

E-ALERT | Food & Drug

October 25, 2010

INSTITUTE OF MEDICINE HOLDS WORKSHOP ON LEGAL STRATEGIES IN CHILDHOOD OBESITY PREVENTION

On October 21, 2010, the Institute of Medicine (IOM) held a workshop to explore legal strategies to aid in the prevention of childhood obesity. The workshop was run by the Standing Committee on Childhood Obesity Prevention, which IOM formed in 2008 to serve “as a focal point for national and state-level policy discussions about obesity prevention among leaders and experts in this field, in government, and from other related disciplines.”¹ The workshop consisted of five panels that discussed food marketing and labeling practices, improving food sales and restaurant practices, using the law to increase physical activity in schools and communities, using litigation to “make change,” and state and local government obesity-prevention strategies.

The panels featured a number of government officials and delegates from industry and consumer groups. Attached is a list of the composition of each of the panels.² Some notable positions from the day-long workshop included:

- **David Vladeck**, Director of the **Federal Trade Commission’s Bureau of Consumer Protection**, discussed coming FTC actions directed at obesity prevention. In the summer of 2011, the agency expects to release an update to its 2008 report on marketing food to children and adolescents.³ The 2011 report will analyze data gathered from companies in 2009, with the intent of measuring the success of industry initiatives to self regulate. The report will not, however, attempt to establish a causative link between marketing and obesity. Vladeck took the position that the agency does not need to demonstrate this level of causation to bring a case based on unfair or deceptive advertising, although he noted that some have taken the position that the lack of causative harm is a potential defense to such cases, and the lack of harm could be relevant to the agency’s decision to move forward with enforcement action. Vladeck also noted that the Interagency Working Group on Food Marketed to Children Ages 2-17, of which FTC is a member, expects to release a Federal Register notice before the end of the year laying out proposed guidelines for marketing. Vladeck stated that the proposed guidelines will not be mandatory, and the working group will seek further comments from stakeholders. Vladeck explained that the guidelines will seek to set a validated and consistent standard for the industry to adopt.⁴

¹ IOM, Committee on Childhood Obesity Prevention, <http://www.iom.edu/Activities/Children/ChildObesPrevention.aspx> (last visited Oct. 22, 2010).

² A copy of the workshop agenda can be found at <http://www.iom.edu/~media/Files/Activity%20Files/Nutrition/FoodForum/PublicAgenda.pdf>. IOM has not made slides and other workshop materials publicly available.

³ FTC, Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation (2008), available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf>.

⁴ For our client alert regarding the FTC’s December 2009 forum on food marketing to children ages 2-17, click [here](#).

- **Barbara Schneeman**, Ph.D., Director of the **Office of Nutrition, Labeling, and Dietary Supplements** at FDA, discussed FDA’s current and planned actions to address childhood obesity. Dr. Schneeman indicated that she expects the agency to release a final guidance document in December 2010 on the menu labeling obligations established by section 4205 of the Patient Protection and Affordable Care Act.⁵ In addition, the agency is considering updates to the nutrition facts panel, with an eye towards revising Daily Values and possibly enhancing the prominence of nutritional information. FDA is also looking at dietary guidance statements, which the agency affirmed in a 2007 “Dear Manufacturer” letter can be made without review or authorization, provided that they are truthful and non-misleading.⁶ Dr. Schneeman stated that the agency is interested in providing greater clarity regarding the definition of a dietary guidance statement and discussing when these statements are appropriate. Finally, Dr. Schneeman discussed FDA’s ongoing evaluation of front-of-package (FOP) labeling. The agency is studying a number of potential FOP labeling methods, including statements of nutrient content (e.g., “contains 550 calories per serving”) and proposals that incorporate symbols, such as the United Kingdom’s “traffic light” labeling. Producing guidance regarding FOP labeling is a priority for Commissioner Hamburg, although Dr. Schneeman could not commit to a timeline for agency action.
- **Michael Landa**, Acting Director at FDA’s **Center for Food Safety and Applied Nutrition (CFSAN)**, discussed FDA’s response to several questions IOM directed toward the agency. Most notably, Landa reiterated CFSAN’s discomfort about qualified health claims. He also indicated that it is difficult, under current authorities, for the agency to evaluate “structure/function claims” for foods because manufacturers are not required to clear these statements with the agency, and FDA lacks compulsory process powers to obtain the manufacturer’s substantiation for the claims.
- **Scott Faber**, Vice President for Federal Affairs for the **Grocery Manufacturers Association**, discussed initiatives that member companies have undertaken to reformulate products and change marketing practices. He also discussed a literature review released yesterday evaluating the link between television advertising and childhood obesity. Like IOM’s 2006 report evaluating the same question, the review concludes that there is insufficient data to establish a causative relationship between television advertising and adiposity.⁷ **Joan Rector McGlockton**, Vice President of Industry Affairs and Food Policy at the **National Restaurant Association**, discussed various obesity initiatives underway in the restaurant industry, including consideration of adopting a uniform, industry-wide standard for labeling healthy menu options.
- **Michael Jacobson**, Ph.D, co-founder and Executive Director of the **Center for Science in the Public Interest (CSPI)**, discussed CSPI’s litigation-related activities regarding obesity. Dr. Jacobson emphasized that he did not view litigation as sufficient, alone, to solve the obesity problem. He did indicate, however, that CSPI plans to file suit against McDonald’s within the next month over the company’s use of toys to market Happy Meals. In a June 2010 demand

⁵ For our client alert describing the draft guidance regarding implementation of the new federal menu labeling requirements, click [here](#). Our client alert describing the legislation is available [here](#).

⁶ FDA, CFSAN, Guidance for Industry and FDA: Dear Manufacturer Letter Regarding Food Labeling (2007), available at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm053425.htm>.

⁷ J. Howard Bealles III, Television Advertising and Childhood Obesity (2010), available at <http://www.gmaonline.org/publicpolicy/docs/obesity/Beales%20Review%20of%20Recent%20Studies.pdf>.

letter, CSPI claimed that this practice is an unfair and deceptive marketing practice in violation of state consumer protection laws.⁸

- **William Sorrell, the Attorney General of Vermont**, spoke on a panel regarding state and local strategies to prevent obesity. Attorney General Sorrell indicated that his office, as part of its Obesity Initiative, plans to release a report on November 15 detailing policy options to curb obesity. He commented that it will likely contain recommendations regarding a sugar-sweetened-beverage tax and a multiplier discount for food stamp participants to purchase healthy items. Attorney General Sorrell also indicated that the obesity issue is gaining the attention of state attorneys general nationwide.

The workshop proceedings reflect the growing attention to the issue of obesity at all levels of government. While some policy proposals would promote the types of voluntary industry initiatives already underway or encourage consumers to make healthy food choices, others are more aggressive and would seek to control obesity by potentially limiting consumer choice. Covington & Burling LLP closely monitors legal and policy developments that could impact the food industry and will keep clients apprised of these matters. We would be happy to discuss any question regarding the workshop or other nutrition-related initiatives.

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

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⁸ Letter from Stephan Gardner, Litigation Director, CSPI, to Jim Skinner, Vice Chairman, CEO, and President, McDonald's Corporation (June 22, 2010), available at <http://cspinet.org/new/pdf/mcdonalds-demand-062210.pdf>.