

Supporting Health through Healthier Food Choices: A Spotlight on Food Labeling in 2016

February 24, 2016 Suzie Trigg

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The FDA's Proposals on the Revision of the Nutrition and Supplement Facts Labels

In early 2014, first lady Michelle Obama announced upcoming changes to the FDA's Nutrition Facts label, and in March 2014, the FDA issued a proposed rule on the revision of Nutrition and Supplement Facts labels "to assist consumers in maintaining healthy dietary practices." The FDA's proposed rule, along with a supplemental proposed rule issued in July 2015 regarding added sugar, mark the first changes to the Nutrition Facts panel since the 2003 *trans fat* rulemaking and the first overhaul of the Nutrition Facts panel in the 20 years since implementation.

The FDA's proposed Nutrition Facts label changes have received extensive attention – and comment – from industry and the public alike. The food industry estimates that a significant amount of resources will be required to implement the changes, and many companies are concerned about maintaining their brand's image in light of increased serving sizes and the labeling of "added sugar." As to serving sizes, the FDA has attempted to more accurately reflect the amount that consumers eat in a sitting, rather than what consumers *should* eat in a sitting. Therefore, the total calories of many products, in addition to appearing in a larger font, will also appear to consumers to increase. As to added sugar, the industry has questioned the FDA's scientific basis for mandating such disclosure, particularly since there is no distinguishable difference between sugars in a food and added sugars in a food.

In short, while many aspects of the FDA's proposed updates to Nutrition Facts labels are hotly debated, it is likely that the FDA will interpret the comments that it has received to release a final rule in 2016. From there, it remains to be seen whether the FDA will allow two years for implementation or more time, as certain industry stakeholders have requested. Meanwhile, the food industry is already preparing for revisions, given the long lead time needed to reanalyze products and potentially reformulate certain products.

GE, GMO, Bioengineered – Which to Use or Not Use?

Vermont's hotly contested Act 120 – the nation's first significant law relating to the labeling of food produced with genetic engineering ("GE") – remains the subject of a lawsuit brought by the Grocery Manufacturers Association ("GMA"). GMA has argued that Vermont's law, which requires food product manufacturers to label foods sold in Vermont after July 1, 2016 as "produced with genetic engineering" (if containing genetically engineered ingredients), is unconstitutional and confusing to consumers. More recently, the FDA has released its own guidance revealing its position on the labeling of genetically engineered foods.

The FDA's Guidance on Voluntary Labeling Indicating Whether Foods Have or Have Not Been Derived from Genetically Engineered Plants reaffirms the FDA's position that the FDA does not view genetic engineering, alone, as a material fact that warrants mandatory inclusion on food labels. However, the FDA recognized the interest in this information and suggested the use of statements such as:

- "Not bioengineered."
- "Not genetically engineered."
- "Not genetically modified through the use of modern biotechnology."
- "We do not use ingredients that were produced using modern biotechnology."
- "This oil is made from soybeans that were not genetically engineered."
- "Our corn growers do not plant bioengineered seeds."

Notably, the FDA cautioned against the use of the term "GMO," as such term describes full organisms and not ingredients.

Labeling Foods as Natural

In response to requests from courts, the public, and industry, the FDA may be one step closer to more fully defining the parameters under which a food can be labeled as "natural." The FDA is currently seeking comments on the use of the term "natural" on food labeling. The comment period ends on May 10, 2016.

With significant changes to mandatory food labeling on the way, along with new developments with respect to voluntary labeling of foods, 2016 promises to be a year in which food companies should closely watch developments and weigh in to promote their interests.