

Food & Beverage MVP: Covington's Jessica O'Connell

By **Sophia Morris**

Law360, New York (December 20, 2016, 5:28 PM EST) -- Covington & Burling LLP's Jessica O'Connell stopped the U.S. Food and Drug Administration from taking action against Kind LLC over the allegedly misleading labeling of its snack bars, resulting in a change in the food industry as a whole when the FDA announced it would review its "healthy" labeling regulations and earning her place as a Law360 Food & Beverage MVP for 2016.

O'Connell, a special counsel in Covington's Washington, D.C., office, represented Kind after the company received a warning letter from the FDA over its use of the descriptor "healthy and tasty" on its granola bars and other products. She was highly qualified for the job, having spent six years as an associate chief counsel for food at the agency.

O'Connell said her intimate understanding of the FDA was helpful as she attempted to collaborate with the agency rather than engage in an adversarial process. She sees herself as a translator between the food industry and the agency, helping both sides to see the other's perspective.

"What we identified very early on was that the biggest issue here is there were regulations that were really outdated," she told Law360. "And the strategy was really to try to be collaborative with the FDA to think about the best path forward, not only for Kind, but also for the food industry, and thinking about how to move the bar forward and get the regulations updated in a way that reflects current science."

She said more collaborative approach was unusual, with warning letter recipients more likely to simply respond to the alleged violation rather than attempt to work with the agency to change the regulations.

"Typically a warning letter doesn't lead to a citizens petition that [then] leads to FDA actually announcing that they're going to change the regulation, and that part was the result of a lot of engagement with FDA and helping them to understand industry's perspective," she said.

Kind's citizen petition was submitted to the FDA in December 2015, and in May 2016 the agency said it would allow Kind to label its products as "healthy" if the term referred to the company's philosophy and



not the nutritional content of its snack bars. The FDA acknowledged that public health guidelines on what foods are considered healthy have changed in recent years, and it is working to update its labeling policies.

Kind was also facing multidistrict litigation over its product labeling, and the FDA's public reversal meant that all claims relating to the use of "healthy" were dropped.

O'Connell's interest in the area of food stems from her background in public health, in which she has a master's degree. She said that in the last 10 years or so, consumers have become more interested in the contents of their food, spurring a growth in consumer protection litigation. Some of this litigation is a response to the work of regulators, while others, such as suits over natural labeling, have been pushed by consumers.

"If we're entering a time when there's potentially going to be less federal resources devoted to food regulation, then it will be interesting to see what happens on that consumer level," she said.

--Editing by Brian Baresch.