Nutrition as a Winnable Battle

American Society of Law, Medicine & Ethics
Public Health Law Association
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Nutrition as a Winnable Battle
Jennifer L. Pomeranz, J.D., M.P.H.
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Winnable Battles

- Nutrition Labeling
- Specific Consumer Protection Actions
- Sugary Beverage Taxes
Federal, State, Local

- FDA
  - Labeling, Nutrition Facts Panel
- Attorneys General/Plaintiffs
  - Consumer protection lawsuits
- State/Local (Federal)
  - Taxes/Subsidies
FDA Regulations

- Nutrition Labeling Education Act
- Factual Information
  - Tobacco Warning Label Cases
- Health, Nutrition Claims
FDA: Food and Beverage Labeling

![Nutrition Facts](image)

- **Serving Size**: 125g
- **Calories**: 65
  - Calories from Fat: 2
- **Total Fat**: 0g 0%
- **Saturated Fat**: 0g 0%
- **Trans Fat**: 0g
- **Cholesterol**: 0mg 0%
- **Sodium**: 1mg 0%
- **Total Carbohydrate**: 17g 6%
  - Dietary Fiber: 3g 12%
  - Sugars: 13g
- **Protein**: 0g
- **Vitamin A**: 1%
- **Vitamin C**: 10%
- **Calcium**: 1%
- **Iron**: 1%

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.*
FDA: Energy Drinks
Claims (2.5 per box) - 41% sugar content

www.cerealfacts.org (worst nutritional rating; in 2009 12 grams sugar)
**FDA and Sugar Labeling**

A nutritional facts label from a product like Lucky Charms cereal. The image includes the nutritional information such as calories, fat, sugar, and other components. The ingredients are also listed, indicating the presence of sugar in the product.

The label specifies the Daily Value percentages and highlights the importance of understanding the nutritional content for informed consumption.
Recommendations for the FDA

- Make binding guidelines for energy drinks and enforce
- Disclose caffeine
- Disclose added sugar (NFP and ingredient list)
- DRV added sugar
- Disqualifying level added sugar to make health claims
Consumer Protection: False, Deceptive, Misleading

- State Government: Attorneys General
- Plaintiffs
- Federal Government
  - FTC: TV, internet, mobile
  - FDA: packaging
AGs and Consumer Protection

- 50 states and DC
- UDAP statutes (unfair and deceptive)
- Multi-state action potential
- Public health precedent
Attorneys General (FTC/FDA)
17 AGs “Binge-in-a-Can”
Binge-in-a-Can?
Plaintiffs (California)
Where are the Blueberries?

Ingredients

WHOLE GRAIN WHEAT, SUGAR, BLUEBERRY FLavored CRUNCHLETS (SUGAR, CORN CEREAL, SOYBEAN OIL, MODIFIED CORNSTARCH, WATER, NATURAL AND ARTIFICIAL FLAVOR, GLYCERIN, CORN SYRUP, RED #40 LAKE, BLUE #2 LAKE), NATURAL AND ARTIFICIAL BLUEBERRY FLAVOR, SORBITOL, GELATIN, REDUCED IRON, NIACINAMIDE, BLUE #2 LAKE, PYRIDOXINE HYDROCHLORIDE (VITAMIN B6), RIBOFLAVIN (VITAMIN B2), THIAMIN HYDROCHLORIDE (VITAMIN B1), RED #40, FOLIC ACID, ZINC OXIDE, VITAMIN B12. TO MAINTAIN QUALITY, BHT HAS BEEN ADDED TO PACKAGING.
More Difficult

- Parham/CSPI v. McDonalds re: Happy Meals
  - “Inherently Deceptive”
  - Dismissed with prejudice
  - No opinion on law
- Pelman v. McDonalds re: Obesity/Comorbidities
  - 24 states block this type
  - Politically charged
  - Plaintiffs lawyers
- Maybe in the Future?
(Federal), State, Local Taxes

- Excise taxes
- U.S. history
- Alter price
- Earmarking
Excise Tax Sugary Beverages

- Public health rationale
- Taxing rationale
- Excise v. Sales tax
  - 1¢ per ounce; $1.28 per gallon; 2¢ per ounce
  - Lower raise revenue; Higher deter consumption
- Minimum price laws/Prohibit trade discounts
- Regressive Argument
- Substitution Argument
- SNAP (Supplemental Nutrition Assistance Program)
Thank you!

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Nutrition as a Winnable Battle: Is It Too Soon to Tell?

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Menu Labeling: What Is It?

- In the United States, eating outside of the home has become a common practice
  - ~ 1/3 of caloric intake occurs while eating out
  - ~ 1/2 of households’ food budgets are used to eat out
  - Eating out has been associated with obesity

- Information about foods’ nutritional content fills a gap
  - Difficulties estimating calories and other content
  - Consumers have expressed interest in receiving nutrition information
  - Menu labeling may raise awareness about nutrition and influence consumers’ food choices
Menu Labeling: What Does It Look Like?
Menu Labeling: On-going Legal Activity

- **Localities:** In 2008, New York City began requiring restaurants with 15 or more locations to engage in menu labeling.

- **States:** States including California and Oregon have enacted menu labeling laws.

- **Federal government:** In 2010, the Patient Protection and Affordable Care Act established menu labeling requirements:
  - Applies to restaurants with 20 or more locations
  - Calorie information must be available on menus and menu boards
  - Other nutrition information must be available upon request
  - States and localities cannot impose additional requirements for restaurants covered by the ACA
Menu Labeling: Too Soon To Tell

- **Implementation challenges**
  - Delayed FDA regulations
  - ACA litigation

- **Restaurants that fall outside of the ACA**
  - Can choose to opt-in to the ACA requirements
  - Could be regulated by the states

- **Other concerns**
  - What about other nutrition information?
  - Non-restaurant establishments (e.g., movie theaters, bowling alleys)
Food Advertising to Children: A Problem?

- Advertising affects children’s food preferences and diets
- Companies spend ~$2 billion each year on food advertising to children
- “Food and beverage marketing practices geared to children and youth are out of balance with healthful diets and contribute to an environment that puts their health at risk.”
  –Institute of Medicine, *Food Marketing to Children and Youth: Threat or Opportunity?* 2006
**Food Advertising to Children: The IWG**

- Interagency Working Group on Foods Marketed to Children
  - IWG created by Congress in 2009
  - Includes FDA, FTC, CDC, and USDA
  - Charge: formulate *recommendations* to help the government create *voluntary guidance*

- IWG releases report in April 2011
  - Through *voluntary efforts*, the food industry should improve the nutritional quality of food marketed to youth ages 2-17
  - Foods marketed to children should:
    - 1) Make a *meaningful contribution* to a healthful diet
    - 2) *Minimize* nutrients that could *negatively impact health* or weight
Food Advertising to Children: CFBAI

- Children’s Food and Beverage Advertising Initiative (CFBAI)
  - Created in 2006
  - Affiliated with the Council of Better Business Bureaus
  - Self-regulatory program for 17 food companies
  - July 2011, released its own recommendations
    - Limited to children under 12

- Is it too soon to tell?
  - IWG is currently revising its recommendations:
    - To address concerns raised by industry about the report
Front-of-Package Labeling: What Is It?

- Food packages are required to exhibit certain information
  - Nutrition facts panel
  - Displayed on the side of a package

- Front-of-package (FOP) labeling
  - Easy to see
  - Easy to understand???
  - Largely unregulated
Front-of-Package Labeling: How Does It Look?

- Low sodium
- Low calories
- 0g carbs per serving
Institute of Medicine issued reports on FOP labeling
- Released in 2010 and 2011
- Requested due to proliferation of FOP initiatives
- Intended to inform FDA’s regulatory process
- Goal: a uniform, evidence-based FOP system

Too soon to tell?
- FDA has not yet acted
- Are these programs scientifically sound?
- Do consumers understand what they’re reading?
Thank you!

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Nutrition as a Winnable Battle: Sodium Reduction Efforts

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Sodium—Why Does It Matter?

- on average, we eat about 3,300 mg/day
- most of us should eat only 1,500 mg/day (at most)
- excess salt consumption results in more than 100,000 unnecessary deaths per year
The Estimated Benefits of Reducing Sodium in Our Food Supply:

Reducing the average population intake to 2,300 mg/day (current recommended maximum under Dietary Guidelines) may…
  • Reduce cases of hypertension by 11 million
  • Save $18 billion in health care costs
  • Gain 312,000 Quality Adjusted Life Years (QALYs)

Reducing the average population intake to 1,500 mg per day may…
  • Reduce cases of hypertension by 16 million
  • Save $26 billion in health care costs
  • Gain 459,000 QALYs

For more information, see: L.J. Appel et al., *The Importance of Population-Wide Sodium Reduction As a Means to Prevent Cardiovascular Disease and Stroke: A Call to Action From the American Heart Association*, Circulation 2011, available at http://circ.ahajournals.org/content/123/10/1138.full.pdf
Where Does All This Salt Come From?

Most Sodium Comes from Processed and Restaurant Foods

- Processed and restaurant foods: 77%
- Naturally occurring: 12%
- While eating: 6%
- Home cooking: 5%


http://www.cdc.gov/salt/food.htm
Why Is There So Much Salt in Processed and Prepared Foods?

- We tend to like the taste
- Food safety/preservative
- It’s cheap
- It does a lot for processed foods:
  - Masks bitter flavors
  - Provides texture, “mouth feel”
  - Keeps some processed meat products from tasting like “damp dog hair”.

— The Hard Sell on Salt, NY Times, May 29, 2010
What Can Be Done?

- Preferences for salty taste are cultivated, and can be unlearned
- Telling individuals to “just say no” to salt can’t do it
- Reducing sodium content in a step-wise manner
Who’s Doing What:

- Federal regulations
- Government-led, voluntary initiatives
- Procurement power
- Industry-led, voluntary initiatives
Federal Regulations

- Labeling regulations—content claims such as “healthy,” “light,” “low sodium;” disclosures on meat labeling
- Sodium Daily Reference Value
- National school meal program standards
- IOM recommendation: modify the “Generally Recognized as Safe” status of sodium
Federal Regulations

- **Sodium’s Daily Reference Value (DRV)** for purposes of percent daily value calculation on the Nutrition Facts Panel
  
  Currently: 2,400 mg/day

- FDA is considering whether to adjust it (along with other daily values):
  
  2,300 mg/day (tolerable upper level of intake as suggested by the 2005 & 2010 Dietary Guidelines for Americans);
  
  or to
  
  1,500 mg/day (Adequate Intake level per IOM)

National School Meal Programs

- **National School Breakfast Program Guidelines**
  - 25%-27% reduction in sodium content in breakfast meals, from 2004-‘05 baseline numbers
  - 3-step reduction (2, 5, and 10 yrs from July 1, 2012)
  - Final limits range from ≤ 430 - ≤ 500 mg/meal

- **National School Lunch Program Guidelines**
  - 53%-54% reduction in sodium content, from 2004-‘05 baseline numbers
  - 3-step reduction (2, 5, and 10 yrs from July 1, 2012)
  - Final limits range from ≤ 640 - ≤ 740 mg/meal
“FDA should modify the generally recognized as safe (GRAS) status of salt added to processed foods in order to reduce the salt content of the food supply in a stepwise manner.”
GRAS?
Nothing can be added to food until it has been approved for safety by the FDA, unless the substance is “generally recognized as safe” or “GRAS.”
“Generally recognized as safe” (GRAS): due to “experience based on common use in food” prior to 1958, the substance is considered to be safe.

A substance is considered GRAS only for particular uses.

Conditions can be set for safe use.
Federal Sodium Regulation in Context

- The FDA has considered regulation of sodium content at various times over many years, but has not acted to limit sodium content in the food supply.
Regulatory Challenges

- Scientific issues
- Technical issues
- Political issues
Government-Led Voluntary Initiatives

- **National Salt Reduction Initiative—New York City Department of Health and Mental Hygiene**
  - Launched in 2009
  - Goal is to reduce sodium intake by 20% by 2014
  - Developed sodium targets for 62 packaged foods and 25 restaurant food categories (includes 2012 interim and 2014 final targets)
  - 28 companies have committed to meeting either or both targets
Government-Led Voluntary Initiatives

- **Interagency Working Group (IWG) on Food Marketed to Children**
  - Congress directed FTC, CDC, USDA, and FDA to study and report
  - Proposed recommendations focus on ten categories of foods most heavily marketed to children and adolescents (ages 2-17)
  - Includes recommended nutritional criteria for foods marketed to children and youth
  - Sodium stepwise reduction goals:
    - For individual foods:
      - ≤ 210 mg/serving (interim);
      - ≤ 140 mg/RACC (by 2021)
    - For main dishes and meals:
      - ≤ 450 mg/ serving (interim);
      - ≤ 300 mg/serving (by 2021)
Government-Led Initiatives

- CDC’s Sodium Reduction in Communities Program launched in 2010
- Funding five communities to increase availability and access to healthy foods and monitor progress toward reducing sodium intake
  - 2 California communities (L.A. & Shasta counties)
  - 3 New York communities (NYC, Broome & Schenectady counties)
  - Shawnee County, Kansas
- Programs cover variety of food environments (schools, restaurants, stores, worksites)
Using Procurement Power

- Improving the Food Environment through Nutrition Standards: A Guide for Government Procurement (CDC)
  - Designed to provide practical guidance to states and local governments in designing, developing and implementing food procurement policies.

- For more, see
  - Online Procurement Resources (CDC), available at http://www.cdc.gov/salt/pdfs/Salt_Procurement_Resources.pdf
  - Addressing Childhood Obesity through School Food Procurement webinar, 4/17/12, available at www.publichealthlawcenter.org
Industry-Led Voluntary Initiatives

  - 16 food company participants
  - Set sodium limits (among other nutrients) for 13 categories of “children’s food” products, effective Jan. 1, 2014
    - Sodium limits (in mg) for individual products: ≤ 110 - ≤ 540
    - For main dishes: ≤ 600; and for meals: ≤ 740
- National Restaurant Association Kids LiveWell (July 2011)
  - Sodium limits for “healthful” options: ≤ 250 mg for side items, and ≤ 770 mg for meals
- Individual company programs
Sodium Reduction—A Winnable Battle?

- Progress is being made
- Challenges are significant
- There is a way
- Is there a will?
  ...Too soon to tell...
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Question & Answer

Type your question in through the Q and A panel