

the safe zone:

by kristin eads, steven toeniskoetter and jennifer williams zwagerman

when labels fail

The FDA takes a closer look at the food industry to ensure labeling claims are backed with sufficient data.

Many food manufacturers and retailers have turned to labeling as a way to differentiate their products from those of the competition. Although this approach can be very effective, voluntary labeling brings its own sets of concerns and requirements to the table.

The Obama administration has signaled its intent to step up enforcement of existing labeling laws through increased FDA enforcement actions related to front of package (FOP) labeling. Just recently, 16 companies received warning letters from the FDA for alleged nutritional/health claims and/or other labeling violations. State attorneys general have also increased their scrutiny of labeling claims. A recent investigation by the Oregon attorney general prompted a major manufacturer to remove from its product a claim that the product helped boost immunity.

In addition to increased governmental scrutiny, there also has been a sharp increase in private lawsuits involving voluntary labeling. In this regulatory and political environment, companies must ensure that they thoroughly research and comply with all applicable labeling requirements before adding anything to product labels.

SUPPORTING CLAIMS

FOP claims are voluntary – meaning a food company is not required to provide any such information. If a company decides to include such information, however, it needs to comply with the relevant regulations. The FDA regulates both nutritional claims (e.g. “light,” “low

sodium,” “good source of fiber”) and health claims (claims that a particular food or ingredient helps prevent cancer, lowers cholesterol, etc.). In addition to specific claims, a recent trend has been the use of symbols or “scoring” systems to relay nutritional information with the stated goal of helping consumers identify “healthy” products. However, with numerous programs – all with different standards and requirements – there is concern that consumers will become confused, if not misled, and ultimately will avoid reading the required and complete nutrition labels.

One such program was recently withdrawn after substantial criticism from both the FDA and state agencies. The

FDA has begun examining these systems and is expected to eventually publish regulations or guidelines. To the extent that companies wish to make such claims or use such labels, they should ensure that all claims are supported by the necessary data and be aware of any contradictory data that may exist. Despite the economy, sales of organic food products have continued to grow. Food companies considering utilizing an organic label should be aware that “organic” may only be used on products certified as such by a USDA-approved certifying agency. Even food products regulated by the FDA must comply with the USDA organic program standards. These



“Food companies wishing to use local labeling should assure that their products comply with all program requirements.”

products must be grown or raised under strict guidelines. Similarly, food companies seeking to assert animal production claims, such as “cage free,” “free range” or “grass fed,” should comply with USDA regulations that cover the use of such terms on labels.

ALL NATURAL

Another popular labeling term is “natural” or “all natural.” While the FDA has published policies relating to the use of this term, it has yet to establish any binding regulations as to how the term can be properly used.

Food companies should be aware that use of this term is not without some risk, particularly in the area of consumer fraud claims. For example, several major beverage and food manufacturers have had to defend class action suits over their use of the “all natural” claim on products containing high-fructose corn syrup. Unless a product contains only ingredients, which are naturally occurring and minimally processed, there continues to be some risk in using the natural label. Companies considering using the natural label need to carefully examine all ingredients and their source, including any processing that may occur prior to inclusion in a product.

It also is important to be aware of recent regulatory and legal actions to see what signals are being sent regarding use of this label.

LOCAL LABELING

With the local foods or “locavore” movement continuing to gain traction, companies may consider using a voluntary local label. These label additions usually consist of logos or phrases trademarked by a state agency, which the agency licenses for use on qualifying products. A recent review found at least 39 states have some form of voluntary local labeling program.

Some examples include “Jersey Fresh,” “Go Texan” and “Make Mississippi Mine.” Some programs have strict statutory requirements that food companies must follow while others have very loose guidelines.

For instance, some programs allow use of the label for “value-added,” or processed food products, so long as they are manufactured within the state. Other stricter programs only allow use of the logo on processed foods where at least 75 percent of the item’s ingredients come from the state. Food companies wishing to use local labeling should assure that its products comply with all program requirements, especially those relating to processed or manufactured foods.

OTHER MENU LABELING

Food manufacturers are not the only ones who need to worry about labeling – increasingly, restaurants and other food retailers are the

focus of labeling regulations. One such type of regulation is calorie count disclosure on menus.

The recently passed healthcare bill now requires calorie count disclosure on certain chain restaurants’ menus. Some restaurants may choose to voluntarily disclose additional nutritional information to its customers.

But beware: one national chain faced several class actions when tests showed its food products as served actually contained more calories than indicated on its menu. Recent private lawsuits have also been filed based upon voluntary health and nutrition claims placed on menus. Restaurants seeking to disclose



calorie or other nutrient information should institute policies to assure uniformity in size and nutrient content of servings, as well as consider appropriate written disclaimers.

SEEKING ADVICE

Upcoming rulemaking and legislation, as well as increasing consumer awareness,

indicate that already complex labeling regulations will undergo further evaluation and changes. Intense scrutiny by consumer groups, plaintiffs' attorneys, and government agencies has made voluntary labeling an increasingly risky endeavor.

For these reasons, we strongly encourage companies to seek the advice of

counsel when considering any voluntary changes or additions to their labels. **FD**

Kristin Eads, Steven Toeniskoetter and Jennifer Williams Zwagerman

specialize in agribusiness and toxic tort litigation as members of the food, agricultural and biofuels practice group at Faegre & Benson law firm. They can be reached at 612-766-7000.

TRACKING YOUR FOOD

Traceability holds key stake in food safety concerns.

With seemingly regular news of contaminated food products and widespread recalls, consumers and advocate groups are understandably growing increasingly vocal about the need for greater oversight and protection in the food industry. Past reports about peanuts and cookie dough have only magnified how a misstep in a single stage of the production chain can multiply quickly in a global marketplace. One critical component in implementing stronger food safety measures lies in traceability.

Understanding this early on, Pacific Seafood developed and implemented a proprietary tracking system in 2002 to address food sourcing questions head on. Pacific Seafood's Automated Production Control[®] system complements the company's stringent quality control measures by tracing the seafood that passes through its facilities.

In the event that a problem arises with a particular batch of fish, Pacific Seafood can quickly isolate affected product, accelerating a recall process that will protect consumers. The fish is tracked the moment it is unloaded from a fishing vessel and weighed for processing. It is then tracked through processing, packaging and delivery. The company stores a range of information under unique identification numbers clearly marked on the final product.

A product's identification number provides the key to critical information: data within a moment's reach includes which boat the product originated from; when and where it was unloaded; the equipment and people in contact with the product; when it went into produc-

tion; and where it was shipped.

Along with assistance in potential product recalls, the system provides additional quality control, highlighting areas in which the processor can improve operations or quality assessment.

In developing its tracking system, Pacific Seafood took a holistic approach, incorporating company priorities and industry regulations – both current and anticipated – into the design. With control built in at every point, the system is critical to efficiently meeting food safety regulations. Consistent with the company's culture of embracing change, the system can be adapted to accommodate new regulations as they are introduced to benefit consumers, the environment and the resource.

In addition to furnishing a certain element of protection for consumers, the traceability system also provides a level of protection for Pacific Seafood. With clear ability to identify a product's source, Pacific Seafood demonstrates its commitment to responsible use of the ocean's resources and builds trust with consumers, solidifying its position as a viable source of quality protein.

Food safety concerns will not abate any time soon, nor will the need for consumers to know the source of their food. To continue to thrive and protect consumers and their respective industries, producers must be prepared to offer assurance of traceability among their food safety measures.

Frank Dulcich is president and CEO of Pacific Seafood. For more information, visit www.pacseafood.com.

