

E-ALERT | Food & Drug

October 24, 2011

IOM RELEASES REPORT ON FRONT-OF-PACKAGE NUTRITION LABELING

On October 20, 2011, the Institute of Medicine of the National Academies (IOM) released a report on “Front-of-Package Nutrition Rating Systems and Symbols: Promoting Healthier Choices.”¹ The report, commissioned by FDA, USDA, and the CDC in response to a congressional directive, is the culmination of a two-phase review of this issue by the IOM’s Committee on Examination of Front-of-Package Nutrition Rating Systems and Symbols (Committee).² The report concludes that there is sufficient evidence to counsel a fundamental shift in strategy with respect to front-of-package (FOP) labeling practices, recommending that a new system move beyond simply informing consumers about nutrition facts, as does the industry-sponsored “Facts Up Front” system currently being rolled out, towards one that provides clear guidance on the healthfulness of foods and beverages. The IOM Committee held an hour long public briefing to describe the report and respond to questions. This client alert discusses key points from the report and the briefing.

Report Recommendations

According to the Committee, evidence suggests that FOP systems that are simple and easy to understand do encourage healthier product choices, particularly in settings where consumers are making decisions quickly, such as in grocery stores with many options before them.

The Committee describes a successful FOP symbol system as being:

- **Simple:** not requiring specific or sophisticated nutritional knowledge to understand the meaning
- **Interpretive:** nutrition information provided as guidance rather than as specific facts
- **Ordinal:** offering nutritional guidance by using a scaled or ranking system
- **Supported by communication:** with readily remembered names or identifiable symbols

The Committee highlights the EPA/DoE Energy Star® program as an example of a successful government labeling system that serves to illustrate these four characteristics.

Specifically, the Committee recommends that FDA and USDA develop, test, and implement a single, standard FOP symbol system to appear on all food and beverage products, in place of other systems already in use. The system should include: (1) calories, expressed in common household measure serving sizes, and (2) a display of zero to three nutritional “points” reflecting the per-serving content for saturated and *trans* fats, sodium, and added sugars. This could be done through stars, check marks, or some other simple standard symbol that would appear in a consistent location across

¹ The report is available on IOM’s website at <http://www.iom.edu/Reports/2011/Front-of-Package-Nutrition-Rating-Systems-and-Symbols-Promoting-Healthier-Choices.aspx>.

² For additional information see our previous client alerts: [IOM Committee Holds Public Workshop Regarding Front-of-Package Labeling Systems](#) (Apr. 12, 2010); [FDA Requests Comments and Information on Front-of-Package Labeling Systems](#) (Apr. 29, 2010); [IOM Releases Phase I Report on Front-of-Package Nutrition Labeling](#) (Oct. 14, 2010); and [IOM Holds First Phase II Committee Meeting on Front-of-Package Nutrition Rating Systems and Symbols](#) (Oct. 29, 2010).

products. The Committee recommends that the symbol should appear on all grocery products, allowing consumers to compare food choices across and within categories.

The Committee recommends that the FOP symbol be based upon saturated and *trans* fats, sodium, and added sugars because these components of the diet are most linked to chronic diseases. Although IOM's Phase I report did not suggest inclusion of added sugars, Committee members stated that it was now appropriate to include them for greater alignment with the 2010 Dietary Guidelines for Americans. The Committee further recommends that the approach and criteria for evaluating nutrients to limit in an FOP symbol system should be transparent consistent with FDA's labeling regulations, although criteria will need to be established for added sugars, which are not addressed in FDA's current nutrition labeling regulations.

As proposed by the Committee, the process for evaluating the nutrients in an FOP system would occur in two steps:

1. Eligibility. If a food or beverage contains any one of the critical nutrients – saturated and *trans* fats, sodium, and added sugars – in amounts above a threshold limit, the product would not be eligible for earning FOP “points” and would display only calories per serving.
2. Points. If one, two, or three of the nutrients are present at low enough levels to meet the qualifying criteria, the product would earn one, two, or three points. As examples, the Committee notes that 100 percent whole wheat bread could earn all three points, while graham crackers could earn two points for fats and sodium, while an oat and peanut butter bar could earn one point for sodium.

The Committee recommends that implementation of the new FOP symbol system include a multi-stakeholder, multi-faceted awareness and promotion campaign involving ongoing monitoring, research, and evaluation. The Committee believes the proposed system would change behavior on multiple levels. In addition to altering consumer behavior, the nature of the system could cause manufacturers to reformulate products to achieve better ratings. The system could also prompt retailers to change displays to highlight healthier products.

Next Steps and Potential Implications

IOM's recommendations are not binding. FDA and USDA ultimately will need to determine whether they have the resources and political will to push for a single FOP system along the lines recommended by the Committee. Given that the recommended system is substantially different from the industry-favored “Facts Up Front” program, the agencies could likely expect significant opposition to such a system.

The Committee's recommended system also stands at odds with many long-held views regarding FOP labeling and nutrition communications more broadly, in that it makes “good food/bad food” distinctions rather than seeing a reasonable role for most foods in a healthy diet, and in that it purports to tell consumers what to choose rather than providing them information from which they can choose products that are right for them.

Further, some nutrition and public health policy questions remain unresolved by the Committee's recommended system. Most notably, the system does not account for nutrient density or nutrients to encourage, so non-nutritive foods such as non-caloric beverages that contribute no nutritional value to the diet could score higher than calcium-rich low-fat milk or vitamin C-rich 100 percent orange juice. The system also would not reflect which points are for which nutrients, so a person concerned about sodium intake but not about fat or sugars would not know whether a product with

only one or two points received them for their sodium, fat, or sugar content. By contrast, a fact-based system like “Facts Up Front” provides nutrient-specific information. Of course, such a consumer could obtain nutrient-specific information from the Nutrition Facts panel, but that seems to undermine the purpose of meaningful FOP labeling.

We will continue to monitor issues relating to FOP labeling and keep our clients updated about significant developments.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our food & drug practice group:

| | | |
|----------------------------|--------------|--|
| Peter Barton Hutt | 202.662.5522 | phutt@cov.com |
| Miriam Guggenheim | 202.662.5235 | mguggenheim@cov.com |
| Eugene Lambert | 202.662.5422 | elambert@cov.com |
| Clausen Ely | 202.662.5152 | cely@cov.com |
| Jeannie Perron | 202.662.5687 | jperron@cov.com |
| Alissa Jijon | 202.662.5341 | ajijon@cov.com |
| Melissa Whittingham | 202.662.5354 | mwhittingham@cov.com |

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2011 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.