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COMMISSION AUTHORIZED

BEFORE THE
DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICES

In The Matter of	)	
	)	
	)	Docket No. 91-006P
Nutrition Labeling of	)	
Meat and Poultry Products;	)	
Proposed Rule	)	

Comments of the Staffs of the Bureaus of Economics and Consumer Protection of the Federal Trade Commission

February 25, 1992

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*These comments are the views of the staffs of the Bureaus of Consumer Protection and Economics of the Federal Trade Commission. They do not necessarily represent the views of the Commission or any individual Commissioner. Inquiries regarding this comment should be directed to Anne Maher (202-326-2987), Bureau of Consumer Protection or Alan Mathios (202-326-3495), Bureau of Economics.

I. INTRODUCTION AND SUMMARY

The United States Department of Agriculture (USDA) has issued proposed regulations for the nutrition labeling of meat and poultry products and has requested comments on various aspects of these proposals.[1] These proposals largely parallel those proposed by the Food and Drug Administration (FDA). The Nutrition Labeling and Education Act of 1990 (NLEA)[2] requires the Secretary of Health and Human Services, through the Food and Drug Administration (FDA), to make sweeping changes in the regulations governing food labels. Under a tight time schedule, FDA has published over 500 pages of proposed regulations for food labels implementing these requirements and has requested comments on many aspects of these proposals.[3] Based on our experience in analyzing the effects of information in consumer product markets and in considering regulations that address information issues, the staffs of the Bureau of Consumer Protection and the Bureau of Economics of the Federal Trade Commission (FTC) offer the following comments to assist USDA in its deliberations.[4]

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[1] 56 Fed. Reg. at 60,302-364.

[2] Pub. L. No. 101-535, 104 Stat. 2353 (1990)(codified in part at 21 U.S.C. §§ 343(i)(q),(r)).

[3] 56 Fed. Reg. 60,365-891 (1991)(to be codified at 21 C.F.R. Part 101, et al.).

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The FTC enforces sections 5 and 12 of the Federal Trade Commission Act, prohibiting deceptive or unfair practices in or affecting commerce.[5] One of the FTC's major responsibilities is to regulate national advertising, and historically, the FTC has considered the prevention of deceptive food advertising to be of utmost importance. At the same time, the FTC appreciates that food advertising can effectively provide useful nutrition information to consumers. The FTC has developed considerable expertise in understanding the roles of advertising and labeling in providing consumers with information,[6] and regularly considers such issues in food advertising. While we recognize that there are important differences between claims on food labels and those in advertising that may require different

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[5] 15 U.S.C. §§ 45 et seq. The FTC has jurisdiction over the advertising of food and has concurrent jurisdiction with FDA and USDA over the labeling of food. The FTC also has statutory authority to enforce a number of laws that mandate disclosure, including the Federal Cigarette Labeling and Advertising Act, the Truth in Lending Act, and the Energy Policy and Conservation Act, which regulates appliance labeling, and to enforce several laws relating to standard-setting, including the Wool Products Labeling Act and the Magnuson-Moss Warranty & FTC Improvement Act. In addition, the FTC has promulgated disclosure rules, such as the R-Value Rule, which regulates thermal insulation labeling, the Used Car Rule, which requires warranty disclosures, and the Care Labeling Rule, which regulates clothing labeling.

[6] Relevant FTC staff research includes: P. Ippolito & A. Mathios, Health Claims in Advertising and Labeling: A Study of the Cereal Market (1989); M. Lynch, R. Miller, C. Plott & W. Porter, Experimental Studies of Markets With Buyers Ignorant of Quality Before Purchase: When do 'Lemons' Drive Out High Quality Products? (1986); M. Frankena, M. Cohen, T. Daniel, L. Ehrlich, N. Greenspun & D. Keenan, Alcohol, Advertising, Consumption, and Abuse, (1985).

regulatory approaches,[7] we believe our expertise has a bearing on many of the issues the proposed regulations have addressed.

The regulations proposed by USDA largely adopt those proposed by FDA and this comment briefly summarizes the recommendations in our comment submitted to FDA.[8] We have attached as an appendix the FDA comment, which contains the analyses that serve as the basis for the recommendations presented below.

Our analysis is founded on the premise that consumers can improve their diets in two ways. First, they can switch from foods they are currently eating to the healthiest foods that are available (e.g., substituting vegetables and fruit for high fat desserts). Second, consumers can switch to more nutritious versions of the foods they are currently eating (e.g., substituting lean meats or chicken for fatty meats). If, as a recent survey shows,[9] many consumers are unlikely to give up their favorite foods in order to improve their diets, then switching to healthier versions of those favorite foods may prove especially important. This comment analyzes how the proposed

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[7] See Letter from Federal Trade Commission to Senator Slade Gorton, September 25, 1991.

[8] USDA's proposals differ from FDA's in some aspects. For example, USDA proposes to adopt voluntary labeling for many raw meat and poultry products, and proposes to adopt the additional defined terms "lean" and "extra lean."

[9] Survey of American Dietary Habits, The American Dietetic Association (1991) at 12.

regulations likely would affect consumers' ability to make more informed choices for both types of dietary change.

Another premise of this comment is that nutrient claims on a package's front label serve a different function than information on the label's nutrition panel. For example, a nutrition panel on the back of a package may provide useful information, but may be relatively ineffective in generating consumer interest in a new and innovative product. Truthful nutrient claims on the front of the package, however, may be helpful in alerting consumers to more healthful products they might consider in efforts to improve their diets. Thus, this comment also examines how the proposed regulations will help consumers find better products, and how this could affect innovation in food markets.

Much of what USDA proposes will provide valuable information to consumers. However, in some respects the regulations go beyond the NLEA statutes and may have unintended undesirable effects. We believe that USDA and FDA should consider changes that could enhance the regulations' effectiveness; these are summarized below and are discussed in more detail in the attached FDA comment.

A. Nutrient Content Claims

As required by the NLEA, FDA proposes definitions for terms that companies must use to characterize the level of a nutrient in a food.[10] The proposed definitions for absolute nutrient

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[10] See Section 3(b)(1)(A)(iii), 104 Stat. at 2361 (regulations for the implementation of 21 U.S.C. § 343(r)).

content claims (those that do not refer to other products), such as "low," "high" and "free," would provide clarity and certainty through the use of simple terms that highlight foods with the lowest (or highest) levels of various nutrients. These claims should be helpful to consumers attempting to identify such foods. However, definitions for absolute nutrient content claims are based on uniform standards that apply across all food groups, and most foods, including many that can help consumers improve their diets, would not meet the standards in these "low" and "high" definitions. Thus, we believe it is important that other terms be defined, so that foods that may be useful in dietary improvement but do not meet the "low" or "high" standards may have a simple way to feature their nutritional advantages.

USDA proposes to adopt FDA's definitions for these terms, but also proposes definitions for two additional descriptors, "lean" and "extra lean," for meat and poultry products. We agree with this approach. It avoids the potential for consumer confusion that might result from adopting different definitions for the absolute nutrient content claims established by FDA, yet allows firms to use other defined terms to identify the healthier types of meat and poultry.

The proposed regulations would prohibit manufacturers of food products that do not meet the "low" or "high" thresholds from simply featuring the amount of a nutrient on the labels for these products. Thus, for example, claims such as "50 calories per serving" or "6 grams of fat per serving" are prohibited on

the front label, even though this information appears on the mandatory nutrition label.

Such a prohibition would eliminate many factual claims on the front label that could help consumers make better food choices and increase producers' incentives to improve the nutritional composition of their products. For example, under the proposed regulations, virtually no lean meat and poultry products could point out the grams of fat or saturated fat, or milligrams of cholesterol on product labels. At a minimum, given that USDA proposes to define the additional terms "lean" and "extra lean," USDA should permit statements of the amount of a nutrient in a food for foods that meet the "lean" or "extra lean" thresholds. Optimally, we believe that the proposed regulations should authorize simple statements of the amount of a nutrient in any food, unless there is reason to believe that in a particular circumstance such a declaration is likely to mislead consumers.

Because few labels could feature simple, absolute nutrient content claims, relative claims (i.e., those that explicitly make comparisons with other products), such as "reduced" and "less" could become the most important way labels encourage dietary changes and stimulate innovation and competition on nutrition. The proposed regulations would require lengthy disclosures, requiring that all relative claims identify the comparison food and provide several pieces of information on the characteristics of the two foods.[11] While this approach would provide added

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[11] See 56 Fed. Reg. at 60,446.

information if such claims are made, the proposed disclosures appear to be so extensive that they may discourage many claims, especially those that compare products on several nutrient dimensions. Since the proposed disclosures, in part, duplicate information available in the mandatory nutrition panel, we question whether the added convenience of having the disclosures in two places on the product's label is worth the potential loss of the truthful claims likely to be discouraged as a result of including the information twice.

The proposed regulations for relative claims would also limit which products may be compared. The proposals aim to eliminate trivial or irrelevant comparisons by requiring that products achieve minimum absolute and percentage reductions before qualifying to make particular claims and by restricting the foods against which comparisons may be made.[12] These provisions may eliminate many objective comparisons that could help consumers select more nutritious foods and may, therefore, unnecessarily limit the flow of useful nutrition information to consumers. For example, the rules would not allow brand-to-brand comparisons (e.g., "our meat entree has 25% fewer calories than brand x"), comparisons across food groups (e.g., "our chicken without the skin instead of hamburger saves you 8 grams of fat"), or clear comparisons that are below the threshold amounts (e.g., "30 calories less than our regular sliced chicken breast which

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[12] See id. at 60,445-47.

contains 120 calories"). Such limitations are not required by the NLEA.

The proposed regulations contain an alternative approach to relative claims that would retain the minimum absolute difference requirement and most of the restrictions on the types of foods that can be compared, but eliminate the minimum percentage difference requirements.[13] We believe that eliminating the minimum percentage difference is an improvement, but remain concerned that the alternative proposal would still prohibit brand-to-brand comparisons, comparisons across food groups, and clearly stated comparisons for products where the nutrient difference between them is below the threshold amounts. We believe that relative claims that numerically disclose the difference between products in a nonmisleading way would meet the requirements of the NLEA. Such an approach would allow many more truthful claims than the current proposal, and still be effective in controlling deceptive and misleading claims.

Finally, the proposed regulations would require that "a nutrient content claim be, in type size and style, no larger than that of the statement of identity."[14] While we appreciate the concern that single nutrients can be overemphasized, we suggest

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[13] Under this alternative proposal the terms "reduced" and "less" could be used interchangeably. Use of either term would require that the food be compared with an accepted reference food and that the difference in the amount of the nutrient between the reference food and the product with the claim meet or exceed the "low" threshold for that nutrient.

[14] 56 Fed. Reg. at 60,424.

that this proposal be reconsidered. Style and format play an important role in effective marketing, which is critical to bringing information to consumers' attention, and to successful product innovation.

B. Health Claims

USDA states that it intends to publish a separate proposed regulation on health claims that would follow FDA's proposals in this area.[15] We agree with FDA that claims that truthfully relate the health reasons for better food choices are potentially very important to consumers, and that developing regulations for health claims are among the most important challenges in the efforts to redefine the regulations governing food labels. We believe, however, that there are a number of ways in which the proposed regulations could be modified to enhance their ultimate success. We are concerned that the proposed regulations are more restrictive than are necessary to comply with the NLEA's mandate and in several ways could prevent truthful health claims for many products whose consumption has been encouraged for health reasons by dietary authorities.

Under the proposed regulations, many foods may be labeled with relative nutrient content claims, but may not contain health claims on their labels. Nonetheless, FDA Diet and Health surveys[16] and the FTC staff's study of the cereal market[17]

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[15] See 56 Fed. Reg. at 60,321.

[16] These are national telephone surveys directed by the FDA in collaboration with the National Heart, Lung, and Blood (continued...)

indicate that relative nutrient claims alone are unlikely to educate consumers about diet and disease relationships. Moreover, FDA surveys show that even many highly educated consumers lack knowledge of the most basic diet-disease relationships. Consumers who do not know why a particular nutrient is important appear less likely to react to nutrient-content claims than consumers who understand the disease implications of the particular nutrient.

The proposed regulations would establish "disqualifying nutrient levels" for total fat, saturated fat, cholesterol and sodium. A product that exceeds the disqualifying level for any of these nutrients (on the basis of serving size, reference amount, or per 100 grams of food) could not bear a health claim about any diet-disease issue.[18] The regulations would further require that foods satisfy the definition of "low" or "high" for the nutrient involved in the claim.[19]

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[16](...continued)
Institute (NHLBI). For a detailed description of the survey, see Levy and Stephenson (1990), "Nutrition Knowledge Levels About Dietary Fats and Cholesterol: 1983-1988:" Draft, Division of Consumer Studies, FDA.

[17] Ippolito & Mathios, supra note 6.

[18] These levels implement the NLEA's requirement that health claims be used only for a food that does not contain any nutrient in an amount that increases to persons in the general population the risk of a disease or health-related condition that is diet related, taking into account the significance of the food in the total daily diet. 21 U.S.C. § 343(r)(3)(A)(ii).

[19] This additional provision does not appear to be required by the NLEA.

Many foods that can improve diet, including foods that dietary authorities recommend to consumers, could not meet the requirements for health claims, and thus labels for these products could not explain the health reasons for considering them. There are several aspects of the proposals that raise concerns, because they might undermine the goals that underlie USDA's health claims policy.

First, the proposed cholesterol disqualifying level appears to be based on behavioral assumptions about consumption patterns that are not borne out by USDA consumption data, so that health claims for lower fat meat and poultry products that would otherwise not be disqualified may be excluded unnecessarily.

Second, in addition to prohibiting health claims when the levels of particular nutrients exceed the disqualifying levels, the proposed regulations go beyond the NLEA and require foods that otherwise could bear health claims, also to meet the "low" or "high" thresholds for the nutrient in the claim. This proposed requirement would prevent producers of meat and poultry from explaining how their products could help consumers improve their diets. For example, this requirement prohibits the lowest fat meat and poultry products from having labels that explain why consumers should care about switching from high fat meats to lower fat alternatives. Under the proposals, the vast majority of meat and poultry products in the American diet will be prohibited from displaying messages about why consumers seeking dietary improvements should care about the fat, saturated fat,

and cholesterol content in the products they buy. Thus, a manufacturer could not explain why consumers should care about the reduction in fat and saturated fat that would occur if a consumer were to substitute chicken without the skin for hamburger. At a minimum, we believe USDA should permit foods that meet the "lean" or "extra lean" thresholds to have health claims on their labels, provided they meet the other requirements of the NLEA. Optimally, we would recommend that the regulations not require foods to meet the "lean" or "extra lean" threshold in order to bear a health claim. Instead, we suggest that the proposed regulations allow truthful comparative health claims for food substitutions that could help consumers improve their diets.

Finally, we recommend that the regulations treat references to dietary guidance from public health authorities (e.g., the National Institutes of Health and the Surgeon General) not as health claims, but as claims analyzed under FDA's general regulatory requirement that a label claim be truthful and nonmisleading. Public health organizations can be more effective in reaching consumers with valuable advice if products that fit into their recommendations are free to display this information on labels. Additionally, consumers are more likely to notice and appreciate the significance of dietary recommendations if they come from respected public health organizations.

In conclusion, we appreciate the opportunity to provide these comments, and we welcome questions and further discussion.