



# *California consumers* **AND food** *manufacturers* **AWAIT KEY** **GOVERNMENT** **RULES ON** *food labeling.*

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**T**he Food and Drug Administration (FDA) and the United States Department of Agriculture (USDA) are expected to soon issue new regulations regarding the advertising and labeling of food products. California manufacturers will have to make sure that they not only do not

run afoul of those new rules, but that they comply with California's strict false advertising law.

The FDA's reconsideration of the definition of "healthy" came about after it sent the KIND company a warning letter in 2015 for its use of the word "healthy" on its nutritional bars, which

happen to contain nuts. KIND objected to the warning letter by stating that the FDA's definition of "healthy" is outdated and that its products do not meet that definition only because they contain nuts, which are generally regarded as healthy. The FDA then agreed to revisit its definition of "healthy" and to delay enforcement under the old definition. (Unfortunately for KIND, however, the FDA letter precipitated the filing of three separate class action suits based on the claim that KIND was violating the FDA's "healthy standard.").

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The FDA currently permits the use of “healthy” in labeling depending on the proportions of fat, sodium, cholesterol and beneficial nutrients in a product. Although manufacturers, dieticians, consumer advocacy groups, and even the FDA all seem to agree that the current definition and regulation of the word “healthy” in labeling is outdated,<sup>1</sup> what it should be remains open to debate. For instance, should “healthy” be a nutrient component-based description or a food component-based claim? Should calories matter? Should products that include any added sugar be excluded from the “healthy” ambit? Food industry observers await the FDA’s clarification of this and of the term “all natural.” Indeed, the fate of countless false labeling claims hangs in the balance, as most courts, especially in the Northern District of California (also known as the “Food Court”) have stayed cases involving false claims of “all-natural” in anticipation of the FDA issuing a definition of that term.<sup>2</sup>

According to the FDA, 77% of U.S. adults reported using the Nutrition Facts label always, most of the time, or sometimes when buying a food product.<sup>3</sup> Most recently, the FDA announced that it will delay implementation of the requirement that food manufacturers use a revamped Nutrition Facts label. That new label will change how certain nutrition components, such as sugar, fiber and vitamins are presented, and was to be required for manufacturers with annual sales of more than \$10 million by June 26, 2018. However, many manufacturers expressed concern about the deadline given that the USDA is expected to soon issue new labeling requirements for genetically modified organism (GMO) products.

In California, manufacturers also have to contend with perhaps the strictest false-advertising statute in the country, the California False Advertising Law. This law prohibits companies from making any statement

that is untrue or misleading, and that is known, or by the exercise of reasonable care should be known, to be untrue or misleading. A statement is “untrue or misleading” under the False Advertising Law if “members of the public [are] likely to be deceived by the advertising.” *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 120 (2009). This standard covers not only statements that are false, but statements “which, although true, [are] either misleading or which ha[ve] a capacity, likelihood or tendency to deceive or confuse the public.” *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1025-26 (N.D. Cal. 2012). In applying this standard, courts consider whether a reasonable consumer is likely to be deceived. *In re Vioxx Class Cases*, 180 Cal. App. 4th at 130.

However, an advertisement that is not literally true will not incur liability if it qualifies as “mere puffery.” For example, claims “that a computer is ‘ultra-reliable’ or ‘packed with power’ say nothing about the specific

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<sup>1</sup> Gasparro, Annie. “FDA Seeks to Redefine ‘Healthy.’” *The Wall Street Journal*, May 10, 2016. Accessed July 17, 2017. <https://www.wsj.com/articles/fda-seeks-to-redefine-healthy-1462872601>.

<sup>2</sup> In at least one case, a judge has decided not to wait—certifying a class-action lawsuit regarding the allegedly misleading advertisement of cheese. See *Morales et al v. Kraft Foods Group, Inc. et al.*, No. 2:14-CV-04387 (C.D. Cal.).

<sup>3</sup> Lin, Chung-Tung Jordan, Zhang, Yuanting, Carlton, Ewa D., Lo, Serena C., “2014 FDA Health and Diet Survey,” *fda.gov*. Center for Food Safety and Applied Nutrition Food and Drug Administration, May 6, 2016. <https://www.fda.gov/downloads/food/foodscienceresearch/consumerbehaviorresearch/ucm497251.pdf>. (July 16, 2017).



characteristics or components of the computer” and merely constitute non-actionable puffery. *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 855 (N.D. Cal. 2012). Similarly, a fast-food restaurant would not be liable under the False Advertising Law for boasting of its “high-quality ingredients, innovative recipes, and time-tested cooking methods” because such statements constitute nonspecific puffery that is unlikely to deceive or mislead a reasonable consumer. *Fraker v. KFC Corp.*, 06-CV-01284JMWMC, 2007 WL 1296571 (S.D. Cal. Apr. 30, 2007).

Misleading food labeling can also be considered a violation of Section 17200 of California’s Business and Professions Code, which prohibits any “unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” Additionally, plaintiffs typically bring false food labeling claims under the Consumers Legal Remedies Act, California Civil Code sections 1750 through 1784 (“CLRA”), and every State, as well as the Federal government (through the Lanham Act) has prohibited false advertising. This means, of course, that there is a real possibility in any jurisdiction that a jury could find a marketing statement to be misleading.

For example, in 2010, a Federal jury in Los Angeles found that juice maker Welch’s violated the Lanham Act by intentionally misleading consumers with false and deceptive labeling by saying that its juice was a “100% Juice White Grape Pomegranate” product. In reality, each 64 ounce bottle contains over 63 ounces of apple and white grape filler juices, plus additional color and flavor enhancers. Less than a single ounce per bottle is actually pomegranate juice. During the trial, competitor POM Wonderful successfully argued that the product’s labeling, which features large, prominently placed images of pomegranates on the front label, was intentionally designed to mislead consumers into believing the product contained a substantial quantity of pomegranate juice. (In an interesting side note, however, the jury found that POM was not injured by the alleged deception).

Updating the definitions of “healthy” and “natural” could have a profound effect on the food industry, especially regarding GMOs. Industry groups are already advocating for what might qualify as “healthy” or “natural” under the new yet-to-be-issued guidelines. The International Tree Nut Council Nutrition Research & Education Foundation has

asked the FDA for permission to use qualified health claims for nuts and heart disease and to categorize Brazil nuts, cashews, and macadamias as “healthy.” The Egg Nutrition Center has proposed to the FDA that eggs, a high protein, nutrient dense food, be listed as “healthy” under any new criteria.

Regardless of what the FDA chooses to include in its definitions, its rulings will directly impact how manufacturers advertise. Companies will need to make sure that they are not only in compliance with any new FDA guidelines, but that they remain in compliance with all State and Federal false labeling and advertising laws, especially in a consumer-savvy venue like California. ■



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