the question at hand, research incentives; (2) or if it is trying to convey to us that research in support of a health claim must be made public, to what extent does that include proprietary information? So that's the one.

The second one was just an area of sensitivity in recommendation (b). If the working group is asking for further clarification, indicating that further clarification of "emerging science" is critical, where the second working group says that they cannot reach consensus on that area, I think it sends very much of a mixed message in terms of the entire advisory committee.

MS. RICHARDSON: On Item (e), we had many discussions about providing the data to the public, and there were discussions about proprietary information, and it was felt that existing statutory language covered the concerns about proprietary language, if I'm remembering correctly.

This was also related to our concerns about the clarification about health claims and what is viewed as misleading and what is backed by significant scientific agreement. So I think, you know, we had two issues with

this: one, making sure that the consumer is getting information that they can rely upon; and, two, also addressing the concerns of the industry about the protection of their proprietary rights to information.

Rhona?

DR. BENEDICT: Dr. Applebaum.

DR. APPLEBAUM: I also remember from that conversation specifically this was coming--our work in this particular area was coming, you know, after discussion concerning Olestra. And if I recall correctly, there was one individual in particular whose responsibility it is to translate health and nutritional information to consumers.

And she was making the point that, you know, "There's a lot of information obviously surrounding the whole issue of Olestra and Olestra-containing foods that I, as a health professional consulting with consumers, don't have access to. Wouldn't it be nice if FDA had that type of repository, not necessarily in terms of privileged and confidential information per se, but just in terms of dietary recommendations or advice," if that's correct. I mean, that's my recollection.

In regards to the point also that Dr. Buchanan just mentioned, I think that harkens back to what Dr. Kuzminski stated, that there is going to be a point--we are essentially giving you--we were looking at this as if we