



How to Inform the American Consumer of Healthy Food Choices—Are “Smart Food Labels” the Proper Tool to Achieve this Goal?

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Obesity in the United States continues as a growing epidemic and has the distinction as the second largest cause of premature death.¹ Nearly 129 million adults and nine million children have been considered overweight and obese.² Health costs associated with obesity range from “\$69 billion to \$117 billion on an annual basis.”³ Should the federal government step up and implement regulations that support the health and welfare of its citizens or should the consumer figure this out?

Apparently, the time is more than ripe for the federal government to establish specific rules that address how to accurately and clearly present label information concerning healthy food choices. The Food and Drug Administration (FDA) should develop these rules to assure that food manufacturers depict accurate non-misleading and informative labeling. FDA was established to protect the public health “by assur[ing] the safety, effectiveness and security of... our nation’s food supply.”⁴ The continued role of this federal agency is to ensure



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that the public obtains “accurate, science-based information they need [in order] to use... foods to improve their health.”⁵

A Brief Historical “Look Back” to Understand the Current Predicament

The federal government, such as the United States Department of Agriculture, (USDA) actually encouraged consumers to consume an overabundance of foods to deal with problems of malnutrition; however, consumers were not informed that overconsumption of some foods could lead to health problems.⁶ In the 1970s, the nutrition policy was expanded “to address *over*-consumption of food.”⁷ Evidence suggested that major health problems were significantly related to a person’s diet, specifically the overconsumption of foods endorsed by the government.⁸

Congress passed the Nutrition Labeling and Education Act (NLEA) in the 1990s, which was “a step in the direction of consumer protection.”⁹ Since the NLEA became effective “almost all food products must provide a ‘Nutrition Facts’ label”¹⁰ and surveys have revealed that “consumers seem to be paying attention to the labels.”¹¹ Even with these programs to regulate nutrition information, obesity and chronic disease continue to escalate in America because of the “important steps that the government has *not* taken.”¹²

“In the early years of nutrition policy, the federal government regulated the food supply, by statute and the exercise of delegated authority.”¹³ In 1937, Congress “authorized the Secretary of Agriculture to impose a uniform pricing mechanism to stabilize dairy prices.”¹⁴ Pricing was based on the fat content of milk and the higher the content the greater financial reward for farmers.¹⁵ The USDA imposed regulations “that encouraged consum-

ers to choose [the] high-fat varieties of [these] products.”¹⁶ USDA set the standards for the dairy products and was able to “influence individual dairy-food choices in a unique way, allowing only foods with certain characteristics to be labeled with the common names people recognized.”¹⁷

The food industry was provided governmental incentives to promote full fat.¹⁸ When it was discovered that these products were not entirely healthy, no incentives were established to encourage the industry to modify these products.¹⁹ In 1970, FDA started to transform “the standards in ways that accommodated the public interest in nutrition.”²⁰ For example, FDA discontinued mandating certain characteristics of foods and the focus shifted to “adequate labeling of food ingredients;”²¹ this was the first step towards increased consumer information as a means of regulating the food industry.²²

Industry Initiatives-Front of Package Food Labels

Smart Choice Food Label Program

The Smart Choices Food Labeling Program was initiated back in the late summer of 2009 by a board composed of “a diverse coalition of scientists, academicians, health and research organizations, food and beverage manufacturers, and retailers.”²³ The Smart Choices program placed a green checkmark label on a package of all approved products in order “to help shoppers easily identify smarter food and beverage choices.”²⁴ Manufacturers discovered that sales increase when labels are placed on products stating it is a “healthy option.”²⁵

The Smart Choice label criterion was developed by the board. However, the concern expressed is that the program will encourage consumers to “choose

highly processed foods and refined grains instead of fruits, vegetables and whole grains;”²⁶ however, the Smart Choice program has defended its plan by stating that the criteria is based on “government dietary and widely accepted nutritional standards.”²⁷ The Smart Choice endeavor was voluntarily postponed in the Fall of 2009. The basis for the deferment resulted from an FDA announcement regarding the “develop[ment] of standardized criteria on which future front-of-package nutrition or shelf labeling [would] be based.”²⁸

“Front of the Box Labels”

FDA commenced a study to develop new regulations for front of the box nutrition labeling and FDA opines that placing the nutrition label on the front of the box will increase consumer awareness.²⁹ The current front of the box labels that are used by the manufacturer are “designed to grab consumers’” attention by making a claim of health or nutrition on the front of food packages.³⁰ FDA issued a guidance for industry in the form of a letter to Industry about Front of Package Symbols.³¹ Earlier this year, FDA issued warning letters to 17 food companies for statements deemed misleading regarding the nutrition and health benefits of their products.³² Experts have confirmed that FDA’s decision to crack down on the manufacturers finally demonstrates that “the food label is ‘an essential weapon in the toolbox in the fight against obesity and other diseases.’”³³ This action marks the “largest crackdown on deceptive food labeling in more than a decade.”³⁴ It comes at a time when too many manufacturers “have exaggerated the health[iness] of their products, or even implied that their products contain ‘functional’ ingredients that provide drug-like protection against various diseases.”³⁵

Now that nondeceptive nutrition labeling is a priority to FDA, the agency has plans to “propose guidance regarding calorie and nutrient labeling on the front of food packages and... to work collaboratively with the food industry to design and implement innovative approaches to front of the package labeling, which can aid consumers to choose healthier foods.”³⁶ FDA has turned to the public to determine what is an effective front of the package label.³⁷ Specifically, FDA wants to ascertain: “The extent to which consumers notice, use and understand nutrition symbols on front-of-pack labeling of food packages or on shelf tags in retail stores; Research that assesses and compares the effectiveness of particular approaches to front-of-pack labeling; Graphic design, marketing and advertising data and information that can help develop better point-of-purchase nutrition information; How point-of-purchase information may affect decisions by food manufacturers to reformulate products.”³⁸

Regulation of Food Labeling

FDA is in charge of regulating claims relating to misleading food labels.³⁹ The question remains whether the labels containing more information are really helping Americans become healthier or just adding to the confusion.⁴⁰ Even the alleged health benefits of some of the products which are in full compliance with FDA’s standards are questionable.⁴¹ For instance, calorie counts on nutrition labels could contain up to 20 percent error.⁴² This gives rise to “health and nutrition claims on product packaging [] often unreliable sources of information.”⁴³

Organic Terminology as an Illustration

Issues exist pertaining to the mislabeling of “organic” foods.⁴⁴ In order to bypass USDA requirements, some manu-

facturers are labeling their products as “Organics.”⁴⁵ This type of labeling does not fall into the terms that are required for the labeling of “organic” because it is not the same term.⁴⁶ These products do not meet the criteria required to bear the organic seal; however, they are still perceived as such by the average consumer as organic.⁴⁷ These manufacturers may be deceiving the consumers and are profiting the same or more than those that are actually following the criteria.⁴⁸ If this practice is not regulated, there cannot be an incentive for the manufacturers to comply with the current regulations if they are going to profit by consumer confusion and deception.⁴⁹

Government Regulation of Food Labeling

The healthcare legislation signed into law earlier this year by President Obama requires all large restaurant chains, those with 20 or more stores, “to put calorie information on their menus and drive-through signage.”⁵⁰ The regulation has been put in place in hopes of deterring “Americans from eating high calorie items and [to] possibly begin to combat the obesity epidemic in the United States.”⁵¹ The law requires that FDA be put in charge of the regulation and enforcement of this effort.⁵²

There are arguments that this legislation will have no effect on the obesity rate. It is up to the public to “check out the calories and order accordingly.”⁵³ Researchers “discovered that people did [not] really care... and they did [not] stop ordering nightmares just because they were labeled as such.”⁵⁴ The people who enjoy the convenience of having the calorie count displayed in front of them are not the same people that Congress wants to reach, those that were glad to see the calories displayed were those “whose

nutritional consciousness has already been raised.”⁵⁵

The FDA is also currently seeking to limit the sodium contained in processed foods.⁵⁶ Members of Congress have termed the amount of salt in foods a “‘public health crisis’ that demands a swift response from government.”⁵⁷ Some manufacturers have conceded that the level of salt in foods is an issue that should be regulated by the government in schools and school settings; however, they insist it is beyond the scope of the government to regulate the level of salt in all public foods.⁵⁸

Perhaps one can learn from New York City initiatives. New York City was one of the first to regulate caloric disclosure in restaurants.⁵⁹ New York City has recently launched an initiative to reduce the amount of salt in packaged foods and restaurant foods by 25 percent over the next five years.⁶⁰ Several companies have thus far agreed to be a part of the city-wide anti-salt initiative.^{61,62} The high level of sodium that is being consumed by the average American “is a major contributor to high blood pressure, which in turn causes heart attack and stroke, the nation’s leading causes of preventable death.”⁶³ The major issue is that most of the salt that is consumed is already in the food when it is purchased, with this regulation the government can improve the health of America by regulating the levels of salt permitted in foods.⁶⁴

Is Nutrition Education the Answer?

A number of programs have been created to educate the consumer about the proper diet and better choice of products in terms of nutrition value. The weight-loss industry is profitable and has been estimated to earn about \$2.4 billion annually.⁶⁵ Most of these plans were created with an interest in combating the obesity

epidemic with private entities that have benefitted financially from the United States fight against obesity.⁶⁶

Some of these weight loss strategies have been found successful for those that have the perseverance to stick with the agenda. There are programs that create meal plans for their consumers and provide the food for their members to purchase. The food that is provided is essentially fast food for diets. It is food that is good for people on the go; which is the general makeup of the current American population. The question remains what happens when a person stops eating these designated foods? What happens when a person dines at restaurants and or slips back to their prior eating habits?

An established weight loss regime such as *Weight Watchers* and the television show *The Biggest Loser*, attempt to encourage people to change their lifestyles. These programs present people with ideas as to how they can substitute their foods for healthier versions that are just as satisfying and perhaps educate about the importance of exercise. Possibly these programs are in place to hopefully become a “permanent fix” and not just a band-aid on a problem.

Popular fad diets remain a fixture in the American quest to lose weight. These diets are generally published by private individuals and companies that have developed “fool-proof” ways for a person to drop pounds quickly. There are numerous plans that can improve a person’s diet by reducing the amount of “refined carbohydrates and refined sugars and encourage the consumption of lean protein, fiber, fruits, vegetables and good fat.”⁶⁷

Conclusion

FDA, in keeping with the legislative intent of the Federal Food, Drug and Cosmetic Act, needs to continue an

affirmative stance both in proactive and enforcement measures in order to protect consumers and ensure that manufacturers are forthright about product disclosure.⁶⁸ The government must act as a gatekeeper to ensure that responsible labeling regulatory measures are developed to keep abreast with the American lifestyle. This includes practical education initiatives. Congress must authorize adequate resources for FDA to monitor and regulate the industry to ensure that manufacturers adhere to new requirements including front of package labeling. The FDA needs to create regulations for food labels which adequately address these issues. The percentage of error needs to be reduced so that a consumer does not wonder about the disparity.

Additionally, the amount of added sweeteners in various forms remains problematic. Usually, these additives add little or no nutritional value to food. There is pending legislation to reduce the amount of salt in foods⁶⁹ and to tax sodas that contain high levels of sugar.⁷⁰ Undoubtedly, the elimination and/or reduction of these additives would in turn make the food consumed by the public healthier.

Admittedly, food habits are difficult to change; however, education is key to the reduction of obesity. It is imperative that nutrition education commence at a young age when it is simpler to adjust habits toward a healthier lifestyle.⁷¹ The healthcare industry should invest in the health of their clients to assist in decreasing the healthcare costs. There should be continued incentives for the public to seek dietary advice and to become active in a gym or health club. The public needs to be afforded extrinsic motivators in order to achieve a healthier lifestyle.

Congress could provide incentives to industry in the nature of subsidies and

tax reductions to those companies and business that do provide healthier foods to the public. The government should promote the production of healthier foods by providing subsidies to those manufacturers who for example provide low-fat products.⁷² In the long run, industry including farmers, and farmer’s markets that promote fruits and vegetables could profit.⁷³ Smart nondeceptive labels on packaged food are strides in the right direction. The health of our nation depends on regulation of products and it is up to Congress to step up to the plate with appropriate Congressional monetary authorization so that FDA can fulfill the continued theme of the Food, Drug and Cosmetic Act; that is, public protection of the health and welfare of the United States public. ▲

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8 Schaffer, *supra* at 387.

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10 *Id.*

11 *Id.* at 403.

12 *Id.* (emphasis in the original)

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16 *Id.* at 395.

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