

FDA Stirs Debate Over Labeling Authority With Sugar Rule

By **Emily Field**

Law360, New York (May 25, 2016, 8:49 PM ET) -- The U.S. Food and Drug Administration last week unveiled a sweeping overhaul to nutritional labels that it says will help shoppers to make healthy choices, but attorneys expect challenges to the new rule and the agency's authority to require food companies to list how much sugar is added to their products.

The added-sugar requirement — part of the agency's recent revamp of the nutritional facts panel for packaged foods, which hadn't been updated in two decades — reflects current thinking that excess sugar consumption is at least partially to blame for the country's skyrocketing obesity rates and associated health problems, attorneys noted.

The FDA believes that consumers want to see the sugar content of foods broken down into what's added to a product, said Lawrence Reichman of Perkins Coie LLP.

The new label requirements also include a percent daily value of added sugar, as well as the amount in grams.

"As I recall, [the government found] that the average amount of calories in diet from added sugar is 16 percent. It's a ton," Reichman said.

A bottle of Coke would now come in at over 100 percent of the daily value for added sugar, he noted.

By contrast, the World Health Organization in March recommended that added sugar should comprise no more than 10 percent of a daily diet.

The underlying policy driving the FDA's mandate is that the excessive consumption of added sugar is a public health concern, said Robert Hibbert of Morgan Lewis & Bockius LLP.

"And implicit in that requirement is that manufacturers may want to adjust their formulations to have those numbers be more attractive to the consumer," Hibbert said.

But attorneys also questioned the government's authority to require companies to include information about added sugars to nutrition labels, saying industry challenges to the new rule will likely be premised on the argument that the government is infringing companies' First Amendment rights.

"There will be those who assert that FDA has not met its First Amendment burden to justify the

compelled commercial speech," Miriam Guggenheim of Covington & Burling LLP said. "A number of recent cases have addressed which are the right standards [to compel commercial speech] but that remains even now a matter of controversy."

When the FDA issued the nutritional panel changes, it based its authority to do so in a U.S. Supreme Court decision from the 1970s, *Zauderer v. Office of Disciplinary Counsel*, said Michael Walsh of Strasburger & Price LLP.

Under that standard, the government can compel commercial speech as long as it's factual and not controversial.

However, the agency failed to include in its analysis a decision last year from the D.C. Circuit that found that such a standard was limited to compelled speech in advertising, Walsh said.

The panel in a 2-1 ruling in *National Association of Manufacturers et al. v. Securities and Exchange Commission et al.* upheld its 2014 decision that struck down part of a U.S. Securities and Exchange Commission requirement that public companies disclose whether their products are free from certain conflict minerals. The panel said that *Zauderer* didn't apply in that case because the SEC has recognized that its rules have nothing to do with advertising or point-of-sale disclosures, while *Zauderer* dealt with compelled speech for advertising purposes.

"It's very tough for agency in this realm, but I think [the FDA's] approach to the First Amendment is disingenuous at best," Walsh said.

Attorneys saw the added-sugar label change as part of an overall social trend against the consumption of sugar and away from pinning the obesity epidemic on the overconsumption of fat, as recognition has grown that some fats are actually part of a healthy diet.

"To some extent, what we focus on [in] this label is culturally driven," Nathan Adams of Holland & Knight LLP said.

But just as fat is no longer demonized, the tide could turn again on sugar, attorneys said, noting that industry may argue that the FDA's added-sugar requirement isn't based on solid science.

"This is more big government, Big Brother pointing a finger at the latest bogeyman," said David Wallace of Herbert Smith Freehills LLP.

There's apparently no difference in how the body processes sugar added to foods and naturally occurring sugars like fructose and lactose, several attorneys said.

"Is it true that added sugar will have any statistically significant impact on the general health of consumers? I think the science on that doesn't exist," Walsh said.

The added-sugar information may also confuse consumers, who may not understand the difference between added sugars and sugars intrinsic in a food product, or think that the two values for added sugars and total sugars are combined, attorneys say.

For example, if a product has 12 grams of total sugar and 10 grams of added sugar, some consumers might interpret that as 22 grams of sugar in the food, Adams said.

The emphasis on added sugar could also sway consumers into avoiding foods that might otherwise be healthy for them, or cause them to focus too much on sugar while overlooking other parts of a healthy diet, attorneys said.

And some questioned whether the added-sugar label would significantly change consumers' eating and buying patterns.

"The folks who pay attention [to food labels] are mostly likely the ones already following healthy diet guidelines," Wallace said.

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